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Lambda Legal Defense and Education Fund is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people with HIV/AIDS through impact litigation, education, and public policy work.

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The New York Times

THE NEW YORK TIMES EDITORIALS/LETTERS THURSDAY, AUGUST 5, 1999

Bigotry in the Boy Scouts

The New Jersey Supreme Court has issued a powerful ruling against anti-gay bigotry in the Boy Scouts of America. No organization that recruits schoolchildren and says it is guided by honesty and respect for others has any right to ban homosexuals. While courts in other states like California have allowed the Boy Scouts to skirt civil rights laws, the New Jersey Court showed wisdom in refusing to sanction bigotry by this important civic institution.

In a unanimous decision, the Court affirmed an earlier state appeals court ruling that the Boy Scouts violated New Jersey's anti-discrimination law in ousting an assistant scoutmaster, James Dale, solely because he is gay. Mr. Dale, who joined the Scouts when he was 8 and eventually reached the highest rank of Eagle Scout before becoming an assistant scoutmaster, was expelled in 1990 when a local newspaper published an article identifying him as a leader of the Rutgers University Lesbian/Gay Alliance.

New Jersey state law prohibits discrimination against individuals in public accommodations based on sexual orientation. The Boy Scout organization argued that it is a private group not subject to

anti-bias laws that apply to public facilities. But the New Jersey Court has sensibly rejected that view. The organization has had 87 million members nationwide in its history, recruits publicly and is ostensibly non-selective in its membership, and its troops are sponsored by schools and other public service organizations. As a group with an important role in the civic life of communities, it cannot be allowed to operate outside laws designed to eradicate bigotry.

The Boy Scouts contend that the application of the anti-discrimination law would violate its First Amendment rights. But as the Court explained, dismissing an individual solely because he is homosexual is "an act of discrimination unprotected by the First Amendment freedom of speech." Expelling Mr. Dale, a young man with an exemplary Scouting record, because he did not hide his homosexuality runs completely counter to Scouting's purpose to promote truthfulness and courage. The Boy Scouts are expected to seek review of the decision by the United States Supreme Court. The organization would serve its mission better by ending its ugly prejudice against homosexuals, and adding to its list of Boy Scout qualities the virtue of tolerance.

THE CHRONICLE OF PHILANTHROPY

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The Newspaper of the Non-Profit World

Vol. XI, No. 23 • September 23, 1999 • \$4

EVAN WOLFSON

A Fair and Just Verdict in Boy Scouts Case

THE NEW JERSEY SUPREME COURT'S unanimous decision against the Boy Scouts of America's anti-gay policy stands as a persuasive, respectful, and important vindication both of members' rights and civil-rights laws. But Leslie Lenkowsky's opinion piece on the case ("Let Scouts, not Courts, Determine Beliefs," August 26) made it sound as if the court had somehow done something radically new in upholding the state Law Against Discrimination and rejecting a specious First Amendment claim.

In fact, Chief Justice Deborah Poritz, a Republican appointee, writing for the court, delivered a "win-win-win": a win for my client James Dale, who, because he is gay, was expelled from the organization in which he spent more than half his life; a win for the other gay young people who deserve the support, inclusion, skills, and opportunities this valuable program represents; and a win for all Scouts, who join Scouting to be with others of different backgrounds learning to do good, not to be part of bigotry.

First, the court correctly held that, although "private" (in the sense of not owned by the government), Boy Scouts of America is properly subject to the anti-discrimination law as a "place of public accommodation" because it is large (over six million youth and adult members at present), holds itself out as "open to all boys," and has a close and beneficial—indeed special—relationship with government entities such as schools, police and fire departments, and the military. Boy Scouts of America is not some club meeting in a tree house; it is a Congressionally chartered organization that seeks and accepts special privileges from every level of government—and goes to funders holding itself out as the Boy Scouts of America, not the anti-gay Scouts for some Americans.

Second, the justices unanimously rejected Boy Scouts of America's effort to use the First Amendment as a shield, relying on the U.S.

Supreme Court's framework for balancing the compelling government interest in the eradication of discrimination and expressive associational freedom. Under that framework (established in cases rejecting efforts by groups like the Jaycees and the Rotary to exclude women, as well as prior cases involving discrimination against racial minorities), a court weighing First Amendment claims must test their validity by looking at the core "expressive purposes" that brought the members together, not just a "policy" proclaimed by a group's officers, board, or lawyers. If courts were to abdicate making such assessments, as Mr. Lenkowsky recommends, then any would-be discriminator would simply claim the protections of the First Amendment at the drop of a hat, and there would be no further recourse to civil-rights laws for any American in the face of blatant discrimination. The New Jersey Supreme Court followed the U.S. Supreme Court's precedents rejecting such an abdication, which were laid out in three back-to-back unanimous decisions in the mid-1980s joined by Justices Warren Burger, William Rehnquist, Sandra Day O'Connor, and Antonin Scalia.

Moreover, the New Jersey Supreme Court did not, as Mr. Lenkowsky suggests, ignore Boy Scouts of America's expressive purposes. Rather, it sifted the voluminous record and noted three proofs that Boy Scouts' expressive purposes do not entail anti-gay bigotry and exclu-

Continued on Page 61

HANDBOOK

Ruling in Boy Scouts Case: a Win for Members and the Law

Continued from Page 59

sion: (1) not a single document seen by the members (not the Scout Handbook, application, manuals, or even the Web site) mentions that the Boy Scouts of America stands for such exclusion; indeed, in seeking special privileges and wide-open membership, Boy Scouts of America declares itself to be "open to all boys"; (2) since 20 per cent of the Scout troops in New Jersey are sponsored by public schools while other troops are sponsored by entities such as churches and synagogues that differ widely in their views on gay people, sexuality, and other matters, clearly anti-gay prejudice and discrimination—or even any particular religious identity—are not what bring the members together in Scouting; (3) the true and important mission of Boy Scouts of America is fun activities, development of skills, building teamwork and a sense of self, and teaching the values contained in the Scout Handbook definition of "morally straight": "guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be open and honest." All three of these proofs, as well as the stellar Scouting career of James Dale himself, demonstrated that by Scouting's own words, deeds, and standards, a person does not have to be "straight" to be "morally straight" or a good Scout.

Accordingly, the court correctly found there is no true First Amendment problem with enforcement of the civil-rights law, as abiding by the non-discrimination law would not force Boy Scouts of America to change its central message or purposes, nor interfere with the worthwhile activities and values for which its members join.

One further point deserves mention. Whether or not the U.S. Supreme Court takes this case if Boy Scouts of America appeals, which it says it will do, and whether or not Boy Scouts of America ultimately is deemed to have a special license to discriminate based on the First Amendment, the litigation has exposed the gap between the way Boy Scouts of America presents itself to schools and funders and how its lawyers portray it when in court. The question for philanthropies is not whether Boy Scouts of America has a legal right to discriminate, but whether funding should support the faction in Boy Scouts of America that is trying now to make it into a program that excludes members based on their sexual orientation (despite telling schools and others they are "open to all boys"), who go into court arguing that Boy Scouts of America is a quasi-religious organization (despite its Congressional charter, its diverse membership and sponsorship, and its own Handbook requirement of pluralism), and who seek to be exempt from anti-discrimination laws and thus free to discriminate on the basis of race or religion, as well as sexual orientation (despite its central teaching to "respect and defend the rights of others"). By speaking out now, philanthropies can help bring Scouting back to what its members already believe it is: a valuable organization about community service, skills, and respect for all, not bigotry and exclusion.

Evan Wolfson is the senior staff attorney at Lambda Legal Defense & Education Fund, in New York and is the head lawyer in the James Dale v. Boy Scouts of America case.

No. 5461 P. 3/4

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EDITORIALS

The Boy Scouts' Appeal

Only about 3 percent of non-governmental petitions for certiorari to the United States Supreme Court are granted. Thus, there is significance in the Court's recent decision to review *Dale v. Boy Scouts of America*, 160 N.J. 562 (1999). In *Dale*, a unanimous New Jersey Supreme Court held that the Law Against Discrimination bars the Boy Scouts from expelling a member solely because he is an avowed homosexual. In her opinion for the Court, Chief Justice Poritz rejected the argument that the Boy Scouts have a First Amendment (free speech/association) right to exclude gay members. This ruling is at the center of the Boy Scouts' appeal.

The Boy Scouts argue that the words "morally straight" and "clean" in the Scout Oath and Law carry the implication that homosexuality is immoral and that a 1978 position paper excludes homosexual members. But the position paper was never distributed to the membership and the New Jersey Supreme Court found no evidence either that one of the Boy Scouts' purposes is to promote the view that homosexuality is immoral or that this plaintiff sought to advocate the converse. Apparently because of this absence of ideological clash, the New Jersey Supreme Court concluded that plaintiff's expulsion from the Boy Scouts "constituted discrimination based solely on his status as an openly gay man" and that such discrimination is "unprotected by the First Amendment freedom of speech." 160 N.J. 615 and 624.

We agree with Chief Justice Poritz' analysis essentially because the "free trade in ideas" safeguarded by the First Amendment, see *Abrams v. United States*, 250 U.S. 616, 630 (1999) (Holmes, J., joined by Brandeis, J., dissenting), is not compromised where neither an organization nor the member it seeks to expel is advocating ideas that form the basis for the expulsion. In *Dale*, there was no proof that the Boy Scouts are established to persecute those who are gay or to persuade the world that homosexuality is immoral. There was no proof that

admission of gay members would defeat Boy Scout purposes or undermine the mission of that broad spectrum quasi-public organization. This is not a case where government seeks to force African-American members on the Ku Klux Klan or pro-life advocates on a pro-choice group. It is also not a case—like some harassment cases—where only speech is involved.

Our concern about the grant of certiorari in a First Amendment case that does not involve the clash of ideas, but only discrimination on the basis of status, is not limited to Mr. Dale or homosexuals generally. Rather, in our view, a reversal here would threaten the effectiveness of New Jersey's Law Against Discrimination and similar federal and state statutes in all areas of application. It would be difficult to distinguish a United States Supreme Court decision that is status-based whether the next case challenges racial or gender or disability discrimination, rather than prejudice against gays, and whether the context is employment or housing instead of public accommodations. Precedents such as *Frank v. Ivy Club*, 120 N.J. 73 (1990) (private, selective, all-male Princeton University student eating club required to admit women) would likely be unsustainable. New challenges to the Law Against Discrimination would arise. Condominium Association by-laws may seek to exclude "undesirables" on the ground that residential association is a matter of intimacy and taste. Private organizations may argue that status-conscious principles not only permit exclusion of the wrong type of members, but also the wrong type of contractors and employees. For example, what would prevent the Boy Scouts from monitoring the sexual orientation of bus drivers who take troops on outings and maintenance workers who service Boy Scout summer camps?

Once the First Amendment is extended beyond the marketplace of ideas and into the area of ordinary status prejudice, there will be no indelible lines. Prejudice will secure a foothold in the constitution.

March 22, 2000

MEMORANDUM FOR THE PRESIDENT

FROM: BETH NOLAN
WILLIAM P. MARSHALL
J. PAUL OETKEN

SUBJECT: Supreme Court Amicus Participation in *Boy Scouts of America v. Dale*

On April 26, the United States Supreme Court will hear argument in *Boy Scouts of America v. Dale*, No. 99-699. The case presents the question whether the First Amendment precludes application of a state antidiscrimination law that would otherwise prohibit the Boy Scouts from expelling an openly gay man as a member and assistant scoutmaster. The Solicitor General is currently considering whether to file an amicus curiae brief on behalf of the United States, which would be due next Wednesday, March 29.

The Boy Scouts expelled James Dale as an assistant scoutmaster after it discovered that he is gay (from a local newspaper article revealing his involvement in his university's gay organization). Dale sued the Boy Scouts under New Jersey's antidiscrimination statute, which prohibits discrimination on the basis of sexual orientation in places of "public accommodation." The New Jersey Supreme Court held that the statute applies to the Boy Scouts, and it rejected the Boy Scouts' argument that application of the statute to them violates their First Amendment rights to freedom of speech and association.

The leading precedent for this case is *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), in which the Supreme Court held that the First Amendment does not allow the Jaycees to exclude women in contravention of a similar state statute barring discrimination in places of public accommodation. Justice Brennan's opinion for the Court in *Roberts* essentially adopted a balancing test, explaining that the First Amendment right of "expressive association" is not absolute, and does not permit a private group to exclude members in violation of a state antidiscrimination law where the law is not aimed at suppressing speech and does not significantly interfere with the group's expressive activity, at least where the state's interest is compelling.

The principal argument for filing an amicus brief in this case has not so much to do with the Boy Scouts as it does with general First Amendment doctrine. (Whether the Boy Scouts meet the test for avoiding application of the state law under the *Roberts* balancing test presents a difficult question on which reasonable minds may differ, although the New Jersey Supreme Court made a strong case that they do not.) The real federal interest in this case is based on the fact that if the Court were to adopt a very broad reading of the First Amendment right to exclude – as advocated by some of the arguments in the Boy Scouts' brief – this could significantly

undermine enforcement of federal civil rights laws such as Title II (public accommodations) and Title VII (employment).

First, the Boy Scouts argue that this case is controlled by *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), in which the Supreme Court held that the First Amendment allowed the organizers of an Irish-American parade to exclude an Irish-American gay organization from marching with a banner in the parade. That case, however, involved a form of speech itself – marching in a parade; requiring a particular group to include itself would have been compelled speech. To say that prohibiting a private group from excluding some category of people from membership is similarly “compelled speech” – irrespective of the group’s particular form of expressive activity – would amount to a blanket (or extremely broad) exemption from state and federal civil rights laws.

Second, the Boy Scouts rely on Justice O’Connor’s concurring opinion in *Roberts v. United States Jaycees*, which advocates a similar categorical approach. For “expressive associations” (as distinguished from “commercial associations”), Justice O’Connor would apparently give full protection to the selection of a group’s membership, notwithstanding a connection between the nature of an exclusion and the group’s expressive message or activity. “Such an approach is overbroad because it protects discrimination wholly removed from the expressive goals of the organization. Presumably, a noncommercial advocacy organization such as ‘Save the Whales’ would . . . be entitled to exclude black females even though the exclusion has nothing to do with the positions that the organization maintains.” William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 79 (1986).

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NORTHWESTERN UNIVERSITY LAW REVIEW



Discrimination and the Right of Association

William P. Marshall

Volume 81

Fall 1986

Number 1

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WBS (Approved)

From: Anthony J. Steinmeyer
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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.

No. 99-699

FEB 28 2000

CLERK

IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,
v. *Petitioners,*

JAMES DALE,
Respondent.

On Writ of Certiorari to the
Supreme Court of New Jersey

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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.

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

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

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

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

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(1)), 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, idiosyncrasies, 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 "[r]elated 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

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.

Dated: February 28, 2000

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX**NEW JERSEY STATUTES****10:5-4. Obtaining employment, accommodations and privileges without discrimination; civil right**

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

10:5-5. Definitions

As used in this act, unless a different meaning clearly appears from the context:

* * * *

1. "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land

or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; and public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or postsecondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation, in the admission of students.

* * * *

hh. "Affectional or sexual orientation" means 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.

* * * *

10:5-12. Unlawful employment practice or unlawful discrimination

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

* * * *

f. (1) For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of the race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality of such person, or that the patronage or custom thereof of any person of any particular race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality is unwelcome, objectionable or not acceptable, desired or solicited, and the production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any owner, lessee, proprietor, superintendent or manager thereof, shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained herein shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or

school or educational institution which is restricted exclusively to individuals of one sex, from refusing, withholding from or denying to any individual of the opposite sex any of the accommodations, advantages, facilities or privileges thereof on the basis of sex; provided further, that the foregoing limitation shall not apply to any restaurant as defined in R.S.33:1-1 or place where alcoholic beverages are served.

* * * *

515 U.S. 557 printed in FULL format.

JOHN J. HURLEY AND SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
PETITIONERS v. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL
GROUP OF BOSTON, ETC., ET AL.

No. 94-749

SUPREME COURT OF THE UNITED STATES

515 U.S. 557; 115 S. Ct. 2338; 1995 U.S. LEXIS 4050; 132 L.
Ed. 2d 487; 63 U.S.L.W. 4625; 95 Cal. Daily Op. Service
4620; 95 Daily Journal DAR 7943; 9 Fla. Law W. Fed. S 192

April 25, 1995, Argued
June 19, 1995, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF
MASSACHUSETTS.

DISPOSITION: 418 Mass. 238, 636 N. E. 2d 1293, reversed and remanded.

CORE TERMS: parade, message, speaker, expressive, First Amendment, public
accommodations, cable, sexual orientation, lesbian, gay, contingent, public
accommodation, marchers', organizers, marching, banner, amusement, bisexual,
constitutional protection, broadcast, sponsors', state action, celebration,
evacuation, spectators, expressive activity, free speech, proprietor's,
conduit, channel

<=2> View References <=3> Turn Off Lawyers' Edition Display

DECISION: Application of Massachusetts public accommodations law to require
private parade sponsor to include, as marching unit, organization of gays,
lesbians, and bisexuals held to violate sponsor's First Amendment right to free
speech.

SUMMARY: Starting in 1947, an unincorporated association of private individuals
annually sponsored a St. Patrick's Day-Evacuation Day parade in Boston pursuant
to a grant of authority by the city of Boston to organize and conduct the
parade. In 1992, an organization of gay, lesbian, and bisexual descendants of
Irish immigrants was formed for the purpose of marching in the parade, as its
own unit carrying its own banner, in order to (1) celebrate the identity of the
organization's members, (2) show that there were such individuals in the
community, and (3) support the like men and women who sought to march in a St.
Patrick's Day parade in New York. The parade sponsor denied the organization's
application to take part in the 1992 parade, but the organization obtained a
state court order requiring the inclusion of the organization's contingent. In
1993, after the sponsor had again refused to admit the organization to that
year's parade, the organization and some of its members filed a suit in a
Massachusetts trial court against the sponsor and others, in which suit it was
alleged, among other claims, that the sponsor had violated a Massachusetts
statute which prohibited any distinction, discrimination, or restriction on
account of sexual orientation relative to the admission of any person to or
treatment in any place of public accommodation. The trial court, in finding that
the sponsor had violated the public accommodations statute and ordering the
sponsor to include the organization in the parade, concluded that (1) the

parade was an open recreational event that was subject to the statute; (2) the sponsor had sought to exclude the organization on the basis of sexual orientation; and (3) the inclusion of the organization would not violate the sponsor's rights under the Federal Constitution's First Amendment, given the sponsor's lack of selectivity in choosing parade participants and failure to circumscribe the marchers' messages. On appeal, the Supreme Judicial Court of Massachusetts affirmed (418 Mass 238, 636 NE2d 1293).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Souter, J., expressing the unanimous view of the court, it was held that the state courts' application of the public accommodations statute to require the sponsor to include the organization among the marchers in the parade violated the sponsor's rights under the First Amendment's free speech guarantee, as (1) the sponsor, by denying the organization's application to take part in the parade, had decided to exclude a message which the sponsor did not like from the communication that the sponsor chose to make; (2) the application of the public accommodations statute produced an order essentially requiring the sponsor to alter the expressive content of the parade; (3) such a use of the state's power violated the fundamental First Amendment rule that a speaker has the autonomy to choose the content of the speaker's own message; (4) the organization presumably would have had a fair opportunity to obtain a parade permit of its own; (5) thus, it had not been shown that the sponsor had the capacity to silence the voice of competing speakers; and (6) no legitimate interest had been identified in support of the statute's application to expressive activity.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

<=5> CIVIL RIGHTS @6.5

<=6> CONSTITUTIONAL LAW @964

public accommodations -- free speech -- parade -- inclusion of marching unit --

Headnote: <=7> [1A] <=8> [1B] <=9> [1C] <=10> [1D]

With respect to a St. Patrick's Day-Evacuation Day parade sponsor--a private association to which a city has granted the authority to organize and conduct the parade--the application by state courts of a state public accommodations statute to require the sponsor to include, as a marching unit, an organization of gay, lesbian, and bisexual descendants of Irish immigrants violates the sponsor's rights under the free speech guarantee of the Federal Constitution's First Amendment, where (1) the disagreement at issue goes to the organization's admission to the parade as its own unit carrying its own banner; (2) the sponsor, by denying the organization's application to take part in the parade, has decided to exclude a message which the sponsor did not like from the communication that the sponsor chooses to make, in that a contingent marching behind the organization's banner would (a) bear witness to the fact that some Irish are gay, lesbian, or bisexual, and (b) suggest the view that people of the marchers' sexual orientations have a claim to unqualified social acceptance; (3) the state courts' application of the public accommodations statute--which application has the effect of declaring the sponsor's speech itself to be the public accommodation at issue--produces an order essentially requiring the sponsor to alter the expressive content of the parade; (4) such a use of the state's power violates the fundamental First Amendment rule that a speaker has the autonomy to choose the content of the speaker's own message; (5) the

organization presumably would have had a fair opportunity to obtain a parade permit of its own; (6) thus, it has not been shown that the sponsor has the capacity to silence the voice of competing speakers; and (7) no legitimate interest has been identified in support of the statute's application to expressive activity.

<=11> CONSTITUTIONAL LAW @314
equal protection -- free speech --

Headnote: <=12> [2]
The Federal Constitution's First Amendment guarantee of free speech and Fourteenth Amendment guarantee of equal protection guard against encroachment by only the government and erect no shield against merely private conduct.

<=13> APPEAL @1477
review of record -- free speech --

Headnote: <=14> [3]
On certiorari to review a decision of a state's highest court as to whether the state violated a parade sponsor's rights under the free speech guarantee of the Federal Constitution's First Amendment by requiring the sponsor to include among the marchers an organization imparting a message that the sponsor did not wish to convey, the United States Supreme Court's review of the claim that the sponsor's activity is in the nature of protected speech carries with it a federal constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court; in such a case, although the Supreme Court is confronted with the state courts' conclusion that the factual characteristics of the sponsor's activity place that activity within the realm of nonexpressive conduct, the Supreme Court's obligation is to make an independent examination of the whole record so as to assure that the judgment in question does not constitute a forbidden intrusion on the field of free expression.

<=15> APPEAL @1456
witness credibility --

Headnote: <=16> [4]
The requirement of independent appellate review in cases involving the free speech guarantee of the Federal Constitution's First Amendment is a rule of federal constitutional law which does not limit the United States Supreme Court's deference to a trial court on matters of witness credibility.

<=17> APPEAL @751
review of state court decision -- finding of facts --

Headnote: <=18> [5]
The federal constitutional rule of independent appellate review generally requires the United States Supreme Court to review a state court's finding of facts, where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal

question, to analyze the facts.

<=19> APPEAL @1464
review of facts -- free speech --

Headnote: <=20> [6]
On review of a case involving the free speech guarantee of the Federal Constitution's First Amendment, the United States Supreme Court is obligated to make a fresh examination of crucial facts, even where the case has originally been tried in a federal court subject to the provision of Rule 52(a) of the Federal Rules of Civil Procedure that findings of fact shall not be set aside unless clearly erroneous.

<=21> CONSTITUTIONAL LAW @964
free speech -- parades --

Headnote: <=22> [7A] <=23> [7B]
Parades--as the word is used to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way--are a form of expression for purposes of the free speech guarantee of the Federal Constitution's First Amendment; the constitutionally protected expression that inheres in a parade is not limited to the parade's banners and songs.

<=24> CONSTITUTIONAL LAW @926
protected mediums of expression --

Headnote: <=25> [8]
In protecting expression, the Federal Constitution's First Amendment looks beyond written or spoken words as mediums of expression; a narrow, succinctly articulable message is not a condition of constitutional protection; such protection (1) is not confined to expressions conveying a particularized message, and (2) reaches the painting of Jackson Pollock, the music of Arnold Sch nberg, and the Jabberwocky verse of Lewis Carroll.

<=26> CONSTITUTIONAL LAW @927
free speech -- combined communications --

Headnote: <=27> [9]
A private speaker does not forfeit protection under the Federal Constitution's First Amendment simply by combining multifarious voices, or by failing to edit such voices' themes to isolate an exact message as the exclusive subject matter of the speech; First Amendment protection does not require a speaker to generate, as an original matter, each item featured in the communication.

<=28> CONSTITUTIONAL LAW @945
free speech -- cable television --

Headnote: <=29> [10]
Cable television operators are engaged in speech activities that are protected

under the Federal Constitution's First Amendment even when such operators only select programming originally produced by others.

<=30> CONSTITUTIONAL LAW @929
free press --

Headnote: <=31> [11]

A newspaper's opinion pages fall squarely within the core of security of the Federal Constitution's First Amendment, as does the selection of a paid noncommercial advertisement for inclusion in a daily newspaper.

<=32> CONSTITUTIONAL LAW @964
free speech -- parades --

Headnote: <=33> [12]

The selection of contingents to make a parade is entitled to protection under the free speech guarantee of the Federal Constitution's First Amendment.

<=34> CONSTITUTIONAL LAW @964
free speech -- parades -- participation as expression --

Headnote: <=35> [13]

The participation as a unit in a St. Patrick's Day-Evacuation Day parade of an organization of gay, lesbian, and bisexual descendants of Irish immigrants is expressive in nature, for purposes of the free speech guarantee of the Federal Constitution's First Amendment, where (1) the organization was formed for the purpose of marching in the parade in order to (a) celebrate the identity of the organization's members, (b) show that there are such individuals in the community, and (c) support the like men and women who sought to march in a St. Patrick's Day parade in another city; (2) the organization distributed a fact sheet describing the members' intentions; and (3) the record otherwise corroborates the expressive nature of the organization's participation in the parade.

<=36> CIVIL RIGHTS @6.5
public accommodations statutes --

Headnote: <=37> [14]

Public accommodations statutes, prohibiting various forms of discrimination in the admission of persons to or treatment of persons in places of public accommodation, (1) are well within a state's usual power to enact, where a legislature has reason to believe that a given group is the target of discrimination; and (2) do not, as a general matter, violate the Federal Constitution's First or Fourteenth Amendments.

<=38> CONSTITUTIONAL LAW @927
free speech -- right not to speak --

Headnote: <=39> [15]

One important manifestation of the principle of free speech, for purposes of the Federal Constitution's First Amendment, is that one who chooses to speak is also permitted to decide what not to say, since all speech inherently involves choices of what to say and what to leave unsaid; thus, outside the context of commercial advertising, the state may not compel affirmance of a belief with which the speaker disagrees; the general rule that the speaker has the right to tailor the speech applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact that the speaker would rather avoid; the rule's benefit is not restricted to the press but is enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers; the point of the rule is the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided or even hurtful.

<=40> CONSTITUTIONAL LAW @940
commercial advertising --

Headnote: <=41> [16]

The state may--consistent with the Federal Constitution's First Amendment--at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of purely factual and uncontroversial information.

<=42> CONSTITUTIONAL LAW @964
free speech -- parade -- organizer as speaker --

Headnote: <=43> [17]

For purposes of determining whether a state violates a parade sponsor's rights under the free speech guarantee of the Federal Constitution's First Amendment by requiring the sponsor to include a particular group among the marchers, the sponsor is itself a speaker, rather than merely a conduit for the speech of participants in the parade, because (1) parades and demonstrations are not understood to be neutrally presented or selectively viewed; (2) in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole; and (3) the group's participation in the parade would thus likely be perceived as having resulted from the sponsor's determination that the group's message was worthy of presentation and possibly of support as well.

<=44> CONSTITUTIONAL LAW @945
free speech -- cable television operator --

Headnote: <=45> [18]

For purposes of determining a cable television operator's rights under the free speech guarantee of the Federal Constitution's First Amendment, the government has an interest in limiting such an operator's monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed.

<=46> CONSTITUTIONAL LAW @931

speech restriction -- governmental objective --

Headnote: <=47> [19]

The threshold requirement of any judicial review of a challenged restriction on speech under the free speech clause of the Federal Constitution's First Amendment--whatever the ultimate level of scrutiny--is that the restriction serve a compelling, or at least important, governmental objective.

<=48> CIVIL RIGHTS @6.5

public accommodations -- sexual orientation --

Headnote: <=49> [20]

The object of Massachusetts' public accommodations statute--which prohibits any distinction, discrimination, or restriction on account of sexual orientation relative to the admission of any person to or treatment in any place of public accommodation--is, on the statute's face, to insure by statute for gays and lesbians desiring to make use of public accommodations that which the old common law promised to any member of the public wanting a meal at the inn, that is, that such gays and lesbians, accepting the usual terms of service, will not be turned away merely on the proprietor's exercise of personal preference.

<=50> CONSTITUTIONAL LAW @938

free speech -- use of street --

Headnote: <=51> [21]

With respect to the free speech guarantee of the Federal Constitution's First Amendment, the tradition of free speech commands that a speaker who takes to the street corner to express views should be free from interference by the state based on the content of what the speaker says.

<=52> CONSTITUTIONAL LAW @930

free speech restriction --

Headnote: <=53> [22A] <=54> [22B]

Under the free speech guarantee of the Federal Constitution's First Amendment, (1) the law is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government, and (2) disapproval of a private speaker's statement does not legitimize use of the government's power to compel the speaker to alter the message by including one more acceptable to others; the idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or to all people grates on the First Amendment, for such an idea amounts to a proposal to limit speech in the service of orthodox expression.

<=55> CIVIL RIGHTS @6.5

<=56> CONSTITUTIONAL LAW @964

access to public benefits -- free speech -- parade --

Headnote: <=57> [23]

Assuming a parade to be large enough and to be a source of public benefits, apart from the parade's expression, that would generally justify application to the parade of a mandated access provision, a group can nonetheless--consistent with the free speech guarantee of the Federal Constitution's First Amendment--be refused admission to the parade as an expressive contingent with its own message just as readily as a private club can exclude an applicant whose manifest views are at odds with a position taken by the club's existing members.

SYLLABUS: Petitioner South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various veterans groups, was authorized by the city of Boston to organize and conduct the St. Patrick's Day-Evacuation Day Parade. The Council refused a place in the 1993 event to respondent GLIB, an organization formed for the purpose of marching in the parade in order to express its members' pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, 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 St. Patrick's Day parade. GLIB and some of its members filed this suit in state court, alleging that the denial of their application to march violated, *inter alia*, a state law prohibiting discrimination on account of sexual orientation in places of public accommodation. In finding such a violation and ordering the Council to include GLIB in the parade, the trial court, among other things, concluded that the parade had no common theme other than the involvement of the participants, and that, given the Council's lack of selectivity in choosing parade participants and its failure to circumscribe the marchers' messages, the parade lacked any expressive purpose, such that GLIB's inclusion therein would not violate the Council's First Amendment rights. The Supreme Judicial Court of Massachusetts affirmed.

Held: The state courts' application of the Massachusetts public accommodations law to require private citizens who organize a parade to include among the marchers a group imparting a message that the organizers do not wish to convey violates the First Amendment. Pp. 566-581.

(a) Confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the realm of nonexpressive conduct, this Court has a constitutional duty to conduct an independent examination of the record as a whole, without deference to those courts, to assure that their judgment does not constitute a forbidden intrusion on the field of free expression. See, e. g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 285. Pp. 566-568, 11 L. Ed. 2d 686, 84 S. Ct. 710.

(b) The selection of contingents to make a parade is entitled to First Amendment protection. Parades such as petitioners' are a form of protected expression because they include marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Cf., e. g., *Gregory v. Chicago*, 394 U.S. 111, 112, 22 L. Ed. 2d 134, 89 S. Ct. 946. Moreover, such protection is not limited to a parade's banners and songs, but extends to symbolic acts. See, e. g., *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632, 642, 87 L. Ed. 1628, 63 S. Ct. 1178. Although the Council has been rather lenient in admitting participants to its parade, a private speaker does not forfeit constitutional protection simply by combining multifarious voices, by failing to edit their themes to isolate a specific message as the exclusive subject matter of the speech, or by failing to generate, as an

original matter, each item featured in the communication. Thus, petitioners are entitled to protection under the First Amendment. GLIB's participation as a unit in the parade was equally expressive, since the organization was formed to celebrate its members' sexual identities and for related purposes. Pp. 568-570.

(c) The Massachusetts law does not, as a general matter, violate the First or Fourteenth Amendments. Its provisions are well within a legislature's power to enact when it has reason to believe that a given group is being discriminated against. And the statute does not, on its face, target speech or discriminate on the basis of its content. Pp. 571-572.

(d) The state court's application, however, had the effect of declaring the sponsors' speech itself to be the public accommodation. Since every participating parade unit affects the message conveyed by the private organizers, the state courts' peculiar application of the Massachusetts law essentially forced the Council to alter the parade's expressive content and thereby violated the fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say. Petitioners' claim to the benefit of this principle is sound, since the Council selects the expressive units of the parade from potential participants and 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, free from state interference. The constitutional violation is not saved by *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 129 L. Ed. 2d 497, 114 S. Ct. 2445. The Council is a speaker in its own right; a parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience; and there is no assertion here that some speakers will be destroyed in the absence of the Massachusetts law. Nor has any other legitimate interest been identified in support of applying that law in the way done by the state courts to expressive activity like the parade. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87, 64 L. Ed. 2d 741, 100 S. Ct. 2035, and *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13, 101 L. Ed. 2d 1, 108 S. Ct. 2225, distinguished. Pp. 572-581.

418 Mass. 238, 636 N.E.2d 1293, reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

COUNSEL: Chester Darling argued the cause for petitioners. With him on the briefs were Dwight G. Duncan and William M. Connolly.

John Ward argued the cause for respondents. With him on the brief were David Duncan, Gretchen Van Ness, Gary Buseck, Mary Bonauto, Larry W. Yackle, and Charles S. Sims. *

* Briefs of amici curiae urging reversal were filed for the Boy Scouts of America by George A. Davidson, Carla A. Kerr, and David K. Park; for the Catholic War Veterans of the United States of America, Inc., by John P. Hale; for the Center for Individual Rights et al. by Gary B. Born, Ernest L.

Mathews, Jr., Maura R. Cahill, and Michael P. McDonald; and for the Christian Legal Society et al. by Steven T. McFarland, Samuel B. Casey, and Gregory S. Baylor.

Briefs of amici curiae urging affirmance were filed for the Anti-Defamation League et al. by Walter A. Smith, Jr., Thomas N. Bulleit, Jr., Steven M. Freeman, Arlene B. Mayerson, Antonia Hernandez, Alice E. Zaft, Judith L. Lichtman, and Donna R. Lenhoff; and for the Irish Lesbian and Gay Organization et al. by R. Paul Wickes and Michael E. Deutsch.

Burt Neuborne, Steven R. Shapiro, and Marjorie Heins filed a brief for the American Civil Liberties Union as amicus curiae.

JUDGES: SOUTER, J., delivered the opinion for a unanimous Court.

OPINIONBY: SOUTER

OPINION: [*559] JUSTICE SOUTER delivered the opinion of the Court. The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment.

[*560] I

March 17 is set aside for two celebrations in South Boston. As early as 1737, some people in Boston observed the feast of the apostle to Ireland, and since 1776 the day has marked the evacuation of royal troops and Loyalists from the city, prompted by the guns captured at Ticonderoga and set up on Dorchester Heights under General Washington's command. Washington himself reportedly drew on the earlier tradition in choosing "St. Patrick" as the response to "Boston," the password used in the colonial lines on evacuation day. See J. Crimmins, *St. Patrick's Day: Its Celebration in New York and other American Places, 1737-1845*, pp. 15, 19 (1902); see generally 1 H. Commager & R. Morris, *The Spirit of 'Seventy Six*, pp. 138-183 (1958); *The American Book of Days* 262-265 (J. Hatch ed., 3d ed. 1978). Although the General Court of Massachusetts did not officially designate March 17 as Evacuation Day until 1938, see Mass. Gen. Laws @ 6:12K (1992), the City Council of Boston had previously sponsored public celebrations of Evacuation Day, including notable commemorations on the centennial in 1876, and on the 125th anniversary in 1901, with its parade, salute, concert, and fireworks display. See *Celebration of the Centennial Anniversary of the Evacuation of Boston by the British Army* (G. Ellis ed. 1876); *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston et al.*, Civ. Action No. 92-1518A (Super. Ct., Mass., Dec. 15, 1993), reprinted in App. to Pet. for Cert. B1, B8-B9.

The tradition of formal sponsorship by the city came to an end in 1947, however, when Mayor James Michael Curley himself granted authority to organize and conduct the St. Patrick's Day-Evacuation Day Parade to the petitioner South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various South Boston veterans groups. Every year since that time, the Council has applied for and received a permit for the parade, which at times has included as many as 20,000 marchers and drawn [*561] up to 1 million watchers. No other applicant has ever applied for that permit. *Id.*, at

B9. Through 1992, the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding.

In 1992, a number of gay, lesbian, and bisexual descendants of the Irish immigrants joined together with other supporters to form the respondent organization, GLIB, to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade. *Id.*, at B3; App. 51. Although the Council denied GLIB's application to take part in the 1992 parade, GLIB obtained a state-court order to include its contingent, which marched "uneventfully" among that year's 10,000 participants and 750,000 spectators. App. to Pet. for Cert. B3, and n. 4.

In 1993, after the Council had again refused to admit GLIB to the upcoming parade, the organization and some of its members filed this suit against the Council, the individual petitioner John J. "Wacko" Hurley, and the city of Boston, alleging violations of the State and Federal Constitutions and of the state public accommodations law, which prohibits "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws @ 272:98 (1992). After finding that "for at least the past 47 years, the Parade has traveled the same basic route along the public streets of South Boston, providing entertainment, amusement, and recreation to participants and spectators alike," App. to Pet. for Cert. B5-B6, the state trial court ruled that the parade fell within the statutory definition of a public accommodation, which includes "any place . . . which is open to and accepts or solicits the patronage of the general public [*562] and, without limiting the generality of this definition, whether or not it be . . . (6) a boardwalk or other public highway [or] . . . (8) a place of public amusement, recreation, sport, exercise or entertainment," Mass. Gen. Laws @ 272:92A (1992). The court found that the Council had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who simply showed up at the parade without having submitted an application, and did "not generally inquire into the specific messages or views of each applicant." App. to Pet. for Cert. B8-B9. The court consequently rejected the Council's contention that the parade was "private" (in the sense of being exclusive), holding instead that "the lack of genuine selectivity in choosing participants and sponsors demonstrates that the Parade is a public event." *Id.*, at B6. It found the parade to be "eclectic," containing a wide variety of "patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes," as well as conflicting messages. *Id.*, at B24. While noting that the Council had indeed excluded the Ku Klux Klan and ROAR (an antibusing group), *id.*, at B7, it attributed little significance to these facts, concluding ultimately that "the only common theme among the participants and sponsors is their public involvement in the Parade," *id.*, at B24.

The court rejected the Council's assertion that the exclusion of "groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values," *id.*, at B3, and found the Council's "final position [to be] that GLIB would be excluded because of its values and its message, i. e., its members' sexual orientation," *id.*, at B4, n. 5, citing

Tr. of Closing Arg. 43, 51-52 (Nov. 23, 1993). This position, in the court's view, was not only violative of the public accommodations law but "paradoxical" as well, since "a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness." App. to Pet. for [*563] Cert. B24. The court rejected the notion that GLIB's admission would trample on the Council's First Amendment rights since the court understood that constitutional protection of any interest in expressive association would "require focus on a specific message, theme, or group" absent from the parade. Ibid. "Given the [Council's] lack of selectivity in choosing participants and failure to circumscribe the marchers' message," the court found it "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." Id., at B25. It concluded that the parade is "not an exercise of [the Council's] constitutionally protected right of expressive association," but instead "an open recreational event that is subject to the public accommodations law." Id., at B27.

The court held that because the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation, any infringement on the Council's right to expressive association was only "incidental" and "no greater than necessary to accomplish the statute's legitimate purpose" of eradicating discrimination. Id., at B25, citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628-629, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984). Accordingly, it ruled that "GLIB is entitled to participate in the Parade on the same terms and conditions as other participants." App. to Pet. for Cert. B27. n1

- - - - -Footnotes- - - - -

n1 The court dismissed the public accommodations law claim against the city because it found that the city's actions did not amount to inciting or assisting in the Council's violations of @ 272:98. App. to Pet. for Cert. B12-B13. It also dismissed respondents' First and Fourteenth Amendment challenge against the Council for want of state action triggering the proscriptions of those Amendments. Id., at B14-B22. Finally, the court did not reach the state constitutional questions, since respondents had apparently assumed in their arguments that those claims, too, depended for their success upon a finding of state action and because of the court's holding that the public accommodation statutes apply to the parade. Id., at B22.

- - - - -End Footnotes- - - - -

The Supreme Judicial Court of Massachusetts affirmed, seeing nothing clearly erroneous in the trial judge's findings [*564] that GLIB was excluded from the parade based on the sexual orientation of its members, that it was impossible to detect an expressive purpose in the parade, that there was no state action, and that the parade was a public accommodation within the meaning of @ 272:92A. *Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston*, 418 Mass. 238, 242-248, 636 N.E.2d 1293, 1295-1298 (1994). n2 Turning to petitioners' First Amendment claim that application of the public accommodations law to the parade violated their freedom of speech (as distinguished from their right to expressive association, raised in the trial court), the court's majority held that it need not decide on the particular First Amendment theory involved "because, as the [trial] judge found, it is 'impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.'" Id., at 249, 636 N.E.2d

at 1299 (footnote omitted). The defendants had thus failed at the trial level "to demonstrate that the parade truly was an exercise of . . . First Amendment rights," *id.*, at 250, 636 N.E.2d at 1299, citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, n. 5, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984), and on appeal nothing indicated to the majority of the Supreme Judicial Court that the trial judge's assessment of the evidence on this point was clearly erroneous, 418 Mass. at 250, 636 N.E.2d at 1299. The court rejected petitioners' further challenge to the law as overbroad, holding that it does not, on its face, regulate speech, does not let public officials examine the content of speech, and would not be interpreted as reaching speech. *Id.*, at 251-252, 636 N.E.2d at 1300. Finally, the court rejected the challenge that the public accommodations law was unconstitutionally vague, holding that this case did not present an issue of speech and that the law gave persons of [*565] ordinary intelligence a reasonable opportunity to know what was prohibited. *Id.*, at 252, 636 N.E.2d at 1300-1301.

-Footnotes-

n2 Since respondents did not cross-appeal the dismissal of their claims against the city, the Supreme Judicial Court declined to reach those claims. 418 Mass. at 245, n. 12, 636 N.E.2d at 1297.

-End Footnotes-

Justice Nolan dissented. In his view, the Council "does not need a narrow or distinct theme or message in its parade for it to be protected under the First Amendment." *Id.*, at 256, 636 N.E.2d at 1303. First, he wrote, even if the parade had no message at all, GLIB's particular message could not be forced upon it. *Id.*, at 257, 636 N.E.2d at 1303, citing *Wooley v. Maynard*, 430 U.S. 705, 717, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977) (state requirement to display "Live Free or Die" on license plates violates First Amendment). Second, according to Justice Nolan, the trial judge clearly erred in finding the parade devoid of expressive purpose. 418 Mass. at 257, 636 N.E.2d at 1303. He would have held that the Council, like any expressive association, cannot be barred from excluding applicants who do not share the views the Council wishes to advance. *Id.*, at 257-259, 636 N.E.2d at 1303-1304, citing *Roberts, supra*. Under either a pure speech or associational theory, the State's purpose of eliminating discrimination on the basis of sexual orientation, according to the dissent, could be achieved by more narrowly drawn means, such as ordering admission of individuals regardless of sexual preference, without taking the further step of prohibiting the Council from editing the views expressed in their parade. 418 Mass. at 256, 258, 636 N.E.2d at 1302, 1304. In Justice Nolan's opinion, because GLIB's message was separable from the status of its members, such a narrower order would accommodate the State's interest without the likelihood of infringing on the Council's First Amendment rights. Finally, he found clear error in the trial judge's equation of exclusion on the basis of GLIB's message with exclusion on the basis of its members' sexual orientation. To the dissent this appeared false in the light of "overwhelming evidence" that the Council objected to GLIB on account of its message and a dearth of testimony or documentation indicating that sexual orientation was the bar to admission. *Id.*, at 260, 636 [*566] N.E.2d at 1304. The dissent accordingly concluded that the Council had not even violated the State's public accommodations law.

We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment. 513 U.S. 1071 (1995). We hold that it does and reverse.

II Given the scope of the issues as originally joined in this case, it is worth noting some that have fallen aside in the course of the litigation, before reaching us. Although the Council presents us with a First Amendment claim, respondents do not. Neither do they press a claim that the Council's action has denied them equal protection of the laws in violation of the Fourteenth Amendment. While the guarantees of free speech and equal protection guard only against encroachment by the government and "erect no shield against merely private conduct," *Shelley v. Kraemer*, 334 U.S. 1, 13, 92 L. Ed. 1161, 68 S. Ct. 836 (1948); see *Hudgens v. NLRB*, 424 U.S. 507, 513, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976), respondents originally argued that the Council's conduct was not purely private, but had the character of state action. The trial court's review of the city's involvement led it to find otherwise, however, and although the Supreme Judicial Court did not squarely address the issue, it appears to have affirmed the trial court's decision on that point as well as the others. In any event, respondents have not brought that question up either in a cross-petition for certiorari or in their briefs filed in this Court. When asked at oral argument whether they challenged the conclusion by the Massachusetts' courts that no state action is involved in the parade, respondents' counsel answered that they "do not press that issue here." Tr. of Oral Arg. 22. In this Court, then, their claim for inclusion in the parade rests solely on the Massachusetts public accommodations law.

[*567] There is no corresponding concession from the other side, however, and certainly not to the state courts' characterization of the parade as lacking the element of expression for purposes of the First Amendment. Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984). The "requirement of independent appellate review . . . is a rule of federal constitutional law," *id.*, at 510, which does not limit our deference to a trial court on matters of witness credibility, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989), but which generally requires us to "review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," *Fiske v. Kansas*, 274 U.S. 380, 385-386, 71 L. Ed. 1108, 47 S. Ct. 655 (1927). See also *Niemotko v. Maryland*, 340 U.S. 268, 271, 95 L. Ed. 267, 71 S. Ct. 325 (1951); *Jacobellis v. Ohio*, 378 U.S. 184, 189, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964) (opinion of Brennan, J.). This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. See *Bose Corp.*, *supra*, at 503. Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that "findings of fact . . . shall not be set aside unless clearly erroneous," we are obliged to make a fresh examination of crucial facts. Hence, in this case, though we are confronted

with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of non-expressive conduct, our obligation is to "make an independent examination [*568] of the whole record," . . . so as to assure ourselves that this judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) (footnote omitted), quoting *Edwards v. South Carolina*, 372 U.S. 229, 235, 9 L. Ed. 2d 697, 83 S. Ct. 680 (1963).

III

A If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real "parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." S. Davis, *Parades and Power: Street Theatre in Nineteenth-Century Philadelphia* 6 (1986). Hence, we use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or demonstration receives no media coverage, it may as well not have happened." *Id.*, at 171. Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches. In *Gregory v. Chicago*, 394 U.S. 111, 112, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969), for example, petitioners had taken part in a procession to express their grievances to the city government, and we held that such a "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." Similarly, in *Edwards v. South Carolina*, *supra*, at 235, where petitioners had joined in a march of protest and pride, carrying placards and singing *The Star Spangled Banner*, we held that the activities "reflect an exercise of these basic constitutional [*569] rights in their most pristine and classic form." *Accord*, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969). The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that "symbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943), our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), *id.*, at 632, 642, wearing an armband to protest a war, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505-506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969), displaying a red flag, *Stromberg v. California*, 283 U.S. 359, 369, 75 L. Ed. 1117, 51 S. Ct. 532 (1931), and even "marching, walking or parading" in uniforms displaying the swastika, *National Socialist Party of America v. Skokie*, 432 U.S. 43, 53 L. Ed. 2d 96, 97 S. Ct. 2205 (1977). As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," cf. *Spence v. Washington*, 418 U.S. 405, 411, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974) (*per curiam*), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll. Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one

of them. Spectators line the streets; people march in costumes and uniforms, carrying flags and banners with all sorts of messages (e. g., "England get out of Ireland," "Say no to drugs"); marching bands and pipers play; floats are pulled along; and the whole show is broadcast over Boston television. See Record, Exh. 84 (video). To be sure, we agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But 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 [*570] subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994) ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment"). For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258, 41 L. Ed. 2d 730, 94 S. Ct. 2831 (1974), as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper, see *New York Times*, 376 U.S. at 265-266. The selection of contingents to make a parade is entitled to similar protection. Respondents' participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate 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. App. to Pet. for Cert. B3. The organization distributed a fact sheet describing the members' intentions, App. A51, and the record otherwise corroborates the expressive nature of GLIB's participation, see Record, Exh. 84 (video); App. A67 (photograph). In 1993, members of GLIB marched behind a shamrock-strewn banner with the simple inscription "Irish American Gay, Lesbian and Bisexual Group of Boston." GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.

[*571] B

The Massachusetts public accommodations law under which respondents brought suit has a venerable history. At common law, innkeepers, smiths, and others who "made profession of a public employment," were prohibited from refusing, without good reason, to serve a customer. *Lane v. Cotton*, 12 Mod. 472, 484-485, 88 Eng. Rep. 1458, 1464-1465 (K. B. 1701) (Holt, C. J.); see *Bell v. Maryland*, 378 U.S. 226, 298, n. 17, 12 L. Ed. 2d 822, 84 S. Ct. 1814 (1964) (Goldberg, J., concurring); *Lombard v. Louisiana*, 373 U.S. 267, 277, 10 L. Ed. 2d 338, 83 S. Ct. 1122 (1963) (Douglas, J., concurring). As one of the 19th-century English judges put it, the rule was that "the innkeeper is not to select his guests[;] he has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants." *Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N. P. 1835); *M. Konvitz & T. Leskes*, *A Century of Civil Rights* 160 (1961). After the Civil War, the Commonwealth of Massachusetts was the first State to codify

this principle to ensure access to public accommodations regardless of race. See Act Forbidding Unjust Discrimination on Account of Color or Race, 1865 Mass. Acts, ch. 277 (May 16, 1865); Konvitz & Leskes, *supra*, at 155-156; Lerman & Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N. Y. U. Rev. L. & Soc. Change 215, 238 (1978); Fox, *Discrimination and Antidiscrimination in Massachusetts Law*, 44 B. U. L. Rev. 30, 58 (1964). In prohibiting discrimination "in any licensed inn, in any public place of amusement, public conveyance or public meeting," 1865 Mass. Acts, ch. 277, @ 1, the original statute already expanded upon the common law, which had not conferred any right of access to places of public amusement, Lerman & Sanderson, *supra*, at 248. As with many public accommodations statutes across the Nation, the legislature continued to [*572] broaden the scope of legislation, to the point that the law today prohibits discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation . . . , deafness, blindness or any physical or mental disability or ancestry" in "the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws @ 272:98 (1992). Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments. See, e. g., *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 11-16, 101 L. Ed. 2d 1, 108 S. Ct. 2225 (1988); *Roberts v. United States Jaycees*, 468 U.S. at 624-626; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-262, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964). Nor is this statute unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.

C In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. See App. to Pet. for Cert. B26-B27, and n. 28. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content [*573] of their parade. Although the state courts spoke of the parade as a place of public accommodation, see, e. g., 418 Mass. at 247-248, 636 N.E.2d at 1297-1298, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. "Since all speech inherently involves choices of what to say and what to leave unsaid," *Pacific*

Gas & Electric Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 11, 89 L. Ed. 2d 1, 106 S. Ct. 903 (1986) (plurality opinion) (emphasis in original), one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say," *id.*, at 16. Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information," *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 85 L. Ed. 2d 652, 105 S. Ct. 2265 (1985); see *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386-387, 37 L. Ed. 2d 669, 93 S. Ct. 2553 (1973), outside that context it may not compel affirmance of a belief with which the speaker disagrees, see *Barnette*, 319 U.S. at 642. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-342, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995); *Riley v. National Federation of Blind of N. C., Inc.*, [*574] 487 U.S. 781, 797-798, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988), subject, perhaps, to the permissive law of defamation, *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-349, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988). Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful. See *Brandenburg v. Ohio*, 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1949).

Petitioners' claim to the benefit of this principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council 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. The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified [*575] social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control. Respondents argue that any tension between this rule and the Massachusetts law falls short of unconstitutionality, citing the most recent of our cases on the general subject of compelled access

for expressive purposes, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994). There we reviewed regulations requiring cable operators to set aside channels for designated broadcast signals, and applied only intermediate scrutiny. *Id.*, at 662. Respondents contend on this authority that admission of GLIB to the parade would not threaten the core principle of speaker's autonomy because the Council, like a cable operator, is merely "a conduit" for the speech of participants in the parade "rather than itself a speaker." Brief for Respondent 21. But this metaphor is not apt here, because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well. A newspaper, similarly, "is more than a passive receptacle or conduit for news, comment, and advertising," and we have held that "the choice of material . . . and the decisions made as to limitations on the size and content . . . and treatment of public issues . . . --whether fair or unfair--constitute the exercise of editorial control and judgment" upon which the State can not intrude. *Tornillo*, 418 U.S. at 258. Indeed, in *Pacific Gas & Electric*, we invalidated coerced access to the envelope of a private utility's bill and newsletter because the utility "may be forced either to appear to agree with [the intruding leaflet] or to respond." 475 U.S. at 15 (plurality opinion) (citation omitted). The plurality made the further point that if "the government [*576] [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Id.*, at 16. Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.

In *Turner Broadcasting*, we found this problem absent in the cable context, because "given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." 512 U.S. at 655. We stressed that the viewer is frequently apprised of the identity of the broadcaster whose signal is being received via cable and that it is "common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility." *Ibid.* (citation omitted); see *id.*, at 684 (O'CONNOR, J., concurring in part and dissenting in part) (noting that Congress "might . . . conceivably obligate cable operators to act as common carriers for some of their channels").

Parades and demonstrations, in contrast, are not understood to be so neutrally presented or selectively viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow "any identity of viewpoint" between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving [*577] parade. Cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980) (owner of shopping mall "can expressly disavow any connection with the message by simply posting

signs in the area where the speakers or handbillers stand"). Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole. An additional distinction between Turner Broadcasting and this case points to the fundamental weakness of any attempt to justify the state-court order's limitation on the Council's autonomy as a speaker. A cable is not only a conduit for speech produced by others and selected by cable operators for transmission, but a franchised channel giving monopolistic opportunity to shut out some speakers. This power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed. The Government's interest in Turner Broadcasting was not the alteration of speech, but the survival of speakers. In thus identifying an interest going beyond abridgment of speech itself, the defenders of the law at issue in Turner Broadcasting addressed the threshold requirement of any review under the Speech Clause, whatever the ultimate level of scrutiny, that a challenged restriction on speech serve a compelling, or at least important, governmental object, see, e. g., *Pacific Gas & Electric*, supra, at 19; *Turner Broadcasting*, supra, at 662; *United States v. O'Brien*, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). In this case, of course, there is no assertion comparable to the Turner Broadcasting claim that some speakers will be destroyed in the absence of the challenged law. True, the size and success of petitioners' parade makes it an enviable vehicle for the dissemination of GLIB's views, but that fact, [*578] without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators. See App. to Pet. for Cert. B9; Brief for Respondents 10 (citing trial court's finding that no other applicant has applied for the permit). Considering that GLIB presumably would have had a fair shot (under neutral criteria developed by the city) at obtaining a parade permit of its own, respondents have not shown that petitioners enjoy the capacity to "silence the voice of competing speakers," as cable operators do with respect to program providers who wish to reach subscribers, *Turner Broadcasting*, supra, at 656. Nor has any other legitimate interest been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade. The statute, Mass. Gen. Laws @ 272:98 (1992), is a piece of protective legislation that announces no purpose beyond the object both expressed and apparent in its provisions, which is to prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation. On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids. 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 [*579] 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. Having availed itself of the public thoroughfares "for purposes of assembly [and] communicating thoughts between citizens," the Council is engaged in a use of the streets that has "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939) (opinion of Roberts, J.). Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says. See, e. g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972); cf. H. Kalven, *A Worthy Tradition* 6-19 (1988); Fiss, *Free Speech and Social Structure*, 71 *Iowa L. Rev.* 1405, 1408-1409 (1986). The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. See, e. g., *Barnette*, 319 U.S. at 642; *Pacific Gas & Electric*, 475 U.S. at 20. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Far from supporting GLIB, then, *Turner Broadcasting* points to the reasons why the present application of the Massachusetts law can not be sustained. So do the two other principal authorities GLIB has cited. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980), to be sure, we [*580] sustained a state law requiring the proprietors of shopping malls to allow visitors to solicit signatures on political petitions without a showing that the shopping mall owners would otherwise prevent the beneficiaries of the law from reaching an audience. But we found in that case that the proprietors were running "a business establishment that is open to the public to come and go as they please," that the solicitations would "not likely be identified with those of the owner," and that the proprietors could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." *Id.*, at 87. Also, in *Pacific Gas & Electric*, *supra*, at 12, we noted that *PruneYard* did not involve "any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets" The principle of speaker's autonomy was simply not threatened in that case. *New York State Club Assn.* is also instructive by the contrast it provides. There, we turned back a facial challenge to a state antidiscrimination statute on the assumption that the expressive associational character of a dining club with over 400 members could be sufficiently attenuated to permit application of the law even to such a private organization, but we also recognized that the State did not prohibit exclusion of those whose views were at odds with positions espoused by the general club memberships. 487 U.S. at 13; see also *Roberts*, 468 U.S. at 627. In other words, although the association provided public benefits to which a State could ensure equal access, it was also engaged in expressive activity; compelled access to the benefit, which was upheld, did not trespass on the organization's message itself. If we were to analyze this case strictly along

those lines, GLIB would lose. Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could [*581] nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.

IV Our holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others. Accordingly, the judgment of the Supreme Judicial Court is reversed and the case remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Beth B
3/21

① This is not Hurley

- compelled speech: Hurley

No blanket exemption

② Roberts: No O'Connor

private schools (soc wd
call
"commercial")

Title VII: exemptions for religion
RFRA for sex,
rel.

Pub. accom statute: exempt
for private clubs

③ Boy Scouts:

CA correctly applied
Roberts

★ Look @ fn. 9 p. 33

A bunch of cases: 1st Am. defenses raised
to application of

481 U.S. 537 printed in FULL format.

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL ET AL. v. ROTARY
CLUB OF DUARTE ET AL.

No. 86-421

SUPREME COURT OF THE UNITED STATES

481 U.S. 537; 107 S. Ct. 1940; 1987 U.S. LEXIS 5218; 95 L.
Ed. 2d 474; 55 U.S.L.W. 4606; 42 Empl. Prac. Dec. (CCH)
P36,983

March 30, 1987, Argued
May 4, 1987, Decided

PRIOR HISTORY:

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

DISPOSITION: 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213, affirmed.

CORE TERMS: membership, club, First Amendment, Unruh Act, classification, constitutional protection, intimate, admitting, admit, public accommodations, establishment, infringement, profession, candidates, expressive, abandon, attend, compelling interest, entity, business establishment, ethical standards, active member, humanitarian, leadership, fellowship, vocations, overbroad, inclusive, interfere, charter

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DECISION: California civil rights statute held not to violate First Amendment by requiring all-male nonprofit club to admit women to membership.

SUMMARY: Rotary International is a nonprofit corporation composed of local Rotary Clubs. Its purposes are to provide humanitarian service, encourage high ethical standards in all vocations, and help build good will and peace in the world. Individuals are admitted to membership in a Rotary Club according to a "classification system" which insures that each club includes a representative of every business, professional, or institutional activity in the community. Membership is open only to men, although women are permitted to attend meetings, give speeches, receive awards, and form their own associations. When a Rotary Club in California admitted 3 women to active membership, Rotary International revoked the club's charter and terminated its membership in Rotary International. The club and two of its women members sued in the California Superior Court for the County of Los Angeles, (1) alleging that Rotary International had violated the California civil rights statute, which entitles all persons, regardless of their sex, to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments, and (2) seeking to enjoin Rotary International from enforcing its gender restrictions, revoking the local club's charter, or compelling delivery of the club's charter to any representative of Rotary International. The court entered judgment for Rotary International, after finding that neither Rotary International nor the local club was a "business establishment" within the meaning of the statute and that local Rotary Clubs do not provide their members with goods, services, or facilities. The California Court of Appeal, Second

Appellate District, reversed, holding that (1) Rotary International and the local club were business establishments, (2) the local club provided goods, services, and facilities to its members, (3) admitting women to the local club would not seriously interfere with the objectives of Rotary International, and (4) the policy of excluding women was not protected by the First Amendment to the Federal Constitution (178 Cal App 3d 1035, 224 Cal Rptr 213).

On appeal, the United States Supreme Court affirmed. In an opinion by Powell, J., joined by Rehnquist, Ch. J., and Brennan, White, Marshall, and Stevens, JJ., it was held that (1) the California civil rights statute did not violate the First Amendment when it required California Rotary Clubs to admit women to membership, in that the application of the statute to these clubs (a) did not interfere unduly with the members' freedom of private association, where the relationship among Rotary Club members was not the kind of intimate or private relation that warranted constitutional protection, and (b) did not violate the right of expressive association afforded by the First Amendment, where the evidence failed to demonstrate that admitting women to Rotary Clubs would affect in any significant way the existing members' ability to carry out their various purposes; and (2) the contentions that the statute is unconstitutionally vague and overbroad were not properly presented to the state courts and would therefore not be reviewed by the Supreme Court.

Scalia, J., concurred in the judgment.

Blackmun and O'Connor, JJ., did not participate.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

<=5> CIVIL RIGHTS @65

<=6> CONSTITUTIONAL LAW @929

sex discrimination -- freedom of association --

Headnote: <=7> [1A] <=8> [1B] <=9> [1C] <=10> [1D] <=11> [1E]

A state statute which entitles all persons, regardless of their sex, to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments does not violate the First Amendment to the Federal Constitution when it is applied to nonprofit clubs, membership in which is limited to men, by requiring them to admit women to membership, in that the application of the statute to the clubs (1) does not interfere unduly with the club members' freedom of private association, where the relationship among the members is not the kind of intimate private relation that warrants constitutional protection, in the light of the potentially large number of members in the clubs, a high rate of turnover among members, an inclusive membership policy, and the clubs' service projects which aid the community; and (2) does not violate the right of expressive association afforded by the First Amendment, where (a) the evidence fails to demonstrate that admitting women to the clubs would affect in any significant way the existing members' ability to carry out their various purposes, (b) the statute does not require the clubs to abandon or alter any of their service activities which are protected by the First Amendment, to abandon their system of admitting members based on business, professional, and institutional activity in the community, or to admit members who do not reflect a cross section of the community, and (c) even if the statute does work some slight infringement on the members' right of expressive

association, that infringement is justified because it serves the state's compelling interest in eliminating discrimination against women.

<=12> APPEAL @475
Supreme Court jurisdiction -- state court decision -- constitutionality of statute as applied --

Headnote: <=13> [2A] <=14> [2B]
The United States Supreme Court has appellate jurisdiction under 28 USCS 1257(2) to review the decision of a state's intermediate appeals court presenting the question whether a state statute, which entitles all persons, regardless of their sex, to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments, violates the First Amendment to the Federal Constitution when it requires nonprofit clubs, membership to which is limited to men, to admit women to membership, where the appellants challenged the constitutionality of the statute, as applied, and the state intermediate appeals court sustained the validity of the statute as applied; the validity of a state statute is sustained within the meaning of 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds.

<=16> CONSTITUTIONAL LAW @929
freedom of association -- scope --

Headnote: <=17> [3]
Under the First Amendment to the Federal Constitution, freedom of association is afforded constitutional protection in two distinct senses: (1) freedom of private association, under which the Federal Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships; and (2) freedom of expressive association, under which individuals have the freedom to associate for the purpose of engaging in protected speech or religious activities.

<=18> CONSTITUTIONAL LAW @929
association of nonprofit clubs --

Headnote: <=19> [4A] <=20> [4B]
A nonprofit corporation, the members of which are local nonprofit clubs, can claim no constitutionally protected right of private association, and its expressive activities are quite limited, where it is claimed in an action in state court that a state statute violates the First Amendment when it requires the all-male local clubs to admit women to membership.

<=21> CONSTITUTIONAL LAW @929
freedom of association -- protected relationships --

Headnote: <=22> [5]
The freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights, and such relationships may take various forms, including the most intimate; the First

Amendment protects those relationships, including family relationships, that 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.

<=23> CONSTITUTIONAL LAW @929

freedom of association -- particular relationships -- relevant factors --

Headnote: <=24> [6A] <=25> [6B] <=26> [6C]

Determining the limits of state authority over an individual's freedom to enter into a particular association unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments; whether a particular association is sufficiently personal or private to warrant constitutional protection under the First Amendment is determined by considering factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.

<=27> CONSTITUTIONAL LAW @929

First Amendment -- freedom of association --

Headnote: <=28> [7]

The right to engage in activities protected by the First Amendment implies a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends; for this reason, impediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment.

<=29> APPEAL @428

federal claim not raised below -- state court --

Headnote: <=30> [8A] <=31> [8B]

The United States Supreme Court will not review a claim that a state statute--which entitles all persons, regardless of their sex, to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments, and under which an all-male nonprofit club is required to admit women to membership--is unconstitutionally vague and overbroad, where (1) these contentions were not properly presented to the state courts, the issues being presented only when the appellants filed their petition for rehearing with a state appellate court which denied the petition without opinion, (2) there is no showing that the failure of the highest state court to pass upon the federal question was not due to want of proper presentation in the state court, and (3) a casual reference in the appellants' brief in the state appellate court to a federal case discussing the constitutionality of a vague and broad statute, the reference having been made in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to the United States Supreme Court's appellate jurisdiction under 28 USCS 1257(2).

<=33> APPEAL @811

jurisdiction of Supreme Court -- federal claim raised on record --

Headnote: <=34> [9]

The United States Supreme Court will not review a final judgment of a state court unless the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

<=35> APPEAL @428

raising federal question -- state court --

Headnote: <=36> [10]

For the purpose of determining whether the United States Supreme Court will review a federal question that is raised in an appeal from a decision of a state court, it will be assumed that when the highest state court failed to pass upon the federal question, the omission was due to want of proper presentation in the state court, unless the aggrieved party in the Supreme Court can affirmatively show the contrary.

SYLLABUS: Rotary International is a nonprofit corporation composed of local Rotary Clubs. Its purposes are to provide humanitarian service, to encourage high ethical standards in all vocations, and to help build world peace and good will. Individuals are admitted to local club membership according to a "classification system" based on business, professional, and institutional activity in the community. Although women are permitted to attend meetings, give speeches, receive awards, and form auxiliary organizations, the Rotary constitution excludes women from membership. Because it had admitted women to active membership, the Duarte, California, Rotary Club's membership in the international organization was terminated. That club and two of its women members filed a suit alleging that the termination violated California's Unruh Act (Act), which entitles all persons, regardless of sex, to full and equal accommodations, advantages, facilities, privileges, and services in all business establishments in the State. The state trial court entered judgment for Rotary International, concluding that neither it nor the Duarte Club is a "business establishment" within the meaning of the Act. However, the State Court of Appeal reversed on this point, and rejected the contention that Rotary's policy of excluding women is protected by the First Amendment. Accordingly, the court ordered the Duarte Club's reinstatement, and enjoined the enforcement of the gender requirements against it.

Held:

1. The Unruh Act does not violate the First Amendment by requiring California Rotary Clubs to admit women. Pp. 544-549.

(a) Application of the Act to local Rotary Clubs does not interfere unduly with club members' freedom of private association. In determining whether a particular association is sufficiently intimate or private to warrant constitutional protection, consideration must be given to factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. Here, the relationship among Rotary Club members does not warrant protection, in light of the potentially large size of local clubs, the high turnover rate among club members, the inclusive nature of each club's membership, the public purposes behind clubs' service activities,

and the fact that the clubs encourage the participation of strangers in, and welcome media coverage of, many of their central activities. Pp. 544-547.

(b) Application of the Act to California Rotary Clubs does not violate the First Amendment right of expressive association. Although clubs engage in a variety of commendable service activities that are protected by the First Amendment, the evidence fails to demonstrate that admitting women will affect in any significant way the existing members' ability to carry out those activities. Moreover, the Act does not require clubs to abandon or alter their classification and admission systems, but, in fact, will permit them to have an even more representative membership with a broadened capacity for service. Even if the Act does work some slight infringement of members' rights, that infringement is justified by the State's compelling interests in eliminating discrimination against women and in assuring them equal access to public accommodations. The latter interest extends to the acquisition of leadership skills and business contacts as well as tangible goods and services. Pp. 548-549.

2. The contentions that the Act is unconstitutionally vague and overbroad were not properly presented to the state courts, and therefore will not be reviewed by this Court. Pp. 549-550.

COUNSEL: William P. Sutter argued the cause for appellants. With him on the briefs were Peter F. Lovato III and Wm. John Kennedy.

Judith Resnik argued the cause for appellees. On the brief were Carol Agate, Sanford K. Smith, Blanche C. Bersch, Paul Hoffman, and Fred Okrand.

Marian M. Johnston argued the cause for intervenor State of California. With her on the brief were John K. Van de Kamp, Attorney General, Andrea Sheridan Ordin, Chief Assistant Attorney General, and Beverly Tucker, Deputy Attorney General. *

* Briefs of amici curiae urging reversal were filed for the Boy Scouts of America by Ronald C. Redcay, George A. Davidson, and David K. Park; for the Conference of Private Organizations by Thomas P. Ondeck; for the Legal Foundation of America by Jean F. Powers and David Crump; and for Pilot Club International et al. by Stephen G. Seliger.

Briefs of amici curiae urging affirmance were filed for the State of Minnesota et al. by Hubert H. Humphrey III, Attorney General of Minnesota, Richard S. Slowes, Assistant Solicitor General, and Peter M. Ackerman, Special Assistant Attorney General, and for the Attorneys General for their respective States as follows: Joseph I. Lieberman of Connecticut, Neil F. Hartigan of Illinois, William J. Guste of Louisiana, W. Cary Edwards of New Jersey, Anthony J. Celebrezze, Jr., of Ohio, Dave Frohnmayer of Oregon, Jim Mattox of Texas, David L. Wilkinson of Utah, and Donald S. Hanaway of Wisconsin; for the city of New York et al. by Doron Gopstein and Leonard Koerner; for the American Jewish Congress et al. by Marc D. Stern; for the Anti-defamation League of B'nai B'rith by Abigail T. Kelman, Justin J. Finger, Jeffrey P. Sinensky, Steven M. Freeman, and Meyer Eisenberg; for California Women Lawyers et al. by Lorraine L. Loder and Fredric D. Woocher; for the Kiwanis Club of Ridgewood, Inc., et al. by Marcia K. Baer; for the Lloyd Lyons Club by Marla J. McGeorge and Allen T. Murphy, Jr.; and for the Rotary Club of Seattle et al. by M. Margaret McKeown

and Eugene C. Chellis.

Joan M. Graff and Douglas R. Young filed a brief for the Employment Law Center of the Legal Aid Society of San Francisco as amicus curiae.

JUDGES: Powell, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Brennan, White, Marshall, and Stevens JJ., joined. Scalia, J., concurred in the judgment. Blackmun and O'Connor, JJ., took no part in the consideration or decision of the case.

OPINIONBY: POWELL

OPINION: [*539] JUSTICE POWELL delivered the opinion of the Court. We must decide whether a California statute that requires California Rotary Clubs to admit women members violates the First Amendment.

I

A

Rotary International (International) is a nonprofit corporation founded in 1905, with headquarters in Evanston, Illinois. It is "an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." Rotary Manual of Procedure 7 (1981) (hereinafter Manual), App. 35. Individual members belong to a local Rotary Club rather than to International. In turn, each local Rotary Club is a member of International. Ibid. In August 1982, shortly before the trial in this case, International [*540] comprised 19,788 Rotary Clubs in 157 countries, with a total membership of about 907,750. Brief for Appellants 7.

Individuals are admitted to membership in a Rotary Club according to a "classification system." The purpose of this system is to ensure "that each Rotary Club includes a representative of every worthy and recognized business, professional, or institutional activity in the community." 2 Rotary Basic Library, Club Service 67-69 (1981), App. 86. Each active member must work in a leadership capacity in his business or profession. The general rule is that "one active member is admitted for each classification, but he, in turn, may propose an additional active member, who must be in the same business or professional classification." n1 Id., at 7, App. 86. Thus, each classification may be represented by two active members. In addition, "senior active" and "past service" members may represent the same classifications as active members. See Standard Rotary Club Constitution, Art. V, @@ 2-5, Record 97-98. There is no limit to the number of clergymen, journalists, or diplomats who may be admitted to membership. Manual 31, 33, App. 38-39.

- - - - -Footnotes- - - - -

n1 Rotary Clubs may establish separate classifications for subcategories of a business or profession as long as the classification "describe[s] the member's principal and recognized professional activity" 2 Rotary Basic Library, Club Service 8 (1981), App. 87. For example, a single Rotary Club may admit categories and subcategories of lawyers: e. g., trial, corporate, tax, labor, and so on. Ibid.

- - - - -End Footnotes- - - - -

Subject to these requirements, each local Rotary Club is free to adopt its own rules and procedures for admitting new members. Id., at 7, App. 35. International has promulgated Recommended Club By-laws providing that candidates for membership will be considered by both a "classifications committee" and a "membership committee." The classifications committee determines whether the candidate's business or profession is described accurately and fits an "open" classification. The membership committee evaluates the candidate's "character, business and social standing, and general [*541] eligibility." Brief for Appellants 7-8. If any member objects to the candidate's admission, the final decision is made by the club's board of directors.

Membership in Rotary Clubs is open only to men. Standard Rotary Club Constitution, Art. V, @ 2, Record 97. Herbert A. Pigman, the General Secretary of Rotary International, testified that the exclusion of women results in an "aspect of fellowship . . . that is enjoyed by the present male membership," App. to Juris. Statement G-52, and also allows Rotary to operate effectively in foreign countries with varied cultures and social mores. Although women are not admitted to membership, they are permitted to attend meetings, give speeches, and receive awards. Women relatives of Rotary members may form their own associations, and are authorized to wear the Rotary lapel pin. Young women between 14 and 28 years of age may join Interact or Rotaract, organizations sponsored by Rotary International.

B

In 1977 the Rotary Club of Duarte, California, admitted Donna Bogart, Mary Lou Elliott, and Rosemary Freitag to active membership. International notified the Duarte Club that admitting women members is contrary to the Rotary constitution. After an internal hearing, International's board of directors revoked the charter of the Duarte Club and terminated its membership in Rotary International. The Duarte Club's appeal to the International Convention was unsuccessful.

The Duarte Club and two of its women members filed a complaint in the California Superior Court for the County of Los Angeles. The complaint alleged, inter alia, that appellants' actions violated the Unruh Civil Rights Act, Cal. Civ. Code Ann. @ 51 (West 1982). n2 Appellees sought to enjoin [*542] International from enforcing its restrictions against admitting women members, revoking the Duarte Club's charter, or compelling delivery of the charter to any representative of International. Appellees also sought a declaration that appellants' actions had violated the Unruh Act. After a bench trial, the court concluded that neither Rotary International nor the Duarte Club is a "business establishment" within the meaning of the Unruh Act. The court recognized that "some individual Rotarians derive sufficient business advantage from Rotary to warrant deduction of Rotarian expenses in income tax calculations, or to warrant payment of those expenses by their employers" App. to Juris. Statement B-3. But it found that "such business benefits are incidental to the principal purposes of the association . . . to promote fellowship . . . and . . . 'service' activities." Ibid. The court also found that Rotary clubs do not provide their members with goods, services, or facilities. On the basis of these findings and conclusions, the court entered judgment for International.

-Footnotes-

n2 The Unruh Civil Rights Act provides, in part:

"All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code Ann. @ 51 (West 1982).

-End Footnotes-

The California Court of Appeal reversed. 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986). It held that both Rotary International and the Duarte Rotary Club are business establishments subject to the provisions of the Unruh Act. For purposes of the Act, a "'business' embraces everything about which one can be employed," and an "establishment" includes "not only a fixed location, . . . but also a permanent 'commercial force or organization' or a 'permanent settled position (as in life or business).'" O'Connor v. Village Green Owners Assn., 33 Cal. 3d 790, 795, 662 P. 2d 427, 430 (1983) (quoting Burks v. Poppy Construction Co., 57 Cal. 2d 463, 468-469, 370 P. 2d 313, 316 (1962)). The Court of Appeal identified several "businesslike attributes" of Rotary International, including its complex structure, large staff and budget, and extensive [*543] publishing activities. The court held that the trial court had erred in finding that the business advantages afforded by membership in a local Rotary Club are merely incidental. It stated that testimony by members of the Duarte Club "leaves no doubt that business concerns are a motivating factor in joining local clubs," and that "business benefits [are] enjoyed and capitalized upon by Rotarians and their businesses or employers." 178 Cal. App. 3d, at 1057, 224 Cal. Rptr., at 226. The Court of Appeal rejected the trial court's finding that the Duarte Club does not provide goods, services, or facilities to its members. In particular, the court noted that members receive copies of the Rotary magazine and numerous other Rotary publications, are entitled to wear and display the Rotary emblem, and may attend conferences that teach managerial and professional techniques.

The court also held that membership in Rotary International or the Duarte Club does not give rise to a "continuous, personal, and social" relationship that "take[s] place more or less outside public view." Ibid. (internal quotation marks and citations omitted). The court further concluded that admitting women to the Duarte Club would not seriously interfere with the objectives of Rotary International. Finally, the court rejected appellants' argument that their policy of excluding women is protected by the First Amendment principles set out in Roberts v. United States Jaycees, 468 U.S. 609 (1984). It observed that "nothing we have said prevents, or can prevent, International from adopting or attempting to enforce membership rules or restrictions outside of this state." Id., at 1066, 224 Cal. Rptr., at 231. The court ordered appellants to reinstate the Duarte Club as a member of Rotary International, and permanently enjoined them from enforcing or attempting to enforce the gender requirement against the Duarte Club. The California Supreme Court denied appellants' petition for review. We postponed consideration of our jurisdiction to the hearing on the merits. 479 U.S. 929 (1986). We [*544] conclude that we have appellate jurisdiction, n3 and affirm the judgment of

the Court of Appeal.

-Footnotes-

n3 We have appellate jurisdiction to review a final judgment entered by the highest court of a State in which decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U. S. C. @ 1257(2). Appellants squarely challenged the constitutionality of the Unruh Act, as applied, and the Court of Appeal sustained the validity of the statute as applied. "We have held consistently that a state statute is sustained within the meaning of @ 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 441 (1979) (citing Cohen v. California, 403 U.S. 15, 17-18 (1971); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 686, and n. 1 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, n. 3 (1963); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-290 (1921)).

-End Footnotes-

II In Roberts v. United States Jaycees, supra, we upheld against First Amendment challenge a Minnesota statute that required the Jaycees to admit women as full voting members. Roberts provides the framework for analyzing appellants' constitutional claims. As we observed in Roberts, our cases have afforded constitutional protection to freedom of association in two distinct senses. First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities. In many cases, government interference with one form of protected association will also burden the other form of association. In Roberts we determined the nature and degree of constitutional protection by considering separately the effect of the challenged state action on individuals' freedom [*545] of private association and their freedom of expressive association. We follow the same course in this case. n4

-Footnotes-

n4 International, an association of thousands of local Rotary Clubs, can claim no constitutionally protected right of private association. Moreover, its expressive activities are quite limited. See infra, at 548-549. Because the Court of Appeal held that the Duarte Rotary Club also is a business establishment subject to the provisions of the Unruh Act, we proceed to consider whether application of the Unruh Act violates the rights of members of local Rotary Clubs.

-End Footnotes-

A The Court has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. Such relationships may take various forms,

481 U.S. 537, *; 107 S. Ct. 1940;
1987 U.S. LEXIS 5218; 95 L. Ed. 2d 474

including the most intimate. See *Moore v. East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality opinion). We have not attempted to mark the precise boundaries of this type of constitutional protection. The intimate relationships to which we have accorded constitutional protection include marriage, *Zablocki v. Redhail*, 434 U.S. 374, 383-386 (1978); the begetting and bearing of children, *Carey v. Population Services International*, 431 U.S. 678, 684-686 (1977); child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); and cohabitation with relatives, *Moore v. East Cleveland*, supra, at 503-504. Of course, we have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the First Amendment protects those relationships, including family relationships, that 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." *Roberts v. United States Jaycees*, supra, at 619-620. But in *Roberts* we observed that "determining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful [*546] assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." 468 U.S., at 620 (citing *Runyon v. McCrary*, 427 U.S. 160, 187-189 (1976) (POWELL, J., concurring)). In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. 468 U.S., at 620. The evidence in this case indicates that the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection. The size of local Rotary Clubs ranges from fewer than 20 to more than 900. App. to Juris. Statement G-15 (deposition of Herbert A. Pigman, General Secretary of Rotary International). There is no upper limit on the membership of any local Rotary Club. About 10 percent of the membership of a typical club moves away or drops out during a typical year. 2 Rotary Basic Library, Club Service 9-11 (1981), App. 88. The clubs therefore are instructed to "keep a flow of prospects coming" to make up for the attrition and gradually to enlarge the membership. Ibid. The purpose of Rotary "is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community." 1 Rotary Basic Library, Focus on Rotary 60-61 (1981), App. 84. The membership undertakes a variety of service projects designed to aid the community, to raise the standards of the members' businesses and professions, and to improve international relations. n5 Such an inclusive [*547] "fellowship for service based on diversity of interest," *ibid.*, however beneficial to the members and to those they serve, does not suggest the kind of private or personal relationship to which we have accorded protection under the First Amendment. To be sure, membership in Rotary Clubs is not open to the general public. But each club is instructed to include in its membership "all fully qualified prospective members located within its territory," to avoid "arbitrary limits on the number of members in the club," and to "establish and maintain a membership growth pattern." Manual 139, App. 61-62.

-Footnotes-

n5 We of course recognize that Rotary Clubs, like similar organizations, perform useful and important community services. Rotary Clubs in the vicinity

of the Duarte Club have provided meals and transportation to the elderly, vocational guidance for high school students, a swimming program for handicapped children, and international exchange programs, among many other service activities. Record 217H-217J.

- - - - -End Footnotes- - - - -
Many of the Rotary Clubs' central activities are carried on in the presence of strangers. Rotary Clubs are required to admit any member of any other Rotary Club to their meetings. Members are encouraged to invite business associates and competitors to meetings. At some Rotary Clubs, the visitors number "in the tens and twenties each week." App. to Juris. Statement G-24 (deposition of Herbert A. Pigman, General Secretary of Rotary International). Joint meetings with the members of other organizations, and other joint activities, are permitted. The clubs are encouraged to seek coverage of their meetings and activities in local newspapers. In sum, Rotary Clubs, rather than carrying on their activities in an atmosphere of privacy, seek to keep their "windows and doors open to the whole world," 1 Rotary Basic Library, Focus on Rotary 60-61 (1981), App. 85. We therefore conclude that application of the Unruh Act to local Rotary Clubs does not interfere unduly with the members' freedom of private association. n6

- - - - -Footnotes- - - - -
n6 Appellants assert that we "approved" a distinction between the Jaycees and the Kiwanis Club in *Roberts v. United States Jaycees*, 468 U.S. 609, 630 (1984). Brief for Appellants 21. Appellants misconstrue *Roberts*. In that case we observed that the Minnesota court had suggested Kiwanis Clubs were outside the scope of the State's public accommodations law. We concluded that this refuted the Jaycees' arguments that the Minnesota statute was vague and overbroad. We did not consider whether the relationship among members of the Kiwanis Club was sufficiently intimate or private to warrant constitutional protection. Similarly, we have no occasion in this case to consider the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country. Whether the "zone of privacy" established by the First Amendment extends to a particular club or entity requires a careful inquiry into the objective characteristics of the particular relationships at issue. *Roberts v. United States Jaycees*, supra, at 620. Cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting).

- - - - -End Footnotes- - - - -

[*548] B

The Court also has recognized that the right to engage in activities protected by the First Amendment implies "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., at 622. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-909, 932-933 (1982). For this reason, "impediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment" *Hishon v. King & Spalding*, 467 U.S. 69, 80, n. 4 (1984) (POWELL, J., concurring) (citing *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)). In this case,

however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes.

As a matter of policy, Rotary Clubs do not take positions on "public questions," including political or international issues. Manual 115, App. 58-59. To be sure, Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment. But the Unruh Act does not require the clubs to abandon or alter any of these activities. It does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross section of the community. Indeed, by [*549] opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross section of community leaders with a broadened capacity for service. n7

-Footnotes-

n7 In 1980 women were reported to make up 40.6 percent of the managerial and professional labor force in the United States. U.S. Department of Commerce, Statistical Abstract of the United States 400 (1986).

-End Footnotes-

Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women. See Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) (right of association may be limited by state regulations necessary to serve a compelling interest unrelated to the suppression of ideas). On its face the Unruh Act, like the Minnesota public accommodations law we considered in Roberts, makes no distinctions on the basis of the organization's viewpoint. Moreover, public accommodations laws "plainly serv[e] compelling state interests of the highest order." 468 U.S., at 624. In Roberts we recognized that the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services. Id., at 626. The Unruh Act plainly serves this interest. We therefore hold that application of the Unruh Act to California Rotary Clubs does not violate the right of expressive association afforded by the First Amendment. n8

-Footnotes-

n8 Appellants assert that admission of women will impair Rotary's effectiveness as an international organization. This argument is undercut by the fact that the legal effect of the judgment of the California Court of Appeal is limited to the State of California. See supra, at 543. Appellants' argument also is undermined by the fact that women already attend the Rotary Clubs' meetings and participate in many of their activities.

-End Footnotes-

III Finally, appellants contend that the Unruh Act is unconstitutionally vague and overbroad. We conclude that these contentions were not properly presented to the state courts. [*550] It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497 (1981). Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal. The court denied the petition without opinion. When "'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 50, n. 11 (1974) (in turn quoting *Street v. New York*, 394 U.S. 576, 582 (1969))). Appellants have made no such showing in this case. n9

-Footnotes-

n9 Appellants point to a passage in the brief they filed in the California Court of Appeal that quotes this Court's opinion in *NAACP v. Button*, 371 U.S. 415, 435 (1963): "'It is enough [for unconstitutionality] that a vague and broad statute lends itself to selective enforcement against unpopular causes.'" Brief for Respondents in B001663 (Cal. Ct. App.), p. 26 (brackets in original) (quoted in Brief for Appellants 37-37). The quotation occurs in the course of an argument that the Unruh Act should be applied only to memberships in entities that are a vehicle for the public sale of goods, services, or commercial advantages. This casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction under 28 U. S. C. @ 1257(2).

-End Footnotes-

IV The judgment of the Court of Appeal of California is affirmed.

It is so ordered.

JUSTICE SCALIA concurs in the judgment.

JUSTICE BLACKMUN and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

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