No. 99-699

IN THE

Supreme Court of the United States

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

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICI CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, CATO INSTITUTE, TEXAS JUSTICE FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INDEPENDENT WOMEN'S FORUM, AND CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONERS

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. It stands for, among other things, the fundamental right of parents to guide the education of their own children. Eagle Forum ELDF's mission is to enable conservative and pro-family men and women to participate in the process of self-government and public policy making so that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise. The freedom of private citizens to associate for the ad-

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

vancement, promotion, and transmission to the next generation of such values is a fundamental prerequisite of self-government that Eagle Forum ELDF zealously defends through education and participation in significant legal cases.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case raises squarely the question of the right of association under the First Amendment and thus is of central interest to Cato and the Center.

The Texas Justice Foundation is a charitable nonprofit organization that has as part of its mission the protection of those private mediating structures which provide a bulwark of freedom for the individual against excessive intrusion of government. The private ordering of affairs should represent the greatest sector of decision making in any healthy and free country. The Foundation believes in individual rights, in limited government, and that in a pluralistic society it is the duty of individuals, not government, to determine the values and skills to be taught to the next generation. The Foundation seeks to protect, through litigation and education, those fundamental freedoms, such as the freedom of association, essential to the preservation of American society.

The Southeastern Legal Foundation is a nonprofit public interest organization concerned with the proper construction and enforcement of the laws and Constitution of the United States. In addition to initiatives and promulgation of programs designed to inform and educate the public, the Foundation endeavors to influence public policy through litigation. The Southeastern Legal Foundation opposes all efforts by

governments to abridge the freedom of American citizens to speak or associate. While the Southeastern Legal Foundation takes no position on the wisdom of Boy Scouts' decisions, the Foundation stands with the Boy Scouts against this attempt by judicial fiat to weaken a Constitutional guarantee.

The Association of American Physicians & Surgeons ("AAPS") is a nonprofit organization dedicated to defending the private practice of medicine. Founded in 1943, AAPS publishes a newsletter and journal and participates in litigation in furtherance of its goals of limited government and the free market. Central to the interests of AAPS are the First Amendment rights of association and speech at issue in the case at bar, which are essential to limiting government encroachment on the marketplace of ideas, values, and health.

The Independent Women's Forum ("IWF") is a nonprofit, nonpartisan organization founded by women to foster public education about legal, social and economic policies, particularly those affecting women and families. IWF supports policies that promote individual responsibility, limited government, and economic opportunity. IWF believes that freedom of association is the cornerstone of self-government in a democratic society. Further, IWF believes that the central duty of every society is to protect the expression and transmission of the traditional moral virtues on which the freedom, security, and survival of its people depend.

The Center for Individual Rights ("CIR") is a nonprofit public interest law firm founded in 1989. Through its litigation activities, CIR seeks to advance respect for individual rights. Many of the cases in which CIR has participated have involved the First Amendment. *E.g.*, *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). CIR believes that, in recent years, governmental entities have increasingly circumscribed fundamental First Amendment freedoms in the pursuit of political objectives.

SUMMARY OF ARGUMENT

By adopting an overbroad interpretation of the concept of "public accommodation," the New Jersey Supreme Court did more than just stretch state law. It used the "public" label as a weapon to degrade the scope and value of the First Amendment interests it would credit to the Boy Scouts of America (hereinafter "Boy Scouts"). It also used the misapplied "public" label as a lever to elevate the State's declared interest in fighting certain types of discrimination. But on both sides of the constitutional equation, the mislabeling of the Boy Scouts as a "public" entity leads to the wrong result. The Boy Scouts is a private expressive association entitled to undiluted First Amendment protections. And the State's interest in eradicating *private* discrimination unrelated to specific commercial activity is not constitutionally "compelling" enough to outweigh the Boy Scouts' First Amendment rights.

Amici will address the constitutionally required line distinguishing entities with a "public" character and private expressive associations. Both the text and structure of the Constitution presuppose a viable and robust private sphere for the creation, transmission, and evolution of values and beliefs. Just as federal authority may not be construed to undermine the constitutional presupposition of viable and sovereign States, no government – state or federal – has the power to redefine the private sphere down into irrelevance. For it is only the freely developed private viewpoints of individuals and groups that, when periodically aggregated, constitute the free consent of the People to the current regime.

To ensure that government remain subject to the freely renewed consent of the People, rather than impose the views of a temporary regime upon the People, the Constitution offers its most steadfast and unflinching protection to a broadly defined sphere of private association. Private expressive associations should include, at a minimum, all nonprofit, noncommercial entities that have some expressive purpose and

limit membership in any manner related to that purpose. A nonprofit form and the self-described purposes and policies of an organization should provide *prima facie* evidence of the relevant private expressive qualities. The burden should then be upon the State to prove, through compelling evidence, that such entity nonetheless can be categorized as a public accommodation having restricted associative rights.

Once the constitutionally proper scope of private expressive association is recognized, it readily follows that the Boy Scouts and its local affiliates are fully protected by the First Amendment. The Boy Scouts is a nonprofit, noncommercial association with the declared purpose of developing in boys its private and particular vision of morality. By choosing to advance its views through both speech and noncommercial example, and by selecting its membership in a manner related to those views, the Boy Scouts represents a private expressive association regardless of how large or how popular it may be. Its ability to limit membership – and especially leadership – to those who agree with each of its views, in word and through example, goes to the very heart of the freedom of private expressive association.

Finally, once the constitutional difference between entities having some "public" character and private expressive associations is recognized, the anti-discrimination interest asserted by the State cannot be categorized as compelling. The State's strong interest in nondiscriminatory access to publicly offered goods and services does not extend into an interest in unlimited access to the alleged advantages of noncommercial private expressive association. And insofar as the State claims an interest in altering the values and beliefs of the Boy Scouts as an organization, or of society in general, such an interest is illegitimate. The ultimate acceptance or rejection of particular views or beliefs is a matter reserved exclusively to citizens in their private capacities, inheres in the very notion of the People's sovereignty, and may not be imposed through the compulsions or prohibitions of government.

ARGUMENT

The New Jersey Supreme Court rejected the Boy Scouts' claim to freedom of expressive association by stating that the New Jersey Law Against Discrimination ("LAD") does not have a significant impact on the Boy Scouts' expressive association or speech. *Dale* v. *Boy Scouts of America,* 160 N.J. 562, 612, 734 A.2d 1196, 1223 (1999). The court concluded that, "State laws against discrimination may take precedence over the right of expressive association" because where access "to publicly available goods, services, and other advantages" is concerned – *i.e.*, public accommodations – the State has a "compelling interest" to prevent discrimination. *Id.*

The court below unduly diminished the scope of First Amendment protections by assuming that its expansive *state law* definition of a "public" accommodation likewise cabined the *constitutional* scope of private expressive association. But the text and structure of the Constitution place significant constraints on what a State may redefine as a "public" accommodation receiving lesser First Amendment protections. The Boy Scouts is an expressive association well within the broad private sphere entitled to full constitutional protection. And its membership policies are a direct, inevitable, and protected result of those values that it chooses to express.[2]

I. A Robust Private Sphere Is a Bedrock Presupposition of the Constitution and Requires Broad Protection for Freedom of Association.

At the inception of this Nation, the Founders declared that "Governments are instituted among Men, deriving their just powers from the consent of the governed." Declaration of

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[2] Amici offer no collective opinion on the Boy Scouts' views or policies regarding homosexuality. Rather, they believe that the merits of the Boy Scouts' beliefs are wholly irrelevant to the First Amendment question of whether it is a private expressive association with the right to promote and transmit values of its own choosing.

Independence. By this simple statement, the relative places of private persons and public government were recognized: Government exists solely upon the *consent* of the people, and as servant of the People.[3]

The Constitution reflects this sentiment in myriad ways, both express and structural. For example, at the very outset, the Constitution is ordained and established by "We The People of the United States." U.S. Const., preamble. The fundamental role of the People as the foundation, rather than the wards, of government, is likewise reflected in the republican form of the national government and in the constitutional requirement that the "United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, sec. 4. And most notably for this case, there is the First Amendment (applied here through the Fourteenth Amendment), which this Court has recognized as the premier safeguard of the freedoms of private thought, value formation, and communication essential to genuinely free political decisions and free consent of the People. *See NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 460-61 (1958); *Thornhill* v. *Alabama,* 310 U.S. 88, 95-96 (1940); *see also Abood* v. *Detroit Bd. of Educ.,* 431 U.S. 209, 234-35 (1977) ("at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State").[4]

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[3] Indeed, the signatories of the Declaration of Independence made that declaration as "the representatives of the united States of America … in the Name, and by Authority of the good People of these Colonies."

[4] This Court has recognized the superior sovereignty of the People in other contexts as well. *See, e.g., Alden* v. *Maine,* -- U.S. --, --, 119 S. Ct. 2240, 2268 (1999) ("the Constitution begins with the principle that sovereignty rests with the people"); *Hans* v. *Louisiana*, 134 U.S 1, 11 (1890) (referring to "the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts").

Like the constitutional language referring to the States, the language referring to the role of the People stands not merely for what it says, "'but for the presupposition ... which it confirms.'" *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44, 54 (1996) (quoting *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991)). With respect to the People, that presupposition is that true sovereignty forever rests in the hands of the People, and passes in trust to the government for its use only at the continuing and periodically renewed free choice of the People. That presupposition was amply described by James Madison, in Federalist No. 39, discussing the nature of republican government:

> [W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.

The Federalist Papers, at 209 (Rossiter & Kesler eds. 1999). As Madison correctly recognized, we have "rest[ed] all our political experiments on the capacity of mankind for self-government." *Id.* at 208.

In addition to the political sovereignty of the States, therefore, the Constitution presumes a more fundamental private sovereignty of the People. The various characteristics "inherent in the nature of sovereignty" serve as "postulates which limit and control" the proper scope of government authority. *Seminole Tribe,* 517 U.S. at 54, 68 (citations and quotation marks omitted). The People, like the States, are reserved a "vital role" in the "constitutional design" and the "[v]arious textual provisions of the Constitution assume [a free People's] continued existence and active participation in the fundamental processes of governance." *Alden* v. *Maine,* -- U.S. --, --, 119 S. Ct. 2240, 2247 (1999). What this Court recently has said concerning Congress and the States, so too it might say concerning the relationship between *all* republican gov-

ernment and the People: Government "may not treat these sovereign entities as mere prefectures or corporations," but rather must accord "the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty" in the People. *Id.* at --, 119 S. Ct. at 2268.[5]

A. The Role of Private Ideation and Value Transmission in a Republican Democracy

Because the legitimacy of republican government depends upon the consent – direct or indirect – of the private citizenry, it is essential that such consent be freely formed and given.

> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

West Virginia State Bd. of Educ. v. *Barnette,* 319 U.S. 624, 641 (1943). The pervading constitutional requirement that public opinion not be controlled by government is reflected in the "structural role" of the First Amendment "in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555, 587 (1980); s*ee also Herbert* v. *Lando,* 441 U.S. 153, 185 n. 3 (1979) (Brennan, J., dissenting in part) ("'[T]he freedom of speech springs from the necessities of the program of

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[5] While the Constitution's structure and assumptions protect the States against the national government's Article I powers, the Constitution's structure and assumptions protect the People against *both* the national and state governments. Direct Supreme Court enforcement of the First and Fourteenth Amendments as shields against government power thus is not the imposition of federal authority upon the States, but rather is the use of the People's authority to deflect improper government impositions. This case does not involve a clash between two separate sovereigns within the federal system, but rather a clash between the true sovereign – the People speaking through the Constitution – and a subsidiary sovereign.

self-government. … It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.'") (quoting A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1965)).

The free formation of opinion so essential for valid popular consent to republican government has long been recognized to require protection for the "ability and the opportunity to combine with others to advance one's views." *New York State Club Ass'n, Inc.* v. *City of New York,* 487 U.S. 1, 13 (1988). Such protected association ensures the free formation of private views by "preserving political and cultural diversity and … shielding dissident expression from suppression by the majority." *Roberts* v. *United States Jaycees,* 468 U.S. 609, 622 (1984). The structural role of the First Amendment thus offers protection not only for the act of communication itself "but also for the indispensable conditions of meaningful communication." *Richmond Newspapers,* 448 U.S. at 588. And the free formation of views and beliefs is an "indispensable condition" not just of meaningful communication, but of every aspect of the People's sovereignty. The People must be left free to discover their will, rather than be directed and coerced, as subsidiary creatures, into a manufactured will that might be more to the liking of the current regime. "Such plenary [government] control of [private self-]governmental processes denigrates the separate sovereignty of the" People. *Alden,* -- U.S. at --, 119 S. Ct. at 2264.[6]

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[6] The Founders required limited and regularly renewed election of representatives in order to guard against the tendency of any given regime to try to project its authority forward in time. The proscription against titles of nobility, U.S. Const., Art. I, sec. 9, similarly eschewed the type of hereditary authority that projected forward without regard to the regularly renewed assent of a sovereign People. Where a regime passes laws to entrench the present majority's viewpoint and to hinder the possible rise of competing viewpoints, the governors are merely seeking to pass power down to their intellectual, rather than their physical, heirs. Both forms of hereditary power are antithetical to the Constitution. And a government-imposed self-perpetuating orthodoxy is by far the worse of the two.

B. Private Sovereignty Requires a Broad Definition of Private Expressive Association and a Narrow Vision of Public Accommodation.

Just as a textual and structural understanding of the role of the States calls for a more limited view of federal power under Article I, so too such an understanding of the role of the sovereign People calls for a more limited view of *all* government power as it relates to belief, expression, and association. While courts have allowed greater government authority over entities with a certain historically defined "public" character, the constitutional role of private sovereignty demands vigilance against creeping encroachment of government power through broad redefinition of the "public" realm.[7]

In order to preserve the constitutionally presupposed role of the People, the Court should recognize undiluted First Amendment protection for, at a minimum, nonprofit private expressive associations. A nonprofit entity should be deemed a constitutionally "private" expressive association when it: (1) is noncommercial; (2) has an educational, inculcative, or communicative purpose of any type whatsoever; and (3) restricts its membership in a manner related to some aspect of that purpose.[8]

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[7] This concern is particularly salient given the expansion of government and its insinuation into all aspects of daily life. As "social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls," and as the "laissez-faire concept or principle of non-interference has withered at least as to economic affairs," *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 640 (1943), the need for private sovereignty over ideation and expression becomes even more acute. With so many other bulwarks against government overreaching battered or broken, the "majestic generalities of the Bill of Rights" remain among the few safeguards of "the pattern of liberal government" and the sovereignty of the People envisioned by the Founders. *Id.* at 639.

[8] Amici do not address the constitutional protection that should be accorded commercial or non-expressive entities for their various associative activities. Regardless of how this Court might view such associations, full

The nonprofit form should constitute *prima facie* evidence of a noncommercial character. And the statements and views of the body with authority to speak for the organization should constitute *prima facie* evidence of the nature of any expressive purpose and the relation of any membership criteria to such purpose. Thereafter the burden should be upon the State to rebut the association's private expressive character if the State seeks to reduce First Amendment constraints by characterizing the group as a "public" accommodation.[9] As with the "structural principle" acknowledging the sovereign immunity of the States, the People's sovereignty of thought, expression, and association should not be diluted absent "compelling evidence" that an association has voluntarily placed itself in the public realm and surrendered its private status and protection. *Alden,* -- U.S. at --, 119 S. Ct. at 2255 (citation and quotation marks omitted).

Insulating private expressive associations from recategorization as public accommodations is consistent with this Court's treatment of the issue in earlier cases. In *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston,* this Court noted the common-law rule that "innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer," and that it was by making a profession of an activity and taking on customers that they came to be considered "'a sort of public servants.'" 515 U.S. 557, 571 (1995) (quoting old English cases). Similarly in *Roberts*,

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First Amendment protection should extend, at a minimum, to all noncommercial private expressive associations.

[9] *Roberts* and its progeny, of course, involved non-profit entities nonetheless viewed as "commercial" in nature. *See, e.g., Roberts,* 468 U.S. at 626 (referring to "various commercial programs and benefits"). And one can imagine non-profit commercial cooperatives, trade schools, or industry associations having regulatory authority that might well be characterized as commercial or even "public" in some senses. But the burden should be on the State to prove any potentially relevant commercial qualities.

Justice O'Connor contrasted freedom of expressive association and "freedom of commercial association." 468 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment); *see also New York State Club Ass'n,* 487 U.S. at 20 (O'Connor, J., concurring) (distinguishing "[p]redominately commercial organizations"). Regardless whether the Court is correct in affording lesser protection to commercial entities, private noncommercial expressive associations surely are entitled to full First Amendment refuge.

Determining an expressive purpose and the relationship of membership policies by looking to the association's own interpretations of those matters is likewise consistent with the principle that "the speaker has the right to tailor the speech." *Hurley,* 515 U.S. at 573. And deferring to an expressive association's governing body on such matters accords with the First Amendment aversion to government debate over matters of private faith, doctrine, or morals. *See Clay* v. *United States,* 403 U.S. 698, 700 (1971) (Selective Service System must focus on the beliefs of the prospective conscientious objector and not on "its own interpretation of the dogma of the religious sect"); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 733-34 (1872) (in matters concerning "the conformity of the members of the church to the standard of morals required of them," every religious denomination has "the right of construing their own church laws").

The proposed broad definition of private expressive association and the presumptions used in applying that definition reflect the proper place of government relative to the People, and the need to jealously guard against government's tendency toward self-aggrandizement. Any narrower approach would unduly restrict the private sphere and invite government to expand the so-called "public" sphere or to impose its own views on what an association actually believes in order to enforce the latest prescribed orthodoxy. Indeed, that is precisely what happened in this case.

II. The Boy Scouts Is a Private Expressive Association Possessing Undiluted First Amendment Rights.

The New Jersey Supreme Court justified its disregard for the Boy Scouts' First Amendment rights in part by characterizing it as a "public" accommodation supposedly having fewer rights and implicating more compelling regulatory interests than would otherwise be the case with a private expressive association. The court also redefined the Boy Scouts' views in a manner contrary to how the Boy Scouts itself defines those views. Both tactics are unacceptable distortions of constitutional law.

A. The Boy Scouts Is a Private Expressive Association.

Applying the test set forth in Part I, the Boy Scouts easily qualifies as a private expressive association entitled to undiluted First Amendment protection. At both the national and local levels, the Boy Scouts and its units are nonprofit, noncommercial associations, and no court has suggested otherwise.

Regarding the purpose of the organization, the Boy Scouts' Mission Statement provides:

> It is the mission of Boy Scouts 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.

State Court Record JA2238. This purpose falls well within the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. Indeed, at least one member of this Court has cited the Boy Scouts as an example

of an expressive association. *Id.* at 636 & n.* (O'Connor, J., concurring in part and concurring in the judgment).[10]

Further, the national organization having authority to speak for the Boy Scouts has identified homosexuality as incompatible with its view of moral behavior and the values it seeks to instill. *See Curran* v. *Mount Diablo Council of the Boy Scouts of America,* 952 P.2d 218, 225-26 & n. 7 (Cal. 1998); *cf.* Scoutmaster Handbook (1972) (disapproving "the practices of a confirmed homosexual") (State Court Record JA2072-74). Pursuant to this view, the Boy Scouts thus excludes avowed homosexuals. *Curran,* 952 P.2d at 225-26. Based upon the Boy Scouts' authoritative interpretation of its own purposes and values, its membership criteria directly relate to one of the specific values bound up in its purpose.

Under a constitutionally appropriate test, therefore, the Boy Scouts is a *prima facie* private expressive association entitled to full First Amendment protection. None of the factors cited by the State in its interpretation of the LAD is sufficient to establish, under the Constitution, that the Boy Scouts is "public" in character and subject to State interference with its membership policies.

B. State Law Criteria Defining a Public Accommodation Do Not Establish Public Character under the Constitution.

Although the New Jersey court's finding that the Boy Scouts is a public accommodation was done as a matter of state law, that finding also impacted the court's First Amendment analysis. This Court therefore should consider whether the factors relied upon by the court below – broad public solicitation, close relations with government or public

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[10] *Cf. NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 459 (1958) ("The Association, which provides in its constitution that '(a)ny person who is in accordance with (its) principles and policies * * *' may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.").

accommodations, and similarity to state-defined public accommodations – compellingly rebut the Boy Scouts' private expressive character for First Amendment purposes.

As applied by the court below, these various elements of "publicness" are inadequate and, if accepted, would redefine as public far too much protected activity to be acceptable constitutional measures. Thus, regardless of whether the Boy Scouts is "public" in the eyes of New Jersey, it is a private expressive association under the Constitution.

Conditional Solicitation of Membership. According to the court below, the Boy Scouts' solicitation of members from a broad diversity of groups renders it a public accommodation. 160 N.J. at 590-91, 734 A.2d at 1211. But the court discounted the conditional nature of this solicitation: only those persons willing to adhere to the Scout Oath and Law – as interpreted by the Boy Scouts – are sought for membership. *See id.* at 599, 734 A.2d at 1216 (acknowledging that "Boy Scouts' membership application requires members to comply with the Scout Oath and Law"). The court instead proclaimed that the mere breadth of the population solicited – through advertisements, recruiting, and otherwise – converted the conditional invitation to an unconditional one. Whatever the merits of such logic as a matter of New Jersey law, it is inconsistent with the logic of the Constitution.

Numerous expressive associations seek potential new members from among the population at large, but that does not mean persons are invited to become members *regardless* of whether they meet the criteria for membership. The invitation to join, while broad, contains a basic minimum condition of shared views and a willingness to comport oneself in a manner consistent with such views. Likewise with political clubs, religious groups, or affinity organizations (People for the Ethical Treatment of Animals, Greenpeace, NARAL, or the National Right to Life Committee), the fact that they seek to recruit broadly has no bearing on whether membership is conditioned on agreement with their principles. It is that es-

sential condition on membership that is among the hallmarks of a "private" expressive association.

As concerns the Boy Scouts, therefore, its trolling a large sea of candidates in no way implies that every person is welcome *regardless* of compatibility with the self-defined values of Scouting. Any "invitation" by the Boy Scouts, either express or implied, is necessarily conditioned on the invitee's willingness to accept, in word and deed, the values the Boy Scouts professes for itself. The reasoning by which the court below ignored this fundamentally conditional nature of the solicitation is not only wrong, it borders on the surreal.

In one of its more Orwellian moments, the court below argued that there is a "symbolic invitation extended by a Boy Scout each time he wears his uniform in public." 160 N.J. at 591, 734 A.2d at 1211. The Boy Scouts, of course, would suggest a different meaning for its own symbol: An affirmation of the values held by the organization including, presumably, its opposition to homosexuality and atheism. The court below sought to coopt the symbolic speech of the Boy Scouts and imbue it with a message of unlimited invitation that most assuredly was never intended by the Boy Scouts. While the Boy Scouts uniform may well "invite[] the curiosity and awareness of others in the community," 160 N.J. at 591, 734 A.2d at 1211, the same is true of *all* group symbols, such as a priest's Roman collar or a Shriner's fez. But the fact that people become aware of a group through its symbols and speech, and may even want to join the group, is not an unrestricted invitation by the group. Under the New Jersey court's skewed theory, every recognizable group symbol would suddenly become an open and unlimited invitation, rendering the symbolized group a public accommodation.[11]

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[11] The court below seems to suggest that the invitation extended by the Scouts is somehow misleading by not adequately revealing its condition, and that members of the public may "be subjected to the embarrassment and humiliation of being invited[,] … only to find [the] doors barred to

A related example of the court below reinterpreting private expression is its rejection of the Scout Oath and Law as constituting genuine selectivity criteria for membership. 160 N.J. at 599-601, 734 A.2d at 1216-17. No matter how an outside observer *might* interpret Scouting's primary statements of belief, it is not up to such an outside observer – and most certainly not the government – to tell the Boy Scouts that it incorrectly understands its own tenets. The governing body for Scouting has determined that its moral views and primary statements of belief are opposed to homosexuality. That is the end of the matter. It is not for the New Jersey Supreme Court to resolve doctrinal disputes for Scouting any more than it may validly impose upon the Pope a particular construction of the Gospels. *See Watson*, 80 U.S. (13 Wall.) at 727 ("whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them"). The sheer presumption of the New Jersey court on this point highlights the need for a resilient barrier against government restrictions on private values formation, education, and expression.[12]

The court below also made the dubious assertion that "the size of the Boy Scouts organization certainly implies an open membership policy." 160 N.J. at 599, 734 A.2d at 1216.

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them." 160 N.J. at 591, 734 A.2d at 1211 (citation and quotation marks omitted). Even if some may have mistaken the Boy Scouts' invitation in the past, there is certainly no confusion now as to its conditional nature. The Boy Scouts has been defending its exclusion of homosexuals, agnostics, and atheists in the courts for nearly 20 years. No member of those groups could reasonably believe that the Scouts has "invited" them to join.

[12] A similar reinterpretive effort took place in the lower courts in *Hurley,* where the trial court claimed that the position of the parade organizers "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.'" 515 U.S. at 562. The tactic gained no traction in *Hurley* and should likewise fail in this case.

That many people may agree with an organization's message and therefore join does not thereby deprive the organization of control over its message or its membership. To hold otherwise would "punish[] the Boy Scouts for its success in recruiting," *Welsh* v. *Boy Scouts of America,* 993 F.2d 1267, 1277 (CA7 1993), and would render illusory the freedom of expressive association.

While the New Jersey court found the Boy Scouts insufficiently selective to qualify as "private," the proper constitutional test is satisfied so long as an organization is selective on any grounds related to its expressive or educational views and values. That the Boy Scouts' selectivity criteria is in many respects "rather lenient" and allows "multifarious voices" on many topics other than sexual morality or basic belief in a supreme being "does not forfeit constitutional protection." *Hurley,* 515 U.S. at 569-70; *see also id*. at 574 ("[T]he 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.").

Interaction with Government and Public Accommodations. According to the court below, the Boy Scouts is a "public" accommodation "because it maintains close relationships with federal and state governmental bodies and with other recognized public accommodations." 160 N.J. at 591, 734 A.2d at 1211. The most serious problem with this reasoning is that the court relied upon interactions which, if relevant, would render virtually every citizen, much less every group, public in nature. That the Boy Scouts was chartered by Congress, for example, is meaningless as to the constitutional determination of its public or private status. Every nonprofit corporation is chartered by some government, yet that does not convert all nonprofit corporations into public

accommodations.[13] In this case there is no allegation that Congress, or any other government entity, maintains control over the Boy Scouts or otherwise directs its activities via the charter. The Boy Scouts thus is not an agent of the federal government, but rather is a free agent setting its own policies and directions. *See San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.,* 483 U.S. 522, 543-44 (1987) ("[T]hat Congress granted it a corporate charter does not render the USOC a Government agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character.").

The various materiel and other resources provided the Boy Scouts by the federal government likewise do not render the Scouts "public" in character. Such resources are simply gifts to an organization that the government favors. They come with no strings attached, and the Boy Scouts make no particular claim of right to such beneficence. While New Jersey might complain to the federal government if it dislikes the object of this charity, the gift-giving itself does not alter the character of the Boy Scouts. To hold otherwise would necessarily convert every recipient of federal largess into a public accommodation or some other "public" entity subject to heightened regulation by the State. *Cf. Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 246-47 (1985) ("[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court.") Such result would be absurd – imagine a State forbidding interpersonal discrimination by individuals who receive federal health or welfare benefits on the theory that federal subsidization renders them "public"

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[13] Indeed, even were we to focus only on congressionally chartered entities, the New Jersey court's reasoning would render a group such as the Daughters of the American Revolution, 36 U.S.C. § 153101, a public accommodation that presumably then could not limit its membership to women. Furthermore, even if, contrary to reason, a congressional charter *did* impart some "public" character to the chartered entity, it would be a *federal* public character, putting state regulatory authority in doubt.

actors. It also raises a troubling conflict between state and federal law for a State to impose adverse and burdensome conditions on the receipt of federal benefits.[14]

Similarly, the sponsorship of individual Scouting units by local government entities may raise issues concerning the propriety of government sponsoring private expressive associations, but it does not convert the Boy Scouts into a public agent. Rather, it is quite the opposite: those various entities have agreed to be agents for the Boy Scouts, and have agreed to conduct themselves and to instruct their charges according to the rules and values of the Scouts. At no time was the Boy Scouts ever given as a condition of accepting such sponsorship the requirement that it alter its membership practices. Had it been confronted with such a condition it would have been up to the Scouts whether to accept the condition or to reject the erstwhile sponsor. But the Scouts having never accepted such a condition *ex ante*, a court cannot use the current sponsorship to impose the condition *post hoc*.

Finally, the court's reliance upon the Boy Scouts' activities in places of public accommodation is particularly disingenuous. That the Boy Scouts makes use of genuinely public places merely shows it to be like every other private entity or person that has general access to public areas. In this respect the Boy Scouts is no different from any other club or group that may hold meetings in a school or elsewhere. Again, the private use of public facilities does not alter the private char-

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[14] It would be a different – though not necessarily constitutional – situation if the federal government conditioned its benefits on the Boy Scouts' acceptance of various anti-discrimination obligations. In such circumstances the Boy Scouts would at least be free to reject the condition and the benefits rather than alter its protected association. But the federal government has imposed no such condition on its benefits, and the State may not indirectly impose its own such condition on federal benefits by using their receipt to invalidate the private status of the Boy Scouts.

acter of the user, particularly when the group has not accepted any pre-existing condition placed on the use of the facilities.[15]

Analogies to Recreational and Educational Facilities. Finally, the court below stated that the "Boy Scouts' educational and recreational nature" supports its being categorized as a "public" accommodation. 160 N.J. at 594, 734 A.2d at 1213. But from a constitutional perspective, it is the very educational nature of the Boy Scouts that, in part, renders its association "expressive" to begin with. The Boy Scouts seeks to educate youth in the particular values of the Scouting organization. In this respect it is more similar to various religious instructional programs such as Hebrew school or Confraternity of Christian Doctrine (CCD) classes than it is to standard primary or secondary schools. That the Boy Scouts instills a more general set of non-sectarian values rather than specific religious beliefs is simply a difference in the content of the expression, not the fact of expression.

Finally, the private expressive character of the Boy Scouts is not diminished by its resort to various camping and athletic activities to help hold the attention of its members. That is just a matter of method. Nowhere is it decreed that education and values transmission may only take place inside the sometimes stifling confines of a classroom. As Justice O'Connor has recognized, association organized around such activities may still be expressive when the activity constitutes the medium and opportunity for conveying the overall organizational message. *Roberts,* 468 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment).

Overall, the various factors relied upon by the court below for purposes of state law do not provide compelling evidence

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[15] And even such a condition – you may not hold your meetings at school unless you alter your expressive association in a manner to our liking – would in all likelihood be a viewpoint-based unconstitutional condition. *Cf. Rosenberger* v. *Rectors and Visitors of the University of Virginia,* 515 U.S. 819, 829 (1995) (regarding access to a limited forum, the State may not "discriminate against speech on the basis of its viewpoint").

of a "public" character for purposes of the First Amendment. Indeed, they sweep so broadly that, if adopted, they would drastically reduce the scope of constitutionally protected private expressive association. The court's reasoning is thus incompatible with the constitutional presupposition of a broad and sovereign private sphere.

C. Compelled Association with a Person Who Does Not Share One of the Boy Scouts' Values Violates the First Amendment.

The Boy Scouts as an organization has plainly and definitively declared its views concerning the morality of homosexuality. Forcing the Boy Scouts to accept as an adult member and leader an avowed homosexual would inherently conflict with the Scouts' stated moral position and with its ability to convey that position through words and by the example of its leaders. And because the Boy Scouts holds out its adult leaders as role models, forcing the organization to accept Respondent also amounts to compelled speech by forcing the Scouts to place its imprimatur on a person who exemplifies particular values and behavior that the Boy Scouts rejects.

Compelled Expressive Association. The Boy Scouts has chosen to limit its membership to persons who agree with, and are willing to follow, the Scout Oath and Law as the Boy Scouts interprets them. The organization is unwilling to accept as members persons who reject, by word or deed, its interpretation of the Scout Oath and Law as they concern homosexuality, regardless of whether such person agrees with Scouting's views concerning some or all other matters. That associational choice is protected under the First Amendment. As this Court has made abundantly plain, "[f]reedom of association therefore plainly presupposes a freedom not to associate." *Roberts,* 468 U.S. at 623. Where a private expressive association is involved, the desire to exclude should all but end the inquiry. Justice O'Connor correctly noted 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,* 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment).

Indeed, even were a commercial association or public accommodation involved, the entity *still* would be entitled to exclude members on the basis of viewpoint or ideology. *See Hurley,* 515 U.S. at 580-81 (even assuming the nature of the parade "would generally justify a mandated access provision, GLIB could 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."); *cf. New York State Club Ass'n,* 487 U.S. at 13 (1988) ("If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end."). That the Boy Scouts lacks the commercial or public character of the entities considered in *Roberts* or *New York State Club Association* only makes its entitlement to protection that much less debatable.

Unlike the law at issue in *Roberts,* which imposed "no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members," 468 U.S. at 627, the New Jersey LAD forbids exclusion of certain persons with ideologies or philosophies regarding homosexuality different from those of the Boy Scouts. And unlike the Jaycees' frequent formal association with women, which undermined any symbolic significance of its membership restrictions, *id.*, the Boy Scouts as an organization is consistent in its disassociation from avowed homosexuals. Compelled association through membership, therefore, *would* "impair a symbolic message conveyed by the very fact that [homosexuals] are not permitted" to join. *Id.*; *see also Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 541 (1987) (exclusion of women only alleged to advance an "aspect of fellowship," not a particular expressive purpose, and Rotary Club as an organization associated with women in numerous contexts).

Compelled Speech. In addition to the problem of compelled association, the application of the New Jersey LAD in this case goes one step further and effectively compels speech. It is undisputed that adult members of the Boy Scouts must act as educators and role models for conveying the principles of Scouting. Who such leaders are and what they do is as significant an expression as is their direct speech. Respondent has declared to all his sexual orientation and sexual activity. If the Boy Scouts accepts him as a leader and a role model, his "participation would likely be perceived as having resulted from the [Boy Scouts'] customary determination about a [leader] admitted to" Scouting – that it believed him to be a role model "worthy of presentation and quite possibly of" emulation as well. *Hurley,* 515 U.S. at 575. Respondent's mere presence as a Scouting leader – after having come out and declared his sexual orientation and activity – would, like the presence of the prospective marchers in *Hurley*, suggest a variety of facts and views regarding homosexuality and Scouting that the Boy Scouts prefers not to assert or support.

It is well-established First Amendment law that the State "may not compel affirmance of a belief with which the speaker disagrees." *Hurley,* 515 U.S. at 573. This principle is a facet of the "general rule[] that the speaker has the right to tailor the speech," which applies to "expressions of value, opinion, *or endorsement*." *Id.* (emphasis added). Because "all speech inherently involves choices of what to say and what to leave unsaid," there "is necessarily ... a concomitant freedom not to speak." *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion) (citation and internal quotation marks omitted) ("*PG&E*"). The Boy Scouts has its own reasons for declining to have certain views on homosexuality literally or symbolically expressed by one of its members or leaders. But, just as with the parade organizers, "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." *Hurley,* 515 U.S. at 575.

While the court below suggested that the Boy Scouts would remain free to express its own views concerning homosexuality, at a minimum Respondent's presence as a leader would cause confusion or dissonance in the message. If "the government [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." *PG&E*, 475 U.S. at 16. If the Scouts are forced to "endorse" Respondent by presenting him as a role model, its ability also to contradict – though not retract – that symbolic endorsement provides little help.

Furthermore, the Boy Scouts may prefer to advance its own views in a more restrained manner, not raising the issue unless the need to do so specifically arises. But if it felt that Respondent's presence as a leader would send the opposite message, it "may be forced either to appear to agree with [Respondent's] views or to respond." *PG&E*, 475 U.S. at 15 (citation omitted); *id.* at 18 ("Such forced association with potentially hostile views … risks forcing appellant to speak where it would prefer to remain silent."). Such compelled speech burdens core First Amendment rights, particularly where "there is no customary practice whereby [the Boy Scouts] disavow 'any identity of viewpoint' between [itself] and the selected participants." *Hurley,* 515 U.S. at 576; *see also, PG&E,* 475 U.S. at 15 n. 11 ("a disclaimer … does not suffice to eliminate the impermissible pressure on appellant to respond").

In sum, once the private expressive character of the Boy Scouts is recognized, the LAD can be seen to impose an unacceptable burden on First Amendment rights. That burden cannot be discounted by attaching a "public" accommodation label that fails to comport with the constitutional role of private expressive activity and the sovereignty of the People.

III. Preventing Private Discrimination Is Not a Compelling State Interest Sufficient To Trump First Amendment Rights.

Regardless of what one thinks of the merits of the New Jersey LAD and its application in this case, the interests advanced by that law are not compelling in the constitutional sense. When addressing matters at the heart of the First Amendment, a speech restriction or compulsion is prohibited "except in so far as essential operations of government may require it for the preservation of an orderly society." *Barnette,* 319 U.S. at 645 (Murphy, J., concurring); *see also Roberts,* 468 U.S. at 623 (restrictions allowed only where there are "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

Prior cases discussing the importance of a government interest in preventing discrimination all dealt with discrimination by entities with a particular "public" character. Certainly when practiced by government itself, or by public accommodations, properly categorized, the government may assert a significant and potentially compelling interest in prohibiting certain types of discrimination. Thus, in *Roberts*, the State's interest recognized was in "assuring its citizens equal access to publicly available goods and services." 468 U.S. at 624; *see also id*. at 632 (O'Connor, J., concurring in part and concurring in the judgment) (referring to the "goal of ensuring nondiscriminatory access to commercial opportunities"). Likewise in *New York State Club Association*, the interest was described as providing all persons "'a fair and equal opportunity to participate in the business and professional life of the city.'" 487 U.S. at 5 (quoting the city law).

But in the case of *private* expressive associations, there is no equally strong justification for government imposition of a similar equality of access or participation. While private discrimination may in many instances be condemned or subject

to social disapprobation by those who disagree with it, such discrimination is generally not the proper province of government ukases.[16] As but a simple example, while government generally may not discriminate against persons on the basis of political belief, it is absurd to suggest that private citizens may not do so. If a dyed-in-the-wool Democrat wishes never to socialize with an equally and oppositely dyed Republican, he is free to so discriminate in the broad private sphere where most people conduct their lives. If a Jew desires never to dine with a member of the Nazi party, she may privately so discriminate to her heart's content. While the government might be forbidden from discriminating on the basis of such political affiliations, the principle does not carry over into the private sphere. *Cf. Hurley,* 515 U.S. at 566 ("the guarantees of free speech and equal protection guard only against encroachment by the government and 'erec[t] no shield against merely private conduct'") (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948)); *United States Olympic Comm.,* 483 U.S. at 547 ("Because the USOC is not a governmental actor, [Petitioner's] claim that the USOC has enforced its rights in a discriminatory manner must fail.").

The point remains valid even as regards discrimination that some might deem irrational. It simply does not matter whether a private actor has a good reason, a bad reason, or no reason at all for its choices regarding its associates or its beliefs. Private decisions are not subject to the rational basis test and may not be reviewed by the courts to see if they are arbitrary and capricious. The only review of private irrationality or arbitrariness comes from the responsive decisions of other private parties. People can disagree with, object to, and even shun those committing what they view as invidiously

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[16] That the speech or views of private actors might offend or insult is no basis for a state interest in avoiding the "dignitary" harm to those so offended or insulted. The very "point of all speech protection … is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley,* 515 U.S. at 574.

discriminatory acts. But that is where it ends. The government has no compelling role in penalizing such private acts.[17]

The state interest concerning discrimination thus turns not on the discrimination alone, but on the public or private character of the entity discriminating. The court below overestimated the State's interest for the same reason it underestimated the First Amendment interests at stake: It mischaracterized the Boy Scouts as a "public" entity. By doing so the court erroneously framed the discrimination at issue as the denial of a publicly available good or service. Such is not the case. The only thing denied is Respondent's ability to associate with the Boy Scouts and participate in the Scouts' expressive activities. But as this Court held in *Hurley*, the First Amendment forbids characterizing expressive activity itself to be the public accommodation. 515 U.S. at 573.[18]

Discrimination based upon conduct and belief also differs in a significant respect from discrimination based upon certain other characteristics. Thus, while judgments based on race or sex can often merely involve "unsupported generalizations" or "stereotyping" regarding the actual factor to be measured, *Roberts,* 468 U.S. at 628, the Boy Scouts' stated position is not based upon such stereotyping. Rather, the Boy Scouts puts forth an irreducible value statement itself: The view that avowed or practiced homosexuality is immoral.

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[17] This case does not involve discrimination based upon race, where the federal government, and by analogy the States, might potentially turn to the Thirteenth Amendment to demonstrate a constitutionally compelling interest even as to private behavior.

[18] There is likewise no State interest in ensuring access to a monopolistic resource for expressive activity, as in the example of a "company town." *Marsh* v. *Alabama,* 326 U.S. 501 (1946). While it may be true that "the size and success" of the Boy Scouts "makes it an enviable vehicle for" Respondent's expressive association, "that fact, without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to" an audience for Dale's views expressed by word or by personal example. *Hurley,* 515 U.S. at 577-78.

Sexual orientation thus is not being used as a proxy for some other judgment, but is itself the very quality to which the Scouts object. Regardless of whether one agrees with that view, it is an expression of a particular set of values, not a stereotype. Furthermore, a particular avowed and acted upon sexual orientation also is related to one's views *regarding that sexual orientation*. While homosexuality may not properly be used to predict one's views regarding the trade deficit or patriotism, it is certainly a valid indicia of at least *some* views about homosexuality. There is simply no finessing the fact that Respondent's acknowledged views and conduct are contrary to the values the Scouts holds and would convey.

Upon reviewing the particular interest that the court below claims is compelling, we see that it is really an interest in altering the way people think and the values they hold by interfering with their ability to express contrary values. Because the LAD is being "used to produce thoughts and statements acceptable to some groups," it therefore

> 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. … [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.

Hurley, 515 U.S. at 579.

The State's interest in this case is neither compelling nor valid. The mere desirability or political support for anti-discrimination goals does not trump First Amendment rights. The People's sovereignty demands protection of those rights.

CONCLUSION

For the foregoing reasons, the decision of the New Jersey Supreme Court should be reversed.

Respectfully submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

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