

LEAVE THOSE KIDS ALONE: WHY THE FIRST AMENDMENT DOES NOT PROTECT THE BOY SCOUTS OF AMERICA IN ITS DISCRIMINATION AGAINST GAY YOUTH MEMBERS

By Sean Griffith, J.D.*

On June 9, 2003, the Boy Scouts of America's ("BSA") Cradle of Liberty Council released a position statement on its leadership standards stating, "[a]pplications for leadership and membership do not inquire into sexual orientation. However, an individual who declares himself to be a homosexual would not be permitted to join Scouting. All members in Scouting must affirm the values of the Scout Oath and Law, and all leaders must be able to model those values for youth."¹ Additionally, the position statement reaffirms that "the Boy Scout promises to do his duty to God and to be morally straight, as well as to be clean in his thoughts, words and deeds."² These position statements are a clear indicator that the BSA intends to extend its ban on gay leaders to its youth members.³

The Supreme Court's existing framework for deciding when a state's interest in preventing discrimination conflicts with a private group's right to associate leaves open a grey area with regard to the denial of youths' membership to the BSA. The BSA's ban on openly gay youth members likely goes beyond the scope of the Supreme Court's decision in *Boy Scouts of America v. Dale*, which found that a state could not compel the BSA to retain an avowed homosexual as an assistant scoutmaster.⁴

This article will argue that *Boy Scouts of America v. Dale* should extend only to persons in adult leadership positions within the BSA and that its current ban on openly gay youth members constitutes unacceptable discrimination. This article asserts that states have a compelling interest in preventing the discrimination of youth members based on sexual orientation that outweighs the BSA's First Amendment right of expressive association. Finally, a state may have a further compelling interest in protecting youth members of the Boy Scouts from discrimination because of the unique role the group plays in children's education.

THE SUPREME COURT: WHEN GROUP FREEDOMS CONFLICT WITH THE STATE'S INTEREST

The Supreme Court held that freedom of association is a fundamental right that, while not explicitly stated in the Constitution, is protected by the First Amendment. In protecting this right the Supreme Court recognizes two distinct incarnations of the freedom to associate. First, individuals have a freedom of intimate association which protects close relationships from government imposition by acting as a "critical buffer between the individual and the power of the state."⁵ Second, the Supreme Court recognized that citizens must have freedom of expressive association, which protects First Amendment rights against gov-

ernment intrusion by allowing individuals to unite with others holding common views for an expressive purpose.⁶ This article is concerned with the freedom of expressive association.

Implicit in the freedom to associate is the freedom not to associate, which is to say, the freedom to discriminate.⁷ Conversely, the Supreme Court has recognized that a state may have a compelling interest in protecting certain classes of people from discrimination.⁸ States have passed public accommodation statutes which prohibit private groups from denying an individual access to a public accommodation because of his or her race, sex, orientation, or other characteristics. In *Roberts*, the Supreme Court emphasized that public accommodations laws "plainly serve[d] compelling state interests of the highest order,"⁹ and recognized that a state's compelling interest in mandating equal access to women extends to the acquisition of leadership skills and business contacts.¹⁰ Therefore, because the Supreme Court recognizes both a group's freedom to discriminate and a state's interest in preventing discrimination, the stage is set for conflict.

In *Roberts*, *Duarte*, and *New York Club Ass'n*, the Supreme Court laid the framework for considering how conflicts between state interests and group rights should be decided.¹¹ First, the Supreme Court considered whether the state's interest was compelling. All three cases recognized that states have a compelling interest in eliminating public accommodations' policies which discriminated against women.¹² Second, the Supreme Court asked whether the group in question was an expressive association. In *Roberts*¹³ and *Duarte*,¹⁴ the Court found that individuals had united to engage in purposeful, protected speech and thus, the freedom to associate was implicated.¹⁵ Third, the Supreme Court asked whether inclusion of the excluded group would burden the group's messages. Although no burden was found in these cases, the Supreme Court recognized that inclusion of an unwanted group *could* impair the expressive capacity of the association enough to trigger First Amendment protection.¹⁶

In these three cases, the Supreme Court never had to balance a state's interest in preventing discrimination against a private group's First Amendment freedoms because in all three cases, the Supreme Court found no burden on First Amendment activity.¹⁷ However, two points are vital to this article. First, *Roberts* held that the amount of protection the First Amendment offers may be conditional. "The nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake."¹⁸ Second, even where a court recognizes that inclusion of an unwanted group will burden an

association's ability to express its message, "[t]he right to associate for expressive purposes is not, however absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of association freedoms."¹⁹

DALE: WHEN THE STATE CANNOT FORCE A GROUP TO ADMIT A LEADER WHO WOULD COMPROMISE EXPRESSION

James Dale began scouting as an eight year old and attained the rank of Eagle Scout at the age of eighteen. The following year he applied for adult membership, and BSA approved him for the position of assistant scoutmaster. During this time Dale became the co-president of the Rutgers University Lesbian/Gay Alliance and was interviewed by a newspaper regarding his advocacy for the psychological needs of homosexual teenagers. Soon after, Dale received a letter from a BSA executive asking him to revoke his adult membership.²⁰ Dale was denied his right to attend a hearing to review his case because BSA, "does not admit avowed homosexuals to membership in the organization."²¹

Consequently, Dale filed a complaint against the BSA, alleging that it violated New Jersey's public accommodations statute, Law Against Discrimination ("LAD"), by revoking his admittance because of his sexual orientation.²² The BSA successfully appealed the case to the Supreme Court, which held that applying New Jersey's public accommodations law to the BSA violated its First Amendment right of expressive association.²³

The Supreme Court first considered whether BSA was an expressive group, and if so, whether an anti-homosexual message was part of its expression, noting that the purpose of BSA is to instill values in youths, "by having its adult leaders spend time with the youth members, instructing and engaging them" in various activities.²⁴ "The scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values – both expressly and by example."²⁵ Thus, the Supreme Court held that BSA is an expressive group, with its expression being anti-homosexuality.²⁶ The Supreme Court held that the judiciary may not "reject a group's expressed values because they disagree with those values or find them internally inconsistent."²⁷ If BSA claims to be anti-homosexual, the Court holds, it "cannot doubt that the Boy Scouts sincerely holds this view."²⁸

Next, the Supreme Court asked, "whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not promote homosexual conduct as a legitimate form of behavior."²⁹ The Court declared, "as we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."³⁰ The Court emphasized that Dale was a gay activist and his presence as a leader would "at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."³¹

The Supreme Court then analogized this case to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*. In *Hurley*, the Massachusetts Supreme Court ruled that the Gay, Lesbian, and Bisexual Group of Boston (GLIB) was entitled to march because it was impossible to detect an expressive purpose in the parade, there was no state action, and the parade was a public accommodation.³² The South Boston Allied War Veterans Council ("Council") did not wish to exclude GLIB because of the orientation of its members, but because it did not want to march behind a GLIB banner. However, the Supreme Court reversed the Massachusetts Court's decision finding there was no violation of Massachusetts' public accommodation law by the Council in excluding the GLIB from the parade. The Supreme court consistently ruled that GLIB's presence behind a banner would have "interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs."³³ Therefore, the Supreme Court ruled that requiring BSA to, "retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct."³⁴

Finally, the Court considered whether the New Jersey public accommodations law requiring that the Boy Scouts accept Dale as an assistant scoutmaster interferes with the Scouts' freedom of expressive association.³⁵ Without ruling directly on whether BSA was a public accommodation or whether New Jersey had a compelling interest, the Court distinguished *Dale* from *Duarte*, *Roberts*, and *New York State Club Assn*. While the Court found a compelling state interest in each of these cases, there were no "significant burdens" to expressive association and as such, the Supreme Court did not have to balance state interests against group rights in any of those cases.³⁶ In *Dale*, however, the Supreme Court had to conduct a balancing test because of its finding of a "significant burden" and held that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."³⁷

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Given the BSA's vocal opposition to gay members as well as adult leaders in their position statement of 2003, it is likely that they will attempt to bar openly gay youth in the same manner as the ejection of Dale from the BSA. In doing so, the BSA will likely attempt to invoke *Dale* as extending to openly gay youth.

WHY THE BSA CANNOT DIRECTLY EXTEND DALE TO YOUTH MEMBERS

There are two main reasons why the Supreme Court should read *Dale* as restricted to adult leadership positions, and not youth members. First, the language of every *Dale* holding specifically pertains to adult leadership positions. Second, *Dale*'s critical analogy to *Hurley* would prove unworkable if it was

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meant to apply to youth membership. Additionally, lower courts have reached no consensus on a reading of *Dale*.³⁸

In *Dale*, the Supreme Court determined that BSA was an expressive association and that an anti-homosexual message was part of their First Amendment protected speech.³⁹ However, in the Supreme Court's examples of how this message was expressed, it only cited the expressions of adult leadership. BSA wrote that its mission was

“to instill values in young people... by having its adult leaders spend time with the youth members... During this time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scout's values – both expressly and by example.”⁴⁰

In every example the Supreme Court offered, the speaker was the adult scout leader and the audience was the youth member. The Supreme Court did not address the expressive message of the individual boy scouts who were “inculcated.”

Having established that BSA is an expressive group with an anti-homosexual message, the Supreme Court then considered “whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not ‘promote homosexual conduct as a legitimate form of behavior.’”⁴¹ The Supreme Court found in the affirmative, finding that allowing Dale to continue as a leader would, “force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”⁴² The Supreme Court did not rule on whether it was Dale's identity as a gay activist, a gay scout leader, or merely self-identification as being gay which would burden the BSA's message. The Supreme Court only asked whether Dale, who was a vocal gay advocate, would burden the Scouts message.

Based on the preceding findings, it seems likely the Supreme Court intended a narrow holding. The language of *Dale* is confined to answering a question about James Dale and possibly adult leadership positions in general, but it never represents youth members as speakers. As such, the holding should be limited to vocal gay advocates in positions of adult leadership. Rather, the youth members are the intended audience of BSA's speech and message and the Supreme Court does not identify any expressive role for them.

Furthermore, the *Dale* Court relies greatly on *Hurley*. While the Council stated their reasoning for not admitting the GLIB into the parade was because they did not want to march behind a banner,⁴³ the Council would not have had power to deny admittance to individual homosexuals who wished to march.⁴⁴ If the *Dale* decision were meant to extend to youth members without any contention that youth members expressed the BSA's message, then the Court would be allowing BSA to discriminate based only on sexual orientation, which was explicitly prohibited in *Hurley*.⁴⁵ The analogy between *Hurley* and *Dale* only works if *Dale* is read not to implicate youth members.

It is important to note the significance of the absence of a Supreme Court ruling on whether BSA should be considered a public accommodation in *Dale*. One of the pre-requisites of a violation of the First Amendment right to expressive association is state action. As noted earlier, state public accommodation laws circumvent the requirement of state action to apply to private groups.⁴⁶ Because the Supreme Court in *Dale* declined to rule directly on the issue of public accommodation, going directly to the First Amendment balancing test, it set the precedent that a case regarding exclusion of the BSA's gay youth members should be governed by the balancing test.

Consequently, the Supreme Court would need to conduct a balancing test and find that the state's interests in preventing discrimination against children would outweigh the group's interest in expressive association. Two factors would weigh in favor of the state's interest in preventing discrimination: inclusion of a gay youth member would be less of a burden than inclusion of a gay scout leader,⁴⁷ and, the state has a recognized compelling interest in protecting youths from BSA's discrimination because of the unique role it plays in children's education.⁴⁸

The Supreme Court was clear that James Dale was an expressive agent of the BSA and, like a group holding a banner in *Hurley*, he contributed to the overall message of the organization. While gay adult scout leaders may be denied participation in the BSA because they are expressive agents analogous to sign holders in *Hurley*, a youth member is more analogous to the gay individual who wishes to march in the parade without a sign. *Hurley* is clear, moreover, that the First Amendment does not protect an expressive association's decision to deny the mere presence of an individual based only on his or her orientation.⁴⁹ Thus, a person's presence alone is not expressive. Just as individual gay marchers could not have burdened the Council's expression enough to outweigh the commonwealth's interest in preventing discrimination, a BSA youth member's presence alone cannot burden expression enough to outweigh a state's interest in preventing discrimination.

A state may also have a compelling interest in protecting youths from BSA's discrimination because of the unique role the group plays in children's education. This compelling interest may outweigh BSA's freedom of expressive association. In *Boy Scouts of America v. Wyman*, Judge Calabresi writing for a unanimous court upholding the state interest in Connecticut's Gay Rights Law over the BSA's right to associative expression, personally noted that,

“[i]t is possible that, under the Fourteenth Amendment, a state that has adopted a policy of equal protection with respect to a specific group may have a compelling interest in the enforcement of that policy, even if the federal government has not recognized that same group's claim to heightened scrutiny for the purposes of equal protection...”⁵⁰

Merely because the state interest in *Dale* could not outweigh

BSA's right to expressive association does not mean that other states with less restrictive expressive association rights do not have a compelling enough state interest to justify the restrictions.⁵¹

Not only have courts recognized that states may have a compelling interest in eliminating discrimination, but they have also acknowledged states' "compelling interest in educating its youth, to prepare them to participate effectively and intelligently in our open political system, and to be self-reliant and self-sufficient participants in society."⁵² The Boy Scouts prepare children to be all of these things during a time when, as the BSA proclaims on its web site, nearly one in five children in the United States lives in poverty.⁵³

In programs like "Scoutreach," the BSA "targets youth in distressed areas of [the U.S.], where they have many chances to fail, and few opportunities to succeed, much less to excel." The BSA tries to help the many children in the United States who struggle with the issues of "[s]ingle parent families, often headed by mothers and grandmothers, unemployment, a pattern of alcohol and drug abuse and family income below the poverty line."⁵⁴ Representative Dana Rohrabacher (R-CA) explains that the Boy Scouts is, "America's number one values program for youth. Scouting helps strengthen character, develops good citizenship, and enhances both mental and physical fitness among

its participants. Scouting has helped countless youths from broken families by providing them with the moral discipline and leadership they would have otherwise lacked."⁵⁵

CONCLUSION

When it comes to the state's interest in preventing discrimination, children are easily distinguishable from grown men. James Dale was a grown man. The educational needs, identity formation, and self-esteem of an adult is not comparable to a child, who is just developing a sense of self and habits for success. The balancing test the Supreme Court should engage in is not simply between the interests of a private group and the state, but between the irrefutable needs of children and a group's interest in an untrammelled message. Each year, the Boy Scouts provide stability, discipline, and community to hundreds of thousands of youths, helping them become successful adults.

If a case based on the BSA's exclusion of gay youth is raised, the Supreme Court should address the interests of the children. Furthermore, the Supreme Court should find not only that *Dale* does not extend to the non-leadership positions in the BSA, but also that a state has a compelling interest in the rearing of its children that outweighs whatever burden a gay youth member could place on the message of the nation-wide Boy Scouts of America.

ENDNOTES

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¹ *Position Statement on the Cradle of Liberty Council's Stance Regarding the Leadership Standards of the Boy Scouts of America*, Boy Scouts of America, <http://www.scouting.org/media/press/2003/030612/statement.html>.

² *Id.*

³ *See* *Boy Scouts of America v. Dale*, 530 U.S. 640, 645 (2000).

⁴ *Id.* at 643.

⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984).

⁶ *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958).

⁷ *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *see also Roberts*, 468 U.S. at 623.

⁸ *Roberts*, 468 U.S. at 625; *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 535, 549 (1987).

⁹ *Roberts*, 468 U.S. at 624.

¹⁰ *Id.*

¹¹ *Duarte*, 481 U.S. at 535; *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1 (1988); *Roberts*, 468 U.S. at 609.

¹² *Id.*

¹³ *Roberts*, 468 U.S. at 613.

¹⁴ *Duarte*, 481 U.S. at 537; *see also City of N.Y.*, 487 U.S. at 12.

¹⁵ *Roberts*, 468 U.S. at 623; *Duarte*, 481 U.S. at 548.

¹⁶ *City of N.Y.*, 487 U.S. at 13; *Roberts*, 468 U.S. at 622; *Rotary*, 481 U.S. at 548.

¹⁷ *Duarte*, 481 U.S. at 548; *Roberts*, 468 U.S. at 622; *Rotary*, 481 U.S. at 548.

¹⁸ *City of N.Y.*, 487 U.S. at 13.

¹⁹ *Roberts*, 468 U.S. at 623.

²⁰ *Dale*, 530 U.S. at 645.

²¹ *Id.* at 579.

²² *Id.*

²³ *Id.* at 645.

²⁴ *Id.* at 649.

²⁵ *Id.* at 649-50.

²⁶ *Dale*, 530 U.S. 649-50.

²⁷ *Id.* at 651.

²⁸ *Id.*

²⁹ *Id.* at 653.

³⁰ *Id.*

³¹ *Id.*

³² *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 563 (1995) (citing *Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston*, 418 Mass. 238, 242-248 (1994)).

³³ *Dale*, 530 U.S. at 654.

³⁴ *Id.* at 659.

³⁵ *Id.* at 656.

³⁶ *Id.* at 658.

³⁷ *Id.* at 659.

³⁸ *Compare* *Boy Scouts of Am., S. Fla. Council v. Till*, 136 F.Supp.2d 1295, 1308 (S.D.Fla. 2001) (holding that inclusion of homosexual members would burden BSA's free expression under *Dale*), *and Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Human Relations*, 748 N.E.2d 759,767 (2001) (holding that *Dale* applied only to leadership positions in BSA), *with Boy Scouts of Am. v. D.C. Comm'n on Human Rights*, 809 A.2d 1192, 1201-03 (D.C.2002) (holding that *Dale* was limited to only scout leaders who are also public gay advocates).

³⁹ *Dale*, 530 U.S. at 649-51.

⁴⁰ *Id.* at 650.

⁴¹ *Id.* at 652.

⁴² *Id.* at 653.

⁴³ *Id.* at 653.

⁴⁴ *See Hurley* 515 U.S. at 572.

⁴⁵ *Id.*

⁴⁶ *See Roberts*, 468 U.S. at 624.

⁴⁷ *Id.* at 622.

⁴⁸ *See Dale v. Boy Scouts of America*, 160 N.J. 562, 619 (1999) (holding that New Jersey had a compelling interest in preventing "the destructive consequences of discrimination from our society" because "the overarching goal of LAD is nothing less than the eradication 'of the cancer of discrimination.'")

⁴⁹ *Hurley*, 515 U.S. at 574-75.

⁵⁰ *Boy Scouts of America v. Wyman*, 335 F.3d 80, 95 n.5.

⁵¹ *Id.*

⁵² *See Immediato v. Rye Neck School District*, 73 F.3d 454, 461 (2d. Cir.); *see also* *Murphy v. Arkansas*, 852 F.2d 1039, 1042 (8th Cir. 1988); *Palmer v. Bd. of Educ. of City of Chi.*, 603 F.2d 1271, 1274 (7th Cir. 1979) (finding that "there is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society.")

⁵³ What is Scoutreach?, <http://www.scouting.org/factsheets/02-346.html>.

⁵⁴ *Boy Scouts of American, Circle 10 Council*, http://www.circle10.org/support_us/?index_item=3174&db_item=listitem.

⁵⁵ Edwin Meese III, *The Fight for Moral Right: Boy Scouts undaunted by left-wing attacks for refusing to accept gay Scout leaders*, <http://www.defendscouting.com/sldf/meesearticle.html>.