No. 99-699

In the

Supreme Court of the United States

October Term, 1999

BOY SCOUTS OF AMERICA, et al.,

Petitioners,

v.

JAMES DALE,

Respondent.

INTEREST OF *AMICI*[(1)]

This brief is filed by the following *amici*:

The American Civil Liberties Union, the American Federation of Teachers, the Anti-Defamation League, the California Women's Law Center, the Center for Women Policy Studies, Equal Rights Advocates, the Human Rights Campaign, the Mexican American Legal Defense and Educational Fund, the NAACP Legal Defense and Educational Fund, Inc., the National Asian Pacific Legal Consortium, the National Council of Jewish Women, the National Gay and Lesbian Task Force, the NOW Legal Defense and Education Fund, the National Partnership for Women and Families, the National Women's Law Center, the Northwest Women's Law Center, People for the American Way Foundation, Women Employed, and the Women's Law Project**.**

The statements of organizational interest are attached to this brief as an appendix.

STATEMENT OF THE CASE

The Boy Scouts of America is a federally chartered corporation with five million members, including one million youth members and 420,000 adult members in its Boy Scouts program. The organization is run by a National Council, which acts as its policymaking body. *Dale v. Boy Scouts of America* 160 N.J. 562, 571 (1999). The smallest unit in the organization is the troop, and the average troop consists of 15 to 30 boys. Pet.Br. at 40. The purpose of the Boy Scouts is to promote the ability of boys to do things for themselves and others, and to teach patriotism, courage, self-reliance and kindred virtues. Its mission is to instill values in young people and prepare them to make ethical choices. 160 N.J. at 573-74.

The organization aggressively solicits new members through national advertising campaigns on television, in magazines, and through local recruiting drives at schools and elsewhere. "Any boy" is welcome to join the Boy Scouts. *Id.* at 590-91, 609.

James Dale became a cub scout at the age of 8 and remained in scouting until he reached the maximum age of 18 in 1988. He was an exemplary scout. He was accepted in the adult program as an Assistant Scoutmaster in 1989, and served for 16 months. *Id.* at 577-78.

While attending Rutgers University, Dale became a member and eventually co-president of the Rutgers Lesbian/Gay Alliance. During a conference on the psychological and health needs of gay teens, he was interviewed by the Newark Star-Ledger. An article later published in the paper quoted Dale describing his second year at Rutgers. According to the Star-Ledger, he said: "I was looking for a role model, someone who was gay and accepting of me." Dale was identified only as

co-president of the Rutgers Alliance. The Boy Scouts were not mentioned in the article. *Id.* at 578; Joint Lodging Materials 10.

Within a month, Dale was told to sever his relations with the Boy Scouts. When he asked for an explanation, he was told that the Boy Scouts forbids membership to homosexuals. Five months later, a lawyer for the Boy Scouts told Dale the organization does not admit "avowed homosexuals." 160 N.J. at 579-80.

Dale sued, charging his expulsion from the Boy Scouts violated New Jersey's Law Against Discrimination, which forbids discrimination based on sexual orientation in public accommodations. The trial court granted summary judgment to the Boy Scouts, holding that: (1) the organization was not a public accommodation under New Jersey law; (2) if it were, it would meet the law's exception for organizations which are distinctly private; and (3) in any case, subjecting the Boy Scouts to New Jersey's antidiscrimination law would violate the organization's freedom of expressive association. *Id.* at 580.

The Appellate Division reversed on all three points, holding that the Boy Scouts is a public accommodation under the L.A.D. and is not distinctly private. It also rejected the Scouts' freedom of intimate and expressive association claims. 308 N.J.Super. 516 (1998). That decision was in all respects affirmed by the New Jersey Supreme Court. 160 N.J. 562.

SUMMARY OF ARGUMENT

The Boy Scouts of America has more than a million young members and 420,000 adult members in its scouting program. It aggressively solicits new members and tells the public that "any boy" is welcome to join. It holds that moral fitness is a matter of what an individual's own head and heart tell him is right, and it discourages its scoutmasters from discussing sexuality at all. Under these circumstances, the Boy Scouts has no more right to discriminate in violation of state law than the Rotary Club or the Jaycees. Like those other organizations, whose earlier efforts to evade the civil rights laws were soundly rejected by this Court, the exclusionary anti-gay membership policy that the Boy Scouts now so vigorously defends falls outside the scope of any associational or expressive freedom protected by the First Amendment.

1. A Boy Scout troop is not an intimate association. Lack of selectivity alone disqualifies it. More fundamentally, its members do not choose each other; they make no decision about who shall or shall not be members of the troop.

2. New Jersey's Law Against Discrimination does not affect any expressive activity undertaken by the Boy Scouts, or any message the Boy Scouts may wish to convey about gay people. For that reason, *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston* 515 U.S. 557 (1995), does not control this case. State regulation of who takes part in an act of expression, like a parade or a demonstration, interferes directly with a speaker's message. By contrast, insisting that an association not discriminate in its membership ordinarily does not interfere with the organization's message because there is little risk that an association open to the public will be thought to be making a statement through the composition of its membership. The fact that James Dale is seeking to remain a scoutmaster does not alter that understanding since whatever leadership responsibilities Dale's position entails have nothing at all to do with the basis on which Dale was excluded from the Boy Scouts.

3. Any incidental burden on the Boy Scouts' freedom of expressive association is outweighed by the state's compelling interest in ensuring equality. In banning sexual orientation discrimination, New Jersey sought to include in ordinary life a group of Americans unfairly excluded from much of it. That is an important interest, unrelated to the suppression of expression; the Law Against Discrimination is narrowly tailored to effectuate it.

To hold otherwise would be to allow every effort to halt discrimination to be checkmated by an assertion of associational autonomy. The analysis this Court has used to keep equality and expression in balance has worked well for both. The Court should reaffirm it in this case.

ARGUMENT

I. A CLAIMED RIGHT TO FREEDOM OF ASSOCIATION DOES NOT ENTITLE THE BOY SCOUTS TO DISCRIMINATE AGAINST A PROTECTED CLASS IN A PLACE OF PUBLIC ACCOMMODATION

This case does not involve a right to associate as much as an asserted right to disassociate. While those two rights are often opposite sides of the same coin, they are not identical. And when, as here, the desire to exclude is directed against a group that the state has chosen to protect from unequal treatment, the conflict with the state's overriding interest in enforcing its civil rights laws becomes most acute. Over the past two decades, therefore, this Court has crafted a set of rules designed to preserve freedom of association without allowing it to become a subterfuge for discrimination based on animus or

ignorance. In applying those rules, moreover, this Court has generally reacted with great skepticism to claims that important institutions in the social and economic life of the nation have a constitutional right to perpetuate discrimination.

Indeed, this Court has never struck down any civil rights law as a violation of the freedom to associate. Instead, the Court has consistently rejected such claims in a wide variety of contexts. *E.g., Runyon v. McCrary,* 427 U.S. 160 (1976)(upholding civil rights claim against private school that discriminated on the basis of race); *Bob Jones University v. United States,* 461 U.S. 574 (1983)(upholding denial of tax- exempt status based on racial discrimination); *Hishon v. King & Spalding,* 467 U.S. 69 (1984) (upholding sex discrimination judgment against law firm partnership); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)(upholding state law requiring Jaycees to admit women as members); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537 (1987)(upholding state law requiring Rotary Club to admit women as members); *New York State Club Ass'n v. New York,* 487 U.S. 1 (1988)(upholding application of local civil rights law that prohibits discrimination by private clubs that solicit business from nonmembers).

Despite this extensive body of case law, the Boy Scouts claims that it is entitled to a constitutional exemption from New Jersey's antidiscrimination law because, it contends, it violates the organization's rights to both intimate association and expressive association. In fact, it violates neither. The Boy Scouts relies on a conception of those rights that is so potentially limitless it would enable virtually any group to evade the civil rights laws by proclaiming its discriminatory membership policies as evidence of selectivity and an ideological point of view. This Court, however, has consistently and correctly rejected that false syllogism. As the Court observed in *Norwood v. Harrison,* 413 U.S. 455, 470 (1973), "the Constitution places no value on discrimination." Thus, while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protection." *Id.* at 470. *See also Runyon v. McCrary,* 427 U.S. at 176. The New Jersey Supreme Court correctly applied those principles below, and its decision should be affirmed.

A. The Boy Scouts Is Not An Intimate Association

The Boy Scouts invokes two distinctly different aspects of the constitutionally protected right of intimate association: the right to form "highly personal relationships" in which people share an intense commitment to each other, *Roberts,* 468 U.S. at 618, and the right of parents to direct the upbringing of their children, *see, e.g., Meyer v. Nebraska,* 262 U.S. 390 (1923). Both rights enjoy very substantial protection against government interference in proper circumstances. This case, however, does not present those circumstances.

The right of intimate association protects an individual's decisions regarding those with whom she or he will form deep personal attachments, and with whom she or he will make intense personal commitments. *Roberts* 468 U.S. at 617, 619-20; *see also, Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland,* 431 U.S. 494 (1977).

Under this Court's jurisprudence, one of the distinguishing characteristics of an intimate association is "a high degree of selectivity in decisions to begin and maintain the affiliation." *Roberts,* 468 U.S. at 620. By contrast, the record below demonstrates that the goal of the Boy Scouts is to recruit as many members between the ages of eleven and seventeen as possible, with the hope of attracting a broadly diverse membership. *Dale,* 160 N.J. at 609. Based on this record evidence, the New Jersey Supreme Court found that the Boy Scouts were "unselective" in their membership. *Id.* That finding, which is not questioned in this Court, *see* Pet.Br. at 39-41, is alone fatal to any claim of intimate association. *See Roberts, 468 U.S.* at 621.[(2)]

There is an additional problem with any claim of intimate association on the facts of this case, however. The Boy Scouts does not actually grant its members the associational right that the organization now asserts as the basis for defying New Jersey's antidiscrimination law. Unlike the Jaycees in *Roberts,* 468 U.S. at 540-41, and the Rotarians in *Duarte,* 481 U.S. at 613-14, individual members of boy scout troops do not select their fellow scouts. *Dale,* 160 N.J. at 576-77. Rather, the creation of a scout troop is much more akin to student class assignments, which are usually determined without any significant input by the students themselves. *See* Tribe, ß16-15 at 1479 (school may not rely on associational rights of children when their choices are "obviously dominated" by adults). The average primary school class is about the same size as the average boy scout troop, it is similarly led by an adult, and it requires a substantial commitment of time and energy by the children involved.[(3)] Whatever attenuated right of intimate association primary school students may have in the composition of their class, the power of the state to prohibit school officials from engaging in unlawful discrimination when they decide whom to admit is no longer open to serious question. *See Runyon v. McCrary,* 427 U.S. at 177-79. The same principle applies with equal force here and provides ample support for the decision below.

The Boy Scouts fares no better by alleging that New Jersey's Law Against Discrimination somehow infringes the constitutional right of parents to direct the upbringing of their children. The right of parental autonomy simply does not

embrace the right to insist that a public accommodation indulge a parent's discriminatory views by barring disfavored groups from goods and services that are otherwise available to the general public. Thus, while some parents may wish to send their children to an all-white school, that fact does not excuse the school from the need to comply with the state's antidiscrimination laws. *Runyon,* 427 U.S. at 177*,* and *Norwood*, 413 U.S. at 461-63. Indeed, a working definition of unlawful discrimination is that it is the transformation of private prejudices into market decisions.

Accordingly, there is no legal significance to the Boy Scouts' claim that their decision to exclude James Dale from the Scouts solely because he is gay reflects what the organization perceives to be the moral disapproval of at least some of its scouting parents. Even if that perception is accurate, it cannot be controlling. Most forms of discrimination that are now prohibited by our civil rights laws are or were justified on the basis of deeply held moral views. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 3 (1967)(trial judge's finding that segregation was ordained by God); "Resolution on Racial Reconciliation on the 150th Anniversary of the Southern Baptist Convention," The Southern Baptist Convention Annual (1995) at 80-81 (acknowledging denomination's support of slavery and segregation and apologizing to African-Americans); *Bradwell v. Illinois,* 83 U.S. 130, 141 (Bradley, J., concurring) (1872) (natural unsuitability of women to work).

The right to direct the education of one's children is not a right to decide who else may attend school or who may teach. Similarly, the right to provide one's child with a scouting experience is not a right to decide that only members of favored groups may be permitted to join the troop or to lead it.

B. Any Rights of Expressive Association That May Exist In This Case Are Not Unduly Infringed By The Challenged Nondiscrimination Order

In *Roberts,* 468 U.S. at 618, this Court recognized that freedom of association serves an important "instrumental" value in promoting freedom of expression. Accordingly, the government has no more right to dictate the content of the message delivered by a group, *see, e.g., Police Dep't v. Mosley,* 408 U.S. 92 (1972), than it has to dictate the content of the message delivered by an individual, *see, e.g., Texas v. Johnson,* 491 U.S. 397 (1989). That principle does not assist the Boy Scouts in this case, however, because the nondiscrimination law that New Jersey is seeking to enforce is plainly content-neutral, and leaves the Boy Scouts free to advocate whatever position the organization chooses about gay people.

This case is thus fundamentally different from *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, on which the Boy Scouts so heavily relies. That case arose out of a longstanding dispute about whether the private organizers of Boston's St. Patrick's Day Parade had to permit a gay and lesbian group to march under its own banner. In holding that they did not, this Court rejected the view that the parade could appropriately be characterized as a place of public accommodation in the ordinary sense of the term. Rather, the Court concluded, the parade represented a traditional form of expressive activity and the sponsors of the parade, no less than the publishers of a newspaper, *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), were entitled to determine the message they wished to convey. Under the contrary rule proposed by the state, the Court explained, "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." *Hurley,* 515 U.S. at 573.

Had Massachusetts been allowed to insist that the lesbian and gay delegation be admitted to the parade in *Hurley*, observers along the way might well have assumed that the organizers included the lesbian and gay delegation in the parade, and made their message a part of its message. *Id.* at 575. By contrast, there is little risk that an association will be understood to be making a statement through the identity of its members, particularly if the association has millions of members and is open to the public. *See Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980); *accord Dale,* 160 N.J. at 571. Our society is far too diverse for that.

The Boy Scouts would like to read *Hurley* for the proposition that the state can never enforce its civil rights laws over the opposition of any organization that purports to represent a set of values that conflicts with the state's antidiscrimination goals. But the holding of *Hurley* clearly does not go so far. Certainly, nothing in the Court's opinion purports to overrule *Roberts* or even to question it.

To be sure, the ACLU and other members of the civil rights community are acutely aware that government attempts to regulate the membership of an expressive association pose their own First Amendment dangers. *Cf. Cousins v. Wigoda*, 419 U.S. 477 (1975). But this case does not involve a targeted or viewpoint-based effort to regulate an association's membership; it involves instead the indirect effect of a neutrally applied public accommodations law designed to promote civil rights. On these facts, any impact of that law on First Amendment rights is incidental, at best, and must be balanced against the risk to civil rights enforcement if an organization's selective membership policies become their own justification for a claimed right

to discriminate. Nor is that concern a fanciful one. In the 1950s and 1960s, many businesses in the deep South converted overnight into "private clubs" where every white patron was entitled to automatic membership and every potential black customer was barred at the door. *See Daniel v. Paul,* 395 U.S. 298 (1969). With this history in mind, the Court has been appropriately wary of any claim that the message of an association is inextricably tied to its membership policies, so that the latter cannot be regulated without abridging the former.(4)

There may be rare situations where that is true. In *New York State Club Ass'n. v. New York*, 487 U.S. at 13, this Court recognized the possibility that an association might show that it was organized for a specific expressive purpose that it could not effectively advocate unless it could limit its membership to be consistent with its message. For example, an organization founded to promote anti-Semitism and anti-Catholicism(5) might well be right that simply having members who admit to being Jews or Catholics is so inconsistent with its core mission that the First Amendment allows it to exclude them. Given the competing interests at stake, however, *amici* do not believe it is possible to avoid the task of "carefully assess[ing]" the extent to which application of the state's antidiscrimination laws will actually interfere with the organization's core purposes. *Roberts,* 468 U.S. at 620.(6)

That is precisely the inquiry that this Court undertook in *Roberts,* when it determined that any impact on the expressive message of the Jaycees was incidental at best. *Id.* at 627.(7) It is also precisely the inquiry undertaken by the New Jersey courts in this case, which is what led them to conclude that:

The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourage 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.

160 N.J. 2d at 612.

These conclusions could be challenged only if the Boy Scouts were now to demonstrate that the organization is in fact defined by its view that homosexuality is immoral, that this view is integral to who the Boy Scouts are, and that its members decided to join the organization because of its intolerant views about homosexuality. Even in its submissions to this Court, however, the Boy Scouts has stopped well short of that claim. Instead, the Boy Scouts has tried to shift the focus of its argument from a question of membership to a question of leadership. The theory, apparently, is that an organization's leadership choices are entitled to deference by the state -- even when they conflict with the state's antidiscrimination laws -- because those choices represent an organizational statement of some sort.

That argument is flawed on the facts of this case for several critical reasons. First, any act of intentional discrimination can be said to represent an organizational statement but that cannot be a sufficient justification for ignoring the civil rights laws or those laws would quickly become a dead letter. *See Runyon v. McCrary,* 427 U.S. 160. Second, as this Court made clear in the patronage cases, leadership is not a matter of title but a matter of job responsibility. *See* n.6, *supra.* Here, James Dale is seeking to remain an assistant scoutmaster, which is not a policymaking position within the Boy Scouts. *Dale*, 160 N.J. at 572-73, 577. Third, the fact that Dale is gay does not conflict with his non-policymaking responsibilities. While it may be fair to characterize scoutmasters as teachers in some sense, they are specifically instructed by the Boy Scouts to avoid any teaching on issues of sexuality and religion. If the subject comes up, the prescribed answer is that such matters are better discussed at home. *Id.* at 160 N.J. at 575, 614-15.

This would be a different case if Dale were actively seeking to undermine a message about homosexuality that the Boy Scouts were actively seeking to promote, but the record does not support either proposition. As the New Jersey Supreme Court noted: "[T]here is no indication that Dale intends to 'teach' anything whatsoever about homosexuality as a scout leader, or that he will do other than the Boy Scouts instructs him to do -- refer boys to their parents on matters of religion and sex." *Id.* at 623.

In the final analysis, the position of the Boy Scouts appears to be that it is prepared to accept gay members and even gay scoutmasters as long as they remain safely closeted, but it will not accept the presence of anyone who is openly gay. That attitude would not be tolerated for a moment if the Boy Scouts were claiming that it would accept Jewish or Catholic scouts as long as they kept their faith hidden. The price of equal opportunity in this country should not be a requirement to disguise one's identity. To the contrary, the entire goal of the antidiscrimination laws is that people should be judged on what they can do and not on who they are.

It is true that since Dale is openly gay, the better he is at his job as a scoutmaster, the more some may think that being gay is "acceptable." That is a "danger" with anyone who is open about his or her ethnicity or religion. But the Boy Scouts' fear that this will be seen as its message is simply without much basis in reality. What a teacher says outside of school is usually not fairly attributable to the school, *see Pickering v. Board of Education,* 391 U.S. 563, 572 (1968); *Westside Community Schools v. Mergens,* 496 U.S. 226, 250 (1990), particularly if the school makes its wish not to take a position clear. *See Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980). Any danger of attribution here is virtually nonexistent because, as the New Jersey Supreme Court found, the Boy Scouts tells the public that all boys are welcome to join. 160 N.J. at 609. All that an organization can really be understood to have "said" by retaining someone protected against discrimination by the civil rights laws is that the organization obeys the law. If anything, that is a message that the Boy Scouts presumably endorses.

II. ANY INCIDENTAL BURDEN ON THE BOY SCOUTS' EXPRESSION IS OUTWEIGHED IN THIS CASE BY NEW JERSEY'S OVERRIDING INTEREST IN ENSURING EQUAL OPPORTUNITY ON THE BASIS OF SEXUAL ORIENTATION

In *Roberts v. United States Jaycees,* 468 U.S. 609, *Board of Directors of Rotary, Int'l v. Duarte,* 481 U.S. 537, and *New York State Club Ass'n v. City of New York,* 487 U.S. 1, this Court essentially applied the analysis it first developed in *United States v. O'Brien,* 391 U.S. 367 (1968), for evaluating government actions which, while not aimed at a speaker's message, limit the means one can use to express it. That test requires that the government show: (1) that it is acting in pursuit of an "important" interest;[(8)] (2) that the interest is unrelated to the suppression of free expression; and (3) that the approach it has adopted is "narrowly tailored" to achieve the government's goal. Each of those requirements was easily satisfied in the 1980s trilogy; each of those requirements is also easily satisfied here.

A. New Jersey Has A Critically Important Interest in Ensuring Equality On The Basis of Sexual Orientation

One of the central visions on which this nation was founded was that ours would be a society in which talent, skill and hard work would be what mattered. It is an idea that runs through American thought, from James Madison's *Federalist No. 10,* [(9)] through the debates on the adoption of the civil war amendments,[(10)] to the opinions of this Court.[(11)]

That vision has never been realized. Despite our aspirations, we have a long, sad history of judging people not by what they are capable of doing, but by such extraneous things as race, religion, national origin, sex, disability and sexual orientation.

Civil rights laws are enacted to bring our nation closer to a society that does not function on the basis of group stereotype. The Civil Rights Act of 1866 was designed to end "private injustices"against African-Americans who, in the wake of the Civil War, were still unable to find work or housing in large parts of the country. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 422-36 (1968). The Rehabilitation Act of 1973 was aimed at overcoming "prejudice," "insensitivity," and "ignorance" so that people with disabilities would not be denied "jobs or other benefits." *School Board of Nassau County v. Arline,* 480 U.S. 273, 279 , 284 (1987). The caption of Title VII of the 1964 Civil Rights Act plainly expresses its goal of "equal opportunity." 42 U.S.C. ß 2000e.

Thinking in economic terms, as law often does, it is easy to see that the chance to have and hold a job or an apartment on equal terms has to be an essential element of any society that treats people fairly. But the somewhat more intangible value of not being shut out of lunch counters, theaters, businesses and associations that say they are open to the public is every bit as essential. Indeed, when President Kennedy proposed what became the Civil Rights Act of 1964, he noted that no action could be "more contrary to the spirit of our democracy," and none "more rightfully resented," than being barred from public accommodations. *See Daniel v. Paul,* 395 U.S. at 306. Thus, the overriding purpose of civil rights legislation, as this Court explained just a few years ago, is to make it possible for those protected by the law to participate in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans,* 517 U.S. 620, 631 (1996). Stated more broadly, the purpose of the civil rights law is to protect basic human dignity. *See Heart of Atlanta Motel v. United States,* 379 U.S. 241, 250 (1964).

This Court has said that laws designed to ensure equal opportunity and equal access to goods and services serve "compelling state interests of the highest order." *Roberts,* 468 U.S. at 624.[(12)] Given the central place of fair treatment and personal initiative in the American vision of society, it may be that virtually any law truly designed to ensure equal opportunity serves government interests of the highest order. The Court need not decide that in this case, however. At a minimum, there can be no doubt that lesbians and gay men have historically been denied equal opportunity to participate in American life. Gay people have been denied employment as everything from telephone operators to librarians to budget analysts to teachers to police officers to mail room clerks.[(13)] Gay people have lost their homes (as have heterosexuals who lived with gay people),

and been told not to dance with each other, not to eat together in booths, and not to "hang out" together in bars and clubs.(14) Gay people have had their families torn apart and their children left in peril.(15) Lesbians and gay men have been subjected to unspeakable violence for being gay.(16)

The history of gay people in America is in large measure a history of being forced underground,(17) away from the easy participation in "ordinary civic life" that most Americans take for granted. *See Romer,* 517 U.S. at 631. New Jersey committed itself to creating equal opportunity for a group of Americans who truly have been excluded from equal participation in ordinary life when it added sexual orientation to its Law Against Discrimination. That is a government interest of the highest order. *See Roberts,* 468 U.S. at 624.

B. New Jersey's Interest in Equality Is Unrelated To The Suppression Of Free Expression, And Its Law Against Discrimination Limits Expression No More Than Necessary To Achieve Its Stated Goal

New Jersey's interest in ensuring that the gay people who live there have an equal opportunity to participate in society is unrelated to the suppression of free expression. *See, e.g., Roberts,* 468 U.S. at 623. Like the Minnesota public accommodations law in *Roberts*, New Jersey's Law Against Discrimination does not distinguish on the basis of viewpoint or content. *Id.* While the Boy Scouts claim that the application of New Jersey's law to it is motivated by a desire to hamper its ability to express its views, the criteria applied by the New Jersey Supreme Court to determine that the organization is a public accommodation covered by the Law Against Discrimination are undeniably neutral, and have been applied to similar organizations with different views. *Dale,* 160 N.J. at 589-602. Finally, the central purpose of ensuring equality in organizations that open themselves to the general public can be achieved only by forbidding identity-based discrimination. *See Roberts*, 468 U.S. at 626, 628. The Constitution does not disable the government from prohibiting discrimination in places of public accommodation. *See Runyon*, 427 U.S. at 176.

CONCLUSION

For the foregoing reasons, the judgment of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

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1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

2. "The less intimate and more attenuated the association -- and the more the association affects the public realm and access to the privileges and opportunities available in that realm -- the greater the state's power to regulate an organization's exclusionary practices." Tribe, American Constitutional Law (2d ed. 1988), ß16-15 at 1480 n.37.

3. U.S. Dep't of Education, National Center for Education Statistics, *The Condition of Education, 1998,* at 1 (average primary school class size is 24 in public school, 22 in private school) and at "Indicator 38" (avg. hours spent in the classroom by a primary school teacher in a year is 958). *Compare* Pet. Br. at 40 (a typical boy scout troop consists of 15 to 30 boys).

4. Recognition of the fact that there is a "close nexus between the freedoms of speech and assembly" does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. at 13 (citations and internal quotations omitted).

5. Higham, Strangers in the Land: Patterns of American Nativism*, 1860-1925* (Rutgers University Press, 1992 ed.), at 286-299 ("The Klan Rides").

6. This approach is also consistent with the methodology that the Court has employed in other association contexts. In the political patronage cases, the Court has asked whether party affiliation has any relevance to job performance, which is simply another way of asking whether the ability of the prevailing political party to deliver its message will be impeded if it is forced to associate with members of the opposing party by hiring (or retaining) them to fill certain critical positions. *See Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990); *Branti v. Finkel,* 445 U.S. 507 (1980); *Elrod v. Burns,* 427 U.S. 347 (1976). In the compelled dues cases, the Court has focused on whether the organizational dues are being spent for a purpose that is "germane" to the reason that the dues were collected in the first place, which is simply another way of asking whether the challenged expenditure is in furtherance of the organization's central purpose. *See, e.g., Abood v. Detroit Board of Education,* 431 U.S. 209 (1977); *Keller v. State Bar of California,* 496 U.S. 1 (1990).

7. Justice O'Connor's concurring opinion in *Roberts* suggests that the constitutionally relevant line is between expressive associations and commercial associations. 468 U.S. at 632-35. That line, however, would not account for the result in *Runyon v. McCrary.* A school is the quintessential expressive association, *Roberts,* 468 U.S. at 636 (O'Connor, J.). Yet the *Runyon* Court unequivocally held that while the private school defendants in that case could advocate segregation, they could not express that view by segregating their student body. That was not, we believe, because the schools charged tuition, but rather because the core purpose of the schools was to educate, and because the Constitution places so little (if any) value on discrimination as a means of expression. *Runyon*, 427 U.S. at 176. The same analysis applies here.

8. *Roberts* described the necessary government interest as "compelling" but, as the *O'Brien* Court pointed out, there is no magic in the terminology used to describe what must be a very significant government interest. *See Roberts,* 468 U.S. at 623; *O'Brien,* 391 U.S. at 376-77.

9. The Federalist Papers (Penguin Classics Ed. 1987), at 124.

10. Cong. Globe, 39th Cong., 1st Sess., 95, 1160, 1833 (1866); *see also* Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1866).

11. *Frontiero v. Richardson,* 411 U.S. 677, 686-87 (1973)(relegating an entire class of citizens to an inferior status "without regard to actual capabilities" violates a "basic concept of our system"); *see also* Hofstadter, The American Political Tradition (Vintage 1974), at 3-21.

12. It has occasionally been suggested that the government has an overriding interest in forbidding only those forms of discrimination that it would need a compelling justification to practice; or, to put it another way, that the government only has an overriding interest in ending discrimination against those defined by "suspect classifications." *See Smith v. Fair Employment and Housing Commission,* 30 Cal. Rptr.2d 395, 404 (Cal.App. 1994), *reversed on other grounds,* 12 Cal.4th 1143 (1996), *cert. denied*, 521 U.S. 1129 (1997). But apart from using similar terminology, there is no necessary connection between the two ideas, no reason why the Court's analysis of when ensuring equality is overriding should depend on when a reason to treat people unequally is deemed compelling. Indeed, in *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), this Court held that discrimination against the mentally disabled was not suspect at least in part because of significant government efforts to end discrimination. The Court speculated that those efforts might withstand heightened scrutiny even as it ruled that discrimination against the mentally disabled does not require it. *Id.* at 443-45.

13. *See, e.g.*, *DeSantis v. Pacific Telephone,* 608 F.2d 327 (9th Cir. 1979)*; McConnell v. Anderson,* 451 F.2d 193 (8th Cir. 1977); *Norton v. Macy,* 417 F.2d 1161 (D.C. Cir. 1969)*; Glover v. Williamsburg Local School Dist.,* 20 F.Supp.2d 1160 (S.D.Ohio 1998); *Weaver v. Nebo School Dist.,* 29 F.Supp.2d 1279 (D.Utah 1998); *Burton v. Cascade School District Union*

High School, 512 F.2d 850 (9th Cir.), cert. denied, 423 U.S. 839 (1975); *Childers v. Dallas Police Dep't,* 513 F.Supp. 134 (N.D. Tex. 1981) *aff'd*, 669 F.2d 732 (5th Cir. 1982); *Smith v. Liberty Mutual Insurance,* 569 F.2d 325 (5th Cir. 1978).

14. *See, e.g.*, *420 E.80th v. Chin,* 115 Misc.2d 195 (1982), *aff'd*, 97 A.D. 2d 390 (N.Y.A.D. 1st Dep't 1983)*; Hubert v. Williams,* 133 Cal.App.3d Supp. 1(1982)*; Morell v. Dept. of Alcoholic Beverage Control,* 204 Cal.App.2d 504 (1962); *Rolon v. Kulwitzky,* 153 Cal.App.3d 289 (1984)*; One Eleven Wines and Liquors Inc. v. Div. of Alcoholic Beverage Control,* 235 A.2d 12 (N.J. 1967).

15. *See, e.g., Weigand v. Houghton,* 730 So.2d 581, 588 (Miss. 1999)(McRae, J., dissenting)(child placed in home with convicted felon and wife abuser because father was gay); *S.A.G. v. R.A.G.*, 735 S.W.2d 164 (Mo.App. 1987)(mother denied custody in favor of alcoholic father because mother was a lesbian).

16. *See, e.g., Naboszny v. Podlesney,* 92 F.3d 446 (7th Cir. 1996); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir.1997), *cert. denied*, 523 U.S. 1118 (1998); *Coon v. Joseph,* 192 Cal.App.3d 1269 (1987).

17. *See* Katz, *Gay American History; see also State ex.rel. Grant v. Brown,* 39 Ohio St. 2d 112 (1974), *cert. denied sub nom. Duggan v. Brown;* 420 U.S. 916 (1975)(Greater Cincinnati Gay Society not permitted to incorporate); *Owles v. Lomenzo,* 31 N.Y.2d 965(1973)(overruling a similar decision by the New York Secretary of State); *Rowland v. Mad River Local School Dist*., 730 F.2d 444, 446 (6th Cir. 1984), *cert. denied,* 470 U.S. 1009 (1985)(guidance counselor fired in part because she told coworkers she was bisexual); *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982) (overturning discharge of gay man who spoke in favor of civil rights at county commission); *McConnell v. Anderson,* 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972)(same).