

67645-8

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No. 67645-8-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

N.K., and individual proceeding under pseudonym,

Appellant,

v.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF
JESUS CHRIST OF LATTER-DAY SAINTS, a foreign corporation sole
registered to do business in the State of Washington, et al.,

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The Respondents continue to attempt to evade responsibility for allowing an untrustworthy stranger from out of town to take sole charge of a Boy Scout Troop full of young boys, and thereby sexually molest a 12 year old, small-town, Mormon boy. They expressly argue they owed no duty to protect N.K. after inviting him into a Scouting organization they each controlled to some degree, even though these Scouting activities resulted in N.K. being abused in a lockable “Scout” cabin on church grounds. And they implicitly contend none of them had the right to exclude such a “drifter” or “flim-flam man” from the Scout Troop, or to prevent this suspicious vagabond from usurping charge of a chartered Boy Scouts of America Troop in a Mormon ward controlled by LDS.

Despite their posturing, each entity is responsible for letting this vile wolf into the fold of young, trusting Boy Scouts. The ultimate fact is they could have excluded Hall from Scouting, and but for Hall being in Scouting, he could not have molested N.K. in the manner he did, if at all. A jury must decide whether the Scouting relationship was responsible, and if excluding or monitoring Hall—or warning Scouts about the danger of molestation—would have prevented N.K.’s abuse. The trial court erred in granting summary judgment on these facts.

Finally, the trial court erred by denying N.K. his constitutional right to discovery regarding LDS's knowledge of the danger of child sexual abuse, including abuse in Scouting. Neither the trial court nor LDS on appeal has explained how that information is privileged.

II. STATEMENT OF THE CASE

A. Undisputed Facts

The basic unchallenged facts of the case are as follows: (1) Dusty "Rhodes," later Dusty "Hall" arrived in the small town of Shelton on two separate occasions with a vague and suspicious background, CP 1733-36; (2) Hall began attending the local LDS ward, CP 1171, 1205; (3) the Scoutmaster of the ward's Boy Scout Troop was appointed by the ward's leadership team, who was in turn selected by LDS, CP 1649-51,1656; (4) the Scoutmaster did not trust Hall and considered him a con artist, CP 1737-38; (5) N.K. attended Scout activities, as did all LDS boys, CP 1189, 1309; (6) Scout meetings were held at a small, locking cabin on LDS grounds, CP 1289, 1308-09; (7) the local paper reported Hall was the assistant Scoutmaster, CP 1357-58; and (8) Hall was allowed to participate as "an adult supervisor" in the Scoutmaster's words, CP 1739.

None of these facts is controverted or disproven by Respondents.

B. Contested Facts That Must Be Resolved in N.K.'s Favor

Respondents attack N.K.'s presentation of the facts because N.K. has presented them in a light most favorable to him. Yet that is what N.K.

is required to do under the standard of review applicable to the trial court and to this Court, although the trial court failed to do so and the Respondents refuse to do so in their briefing here.

LDS complains factually about N.K.'s foundation for his case. LDS claims there were no citations for N.K.'s statement that "the creepy drifter/flim-flam man was openly allowed to lead the ward's Boy Scout Troop, and the ward's leadership knew as much because they appointed him to that position." But five paragraphs later, N.K. wrote: "Even the "First Counselor" of the ward admitted its leaders, the Bishopric, *voted to allow Hall to volunteer with the Troop.*" N.K.'s Opening Brief at 12 (emphasis added) (citing CP 1314).

LDS's complaint ignores the factual universe that was presented in context in N.K.'s opening brief. For example, when asked "[a]nd did the Bishopric decide that [Hall] would be a Boy Scout volunteer?", the LDS ward's own First Counselor Edwin Savage unequivocally stated, "Yes." CP 1314. In addition, many of the Scouts—Newell, CP 1233, N.K., CP 1188, Cowles, CP 1249, Romans, CP 1270, Bouvier, CP 1276, and Manu, CP 1282—believed Hall was their leader. Their opinion was noted in the paragraph immediately preceding the discussion of the Bishopric's vote, N.K.'s Opening Brief at 12, and Hall's fiancée concurred. CP 1211-12 ("he attended the Scout meetings ... sometimes led them or helped with them"). Even the local newspaper observed the same thing. CP 1357-58.

So the Bishopric knew and approved Hall's Scout volunteering, and the boys, other adults, and even the local paper saw Hall acting as a Troop leader.¹ Finally, N.K. testified he was abused at Scout activities in the locking Scout cabin on LDS grounds. CP 1188-89, 1191, 1308. Any conflict between the testimony that Hall was the Troop's leader and used Scouting to abuse N.K. must be resolved in N.K.'s favor. These facts are enough to show Hall was an authorized Scout volunteer and at least a *de facto* leader, if all facts are taken in N.K.'s favor. The initial statement was not "false" and LDS's argument about citations is incorrect, an error compounded by LDS's selective version of facts despite the need to take all facts and inferences in N.K.'s favor.

BSA's factual arguments center around its suggestions that (1) it had no control over unregistered volunteers, (2) Hall was not a "volunteer" because he was not registered, and (3) N.K. was sometimes abused outside of Scouting. Only the first objection merits rebuttal; the other two are refuted by simple logic and evidence already cited.² Regarding BSA's

¹ Perhaps "appointed" was an incorrect verb to use to connect the vote of the Bishopric to the leadership role assumed by Hall, but the vote to allow Hall to volunteer permitted Hall to assume control over the Troop.

² The pedantic nature of BSA and PHC's arguments that Hall was not a "volunteer" because he was not "registered" or "called" is illustrated by the evasive testimony of BSA official Martin Walsh, where it takes over four pages of testimony for Walsh to tentatively admit that BSA was aware that unregistered adults volunteer in Scouting, despite BSA's registration requirement. CP 1665-66. Hall "helped out" with the ward's Scout Troop—*i.e.* he volunteered, and he was allowed to do so by the Bishopric and Scoutmaster. Respondents offer no cogent explanation for why they should not be liable for N.K.'s abuse suffered during Scouting.

control over Scouting, the evidence shows that BSA had the obvious right—exercised or not—to exclude unregistered adults from Scouting.

The IV files were BSA’s most obvious method of control, in conjunction with the Procedures for the Maintaining Standards of Leadership. CP 1422-24, 1446-54. The IV files were created “to protect youth” “from any danger” by excluding adults through denying registration. CP 1706. The Procedures were mandatory, CP 1716:

Since its inception, the *BSA has maintained its obvious right* to set standards of leadership in the organization. This position is set forth in the bylaws:

Art. VIII, Sect. 1, “No person shall be approved as a leader unless, in the judgement [sic] of the [BSA], that person possesses the moral, educational, and emotional qualities deemed necessary for leadership and satisfies such other leadership qualifications as [BSA] may from time to time require.

CP 1422 (emphasis added).

BSA and its local councils, like PHC, exercised this “obvious right” as to each individual on a yearly basis. *Id.* If a Scout leader engaged in immoral conduct—including child abuse—the council was required to follow a specific script when removing the offender, and to use a specific letter that BSA attached to the Procedures. CP 1422-23 (“hand deliver” the form letter and “make no accusations”) (emphasis in original).

Indeed, the script included instructions to tell the person that “BSA is not sharing this information with anyone and only wishes the individual

to *stop all Scouting activity.*” *Id.* (emphasis added). Notably, it was not simply a leadership role that the individual was denied—he was to be forbidden from participating in Scouting at all.

The IV files illustrate how the Procedures were implemented, and the control BSA exercised over the process. CP 1433-1581. For instance, in the 1976 case of a Scoutmaster who confessed to “an unnatural relationship with at least two boys,” BSA Registration Director Paul Ernst demanded the local Scout executive send a letter setting out the details of the abuse and “a copy of the police or court record.” CP 1525. A 1975 file shows a rejected molester was given one of the form letters described in the Procedures, and was required to “resign from any of his volunteer positions.” CP 1511, 1520. Thus, the necessary logical inference is that unregistered people should have been excluded from Scouting.

Also, BSA governed the local council when assisting with exclusions, as can be seen in these and other files and the Procedures. In conducting a formal review, the council was instructed to carry out a hearing under a 14-point program, including an exhortation to avoid talking to victims. *Id.* CP 1428 (“[i]nvolvement of persons under the age of 18 should be avoided as a rule”). The Procedures even demanded that councils not photocopy them and only show them to “top management of your council.” CP 1415. BSA not only retained control over the process, it retained control about knowledge of the *existence* of the process.

This assertion of control culminated in the United States Supreme Court in *Boy Scouts of America v. Dale*, in which the entire focus of BSA's brief³ was that BSA *alone* controls who can participate. Such has been the consistent testimony of BSA's executives over the years, as well. *See e.g.*, CP 1708. Yet now, when called to account for that control, BSA scurries under a false cloak of impotence and ignorance. BSA had the ability to exclude unregistered volunteers, and BSA claimed the right of control over Troop leaders and councils, like PHC, for this very purpose.

Finally, like BSA and LDS, PHC's complaints about citations to the record are not well taken. In its summary judgment joinder motion below, PHC represented that "[i]ts status is identical to BSA" with respect to governing Troops and allowing or excluding people from Scouting. CP 893. Despite the unity of defense below, PHC now complains N.K. made no separate arguments against it in his opening brief. Even aside from this position reversal, that is simply not correct. N.K. noted PHC's identical role in policing adult participation in Scouting in his opening brief by quoting from PHC's discovery responses. *See e.g.*, CP 1141, 1371, 1377-78. Furthermore, as discussed above, the record is replete with the involvement of local councils, like PHC, in the exclusion and removal of individuals from Scouting.

³ *See* Appendix A-1 – 31, Brief of Petitioners, *Boy Scouts of America v. Dale*, 530 US 640 (2000), discussed below.

Last, as noted in part above, PHC exists to effectuate BSA's instructions at a regional level,⁴ and had the right to exclude unregistered people and undesirables. CP 1344, 1693, 1668 ("There are three entities. They all have the ability to deny someone membership in the Boy Scouts of America"; and where child abuse is discovered, "[t]he first step for the [local council] Scout executive is to inform the registration and subscription executive at the national office of the nature of the allegation.").⁵ In fact, the councils were considered the "eyes and ears" of BSA with respect to allowing or restricting participation—they were far from some unaffiliated and distinct corporate entity. CP 1697; 1716.

It is undisputed that the local councils, like PHC, were required to act on BSA's behalf in enforcing the Procedures and were required to obey the bylaws, rules and regulations of BSA to receive annual charters. CP 1672, 1679-80. PHC was required to carry out the standards set by BSA—it had no choice but to follow BSA's instructions on allowing or

⁴ Cf., *Cradle of Liberty Council, Inc. v. City of Philadelphia*, CIV.A. 08-2429, 2012 WL 947008 (E.D. Pa. Mar. 21, 2012) (asking local Scout executive "Were you at liberty, as a local organization, to disavow the policies of national? A[nswer]: No"; "did Cradle of Liberty Council, were they required to adhere to the national organization's policies? A[nswer]: Absolutely"; "does that apply with respect to other policies? Policies that don't even relate to this but the—are you at liberty to disregard any of the policies from national? A[nswer]: No. No.").

⁵ PHC took issue below with N.K.'s quoting Paul Ernst as saying that, in effect, individual Troops "worked for the local council." Ernst's full quote was that, "The chartered organization was—was—worked for the national—local council and, therefore, they would report to the local council. Local council would report to the National Council." CP 1694. In the context of internal reporting of child abuse, removal of abusive Scout leaders, and enforcing BSA's Procedures for Maintaining Standards of Leadership, the quote is precisely correct.

removing volunteers. CP 1675, CP 1679-80 (local council could not change minimum leader age to 20; local council must “obey the bylaws and rules and regulations of the Boy Scouts of America”); CP 1693 (local councils “had to follow [the Procedures] to the best of their ability”). The local council also collected fees for BSA and transmitted them entirely to the national organization. CP 1679. Because of this continued control, there is no meaningful distinction to be drawn between BSA and PHC.

III. ARGUMENT

A. Summary of Argument

Respondents cannot dispute that Hall participated in Scouting activities. Instead, they advance the unsupported notion that because their own internal, formal procedures of approving an individual’s participation in Scouting were not followed by their agents, they bear no fault. Yet even if this shady drifter was not officially registered by BSA or formally “called” by LDS, that does not excuse the Respondents from allowing him to take charge of the Troop, especially when their Scoutmaster thought him dishonest from the outset. Nor does a lack of formalities exonerate BSA from failing to exercise its right to exclude unregistered volunteers from Scouting—a right BSA argued was of *constitutional* magnitude to the United States Supreme Court—or absolve BSA from its failure to warn participants that Scouting was known to pose a consistent and ongoing problem of sexual molestation of young boys. BSA never warned

N.K. or other Scouts, even though it had known for decades prior that approximately 60 new child molesters a year were discovered in its ranks—each and every year like clockwork.

Respondents each raise slightly different arguments as to (1) why they had no relationship with N.K. or Hall; (2) why they have no liability without knowledge of Hall's danger; and, (3) why there was no causation between their allowing a drifter to run N.K.'s Troop and N.K.'s subsequent molestation by that stranger. N.K.'s opening brief anticipated most of these arguments and set out the reasons why they are liable. In this reply, N.K. addresses further issues raised by Respondents, corrects their incorrect reading of Washington law, and rebuts their shading of the facts in their own favor, in contravention of the proper standard.

First, all Respondents deny that inviting an 11 year old boy to participate in a program run by unrelated adult men created a special relationship of protection. LDS denies any relationship with N.K. because N.K.'s first instance of sexual abuse occurred at N.K.'s home, despite multiple later instances of abuse on LDS grounds and despite testimony that Hall gained access to N.K. because of Hall's participation in the Troop. However, LDS's special relationship with N.K. here is logically indistinguishable from the type of special relationship recognized in *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 727, 985.P.2d 262 (1999).

For their part, BSA and PHC disclaim a special relationship with N.K. by arguing they never had custody of N.K., even though they controlled who was allowed into Scouting, they invited N.K. to take part in a program designed and governed by them to achieve their goals, and N.K. paid them to participate in that program. BSA and PHC built the means through which Hall was able to molest N.K., retained control over it, and should not be allowed to say they had no relationship to N.K. or other boys who were invited into their program and paid to participate.

Second, even without a relationship with N.K., Respondents had a “special relationship” with Hall.⁶ Washington recognizes that control over a third party creates a special relationship with that party, and these Respondents clearly could control Hall by excluding him from Scouting. Respondents also had a special relationship with their Scoutmaster, Ben Danford, over whom they had a right of control when he decided whether to allow Hall to participate in Scouting. There is no question that Respondents allowed Danford to run Troop 155, and there is no requirement for a special relationship with Hall to impose liability for Danford’s negligence. The brief filed by BSA before the United States Supreme Court claiming total control over who can be a Scout leader

⁶ Respondents seem to argue in places that N.K. must prove a special relationship between Respondents and N.K. *and* between Respondents and Hall. This is legally incorrect—liability can lie where the defendant shares a special relationship with either the perpetrator *or* the victim. *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 190, 252 P.3d 914 (2011).

shows the disingenuousness of BSA’s claim that “BSA and the Council have *no role whatsoever* in whom the bishopric selects ... nor whom the congregation votes to sustain as Scoutmasters.” BSA Br. at 24 (emphasis added). In truth, BSA retained the ability to accept or exclude individuals from participation in Scouting as a “matter of obvious right.”

Third, there is no basis in case law or in logic to reject the venerable case of *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953), which allowed a known or obvious dangerous *situation* to serve as a basis for liability. *McLeod* has not been overruled by later cases involving known dangerous individuals. This is particularly evident in *Niece v. Elmview Group Home*, 131 Wn.2d 39, 62 n. 4, 929 P.2d 420 (1997), which stated “there is no reason to differentiate between foreseeable harms caused by potentially hazardous physical conditions (*McLeod*), visitors (*Shepard*), or staff.” The dangerousness of allowing an unknown transient the sole control over a program involving a group of trusting, young boys was or should have been obvious to LDS based on simple common sense—a concept endorsed by *McLeod*—and was unquestionably apparent to BSA and PHC because of their decades-long experience with the IV files. Furthermore, N.K. was molested in the literal equivalent of *McLeod’s* darkened room—the lockable Scout cabin on LDS grounds—something N.K. testified happened as often as weekly.

Fourth, causation is a jury question unless there is some type of extreme circumstance that would make causation impossible. Here, there are no such circumstances. The first time N.K. was abused by Hall was in his home, but he only allowed Hall in his home because Hall was his Scout leader. CP 1197. Additionally, N.K. testified that Scout meetings were occasions for Hall to abuse him in the Scout cabin, CP 1188-89, 1191, and another witness testified Hall abused him at the Scout cabin during Scout sleepovers. CP 1276. Because the Scout cabin locked, Hall had to have a key. Furnishing N.K.'s abuser with both authority and a private place to molest N.K. renders causation a jury question certainly as to LDS. As for BSA, with the right to exclude unregistered people from Scouting, and with Scouting being the reason Hall had so many opportunities to molest N.K., it is a question for the jury whether properly excluding Hall would have prevented N.K.'s abuse. N.K. was molested many, many times, so even if one ignores the abuse that occurred at N.K.'s home, at Hall's home, or outside of official Scout activities, there remain numerous instances of abuse directly tied to Hall's presence at Scouting activities. These are not excused just because N.K. was also abused elsewhere. There is ample evidence for a jury to find that Hall's role in Scouting was a causal factor in much, if not all, of N.K.'s abuse.

Finally, the trial court erred in allowing LDS to conceal evidence regarding the key issue in this case: whether LDS failed to take

reasonable steps to protect N.K. from being sexually abused based on its knowledge of that danger, including abuse by Boy Scout leaders like Hall. N.K. had a constitutional right to discover this relevant information, and the trial court erred in denying him that right by concluding LDS could conceal its knowledge by hiding it in its disciplinary files, particularly after the Washington Supreme Court's recent decision in *Lowy v. Peacehealth*, __ P.3d __ (Wash. June 21, 2012).

B. Standard for Summary Judgment

The trial court below, and the Respondents on appeal, studiously ignored facts and inferences favorable to N.K., or took any such inferences in Respondents' favor. This was error. *See Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993); *see also Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (this Court must "assume facts most favorable to the nonmoving party"). All factual disputes must be viewed in N.K.'s favor for this *de novo* review.

C. Respondents Had a Special Relationship with N.K. and Hall

Washington "recognize[s] a duty to prevent intentionally inflicted harm where the defendant is in a special relationship with *either* the tortfeasor *or* the victim, and where the defendant is or should be aware of the risk." *C.J.C.*, 138 Wn.2d at 724 (emphasis added); *Donohoe v. State*, 135 Wn. App. 824, 836, 142 P.3d 654 (2006) (so holding and quoting Restatement (Second) of Torts § 315 (1965)).

Special relationships exist when there is an ability to control:

Many special relationships give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties.” *Niece*, 131 Wn.2d at 44. ... [A] school has a duty to protect students within its custody from reasonably anticipated dangers, an innkeeper has a duty to protect its guests, and a hospital its patients. *See Niece*, 131 Wn.2d at 44-45 (citing cases). Similarly, even where an employee “is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.” *Niece*, 131 Wn.2d at 48. ... In important aspects, however, the activities of a church generate the kind of relationships where we have, in other contexts, imposed a duty of reasonable care.

C.J.C., 138 Wn.2d at 721.

1. Respondents Had a Special Relationship with N.K.

“The duty to protect another person from the intentional or criminal actions of third parties arises where one party is entrusted with the well being of another.” *Kaltreider v. Lake Chelan Cmty. Hosp.*, 153 Wn. App. 762, 766, 224 P.3d 808 (2009). Washington views children as particularly vulnerable because they “generally lack the experience, judgment, knowledge, and resources to effectively assert their rights.” *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 722, 257 P.3d 570 (2011). They are held to be defenseless in sexual assault situations: “as a matter of public policy, ... children do not have a duty to protect themselves from

sexual abuse by their teachers.” *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 70-71, 124 P.3d 283 (2005).

C.J.C. analogized a church’s role to that of a school:

The children of a congregation may be delivered into the custody and care of a church and its workers, whether it be on the premises for services and Sunday school, or off the premises at church sponsored activities or youth camps. As in other agency relationships, a church chooses its officials, directs their activities, and may restrict and control their conduct. ... ***As a matter of public policy, the protection of children is a high priority.*** In general, therefore, we find churches (***and other religious organizations***) subject to the same duties of reasonable care as would be imposed on any person or entity in selecting and supervising their workers, or protecting vulnerable persons within their custody, so as to prevent reasonably foreseeable harm.

138 Wn.2d at 721-22 (emphasis added). The breadth of *C.J.C.*’s expansion of a duty toward children placed in another’s care must guide this Court’s analysis of the special relationships at issue here.

LDS’s special relationship and duty of protection to N.K. is indistinguishable from that in *C.J.C.* LDS also faces special relationship liability for at least some of the abuse because it controlled the premises on which that abuse occurred. *Boy 1 v. Boy Scouts of Am.*, 832 F. Supp. 2d 1282, 1288 (W.D. Wash. 2011). Having invited N.K. and other LDS ward boys to participate in Scouting, CP 1254, 1275, and 1281, LDS cannot hide from the duty to protect that arises after the boys accepted.

BSA also had a special relationship with N.K. “[R]elationships between a defendant and a foreseeable victim that have been previously recognized by Washington courts as ‘special,’ and, therefore, giving rise to a legal duty to protect the victim from foreseeable criminal acts of third parties, have been described as protective in nature, historically involving an affirmative duty to render aid.” *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 439, 874 P.2d 861 (1994). Additionally, “most of the existing special relationships involve situations where the prospective defendant ... is benefitting financially from the prospective plaintiff.” *Id.* at 441.

In this case, both factors are present. By Scoutmaster Danford’s own admission, he viewed it as “[a]bsolutely” his responsibility “to protect the boys from harm[.]” CP 1749. Yet he received no training on the signs of child abuse or danger to children of that nature. CP 1741, 1744, 1746. Yet the view of BSA was that they “certainly ... wanted to protect youth,” and they affirmatively undertook an obligation to “protect [Scouts] from adult leaders.” CP 1674. This protection was essential because it was “the policy of [BSA] prior to 1978 [that] boys [were] encouraged to develop close personal relationships with leaders because Boy Scouts believe that providing close personal relationships with adults outside the home helps boys in the difficult process of maturing into adulthood.” CP 1677-78 (quoting material from *Dale* brief, *infra*). Because PHC was similarly tasked with enforcing BSA’s restrictions on

membership (and the attendant protective goals), it too had a special relationship with N.K.

Finally, BSA has a financial interest in individual Scouts' memberships because boys, including N.K., and adults pay a fee to be involved in Scouting and all of this money flows directly to BSA. CP 1199, 1679. Therefore, both the protective element and the financial element are satisfied in this case.

2. Respondents Had a Special Relationship With Both Danford and Hall

Irrespective of BSA's ability to tell Scoutmasters when and where to build a campfire, BSA has argued vehemently—with success in the United States Supreme Court—that it retains complete control over who is approved for and allowed to participate in Scouting. Whether Hall was registered or formally “called” is irrelevant, unless BSA is contending that, say, a homeless, adjudicated, predatory child molester would be allowed to run a Troop, so long as he never registers. BSA either controls who can volunteer, or it does not. BSA's judicial admissions⁷ in *Dale* that it alone controls who can and cannot be a Scout leader, and BSA's

⁷ Arguments made by counsel in an appeal are considered judicial admissions in Washington. *In re Matter of Lynch*, 114 Wn.2d 598, 603, 789 P.2d 752 (1990) (“In the course of his argument and in response to questions from the court, [lawyer appearing as his own counsel] made certain statements which are binding against him as judicial admissions”), citing *Black v. Suydam*, 81 Wash. 279, 290 (1914) (counsel's agreeing to facts as stated by court estopped client from later denying them).

documented control over who could participate, at the very least creates an issue of fact regarding its relationship with Hall.

BSA admitted that it had the “obvious” right to set the standards for Troop 155, its leaders, and its volunteers, CP 1040, 1416-18, and BSA admitted that Danford was the “selected, registered Scoutmaster for the LDS Shelton ward Troop in 1977[.]” CP 1044. N.K. was a member of Troop 155, a Troop chartered by Respondents. They held it out as a safe activity for N.K., they held its leaders out as trustworthy, and they sanctioned its Scout activities where N.K. was abused.

“The scope of employment limits an employer’s vicarious liability for an employee’s torts. It does not, however, limit an employer’s liability for a breach of its own duty of care.” *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 544, 184 P.3d 646 (2008). So too, as a policy matter, the “official” status of a perpetrator has no bearing on whether a duty to protect applies to vulnerable minors while they attend LDS or Scout functions. The special relationship between N.K. and the Respondents does not depend on the official status of a victim:

The vulnerability of children to sexual abuse by adults who are placed in positions of responsibility and authority over their well being, whether of a spiritual or a temporal nature, does not vary depending upon whether the children are members of the church or simply attend on a regular basis.

Funkhouser v. Wilson, 89 Wn. App. 644, 659, 950 P.2d 501 (1998), *aff'd in part and remanded sub nom.*, *C.J.C.*, 138 Wn.2d 699. So too, Hall's particular title is of no import, and the Respondents had a right to control Hall by excluding him from Scouting. Because Respondents had a right to exclude Hall from Scouting, they had a special relationship with him that a jury may conclude gives rise to liability.

Washington recognizes a *right to control* test for agency. *State v. Garcia*, 146 Wn. App. 821, 827-28, 193 P.3d 181 (2008) (“[T]he existence of the right of control, not its exercise, ... is decisive.”); *Poutre v. Saunders*, 19 Wn.2d 561, 565, 143 P.2d 554 (1943) (same). “If the evidence conflicts regarding the relationship between the parties at the time of the injury or if it is reasonably susceptible of more than one inference, then the question is one of fact for the jury.” *Chapman v. Black*, 49 Wn. App. 94, 99, 741 P.2d 998 (1987). BSA burnishes that right very brightly when it wishes. In point of fact, BSA subjects Scout leaders to intense control in their daily conduct with Scouts, their selection process, and the right to remove leaders even for beliefs or conduct wholly independent of and separate from Scouting (and away from Scouting)—such as sexuality and sexual orientation, drug and alcohol use, and religious faith and practice.

In a selective bit of sophistry, BSA states that “BSA and the Council have no role whatsoever in whom the bishopric selects ... nor

whom the congregation votes to sustain as Scoutmasters.” BSA Br. at 24. However, in between those two events, BSA and PHC have the absolute discretion and final approval to determine who is and who is not allowed to participate in Scouting. CP 1643-44, 1669, 1671, 1708 (BSA retains right to set standards for participation in Scouting and has final say in approving volunteers). BSA could have required any type of training it wished, and was able to set the exact criteria a person needed to participate in Scouting. CP 1672 (BSA “could have required all sorts of things”).

As noted above, BSA’s right to remove, deny participation, or exclude also continues after such an appointment by the Troop—at the time set out in the “Procedures for Maintaining Standards of Leadership.” CP 1415-30; *see also* Constitution and Bylaws of Boy Scouts of America at 78-79, CP 1631. The Procedures showed BSA’s complete control over the removal and exclusion process, they were binding on the local councils like PHC, and the councils enforced the Procedures against individual Troops. CP 1693. Further evidencing BSA’s control over participation, BSA executive Martin Walsh testified that BSA had the right to and does demand that all volunteers in Scouting be registered, has the discretion to exclude anyone from participation, and has the final say in renewing charters for all Troops. CP 1665-69.

All of this evidence, combined with the judicial admissions found in the *Dale* brief discussed below, demonstrate that even in the unlikely

event an unregistered individual like Hall was not an agent, nevertheless Scoutmaster Danford *was* BSA's agent, if for no other purpose than deciding which adults could participate in Scouting activities. BSA had the right to control whom he allowed to volunteer, and Danford, acting as Scoutmaster for the LDS ward's Troop, allowed a stranger he did not trust to take full and private control over a group of boys.

Contrary to BSA's response brief, N.K. does not assert that BSA has "no control over local community organizations." Rather, BSA has *total* control over whom they allow to volunteer. BSA's Petitioners Brief on the Merits in *Boy Scouts of America v. Dale*, 530 US 640 (2000), illustrates exactly this control. In *Dale*, BSA strenuously argued that it (*and it alone*) retains—and *must* retain as a matter of constitutional principle of First Amendment free association—complete control in the selection of Scout leaders. Taking BSA's brief on the merits in *Dale* as judicial admissions, it is apparent that BSA retains a significant right to control the conduct of its Scout leaders, irrespective of whether control is actually exercised. BSA should not be permitted to say one thing to this Court after saying the exact opposite to the United States Supreme Court.

BSA's *Dale* brief begins with a recitation that the "mission" of BSA is to "instill the values of the Scout Oath and Scout Law in youth[.]" *Defendant BSA's Brief for Petitioners* at 2 (the following citations are to the *Dale* brief, and its internal quotation marks are omitted).

“Responsibility for inculcating Boy Scouting’s values is entrusted to the volunteer Scoutmaster and Assistant Scoutmasters.” *Id.* at 3. The Scoutmaster is a “wise friend to whom [the Scout] can always turn for advice.” *Id.* This “advice” is not limited to how to tie knots and set up tents, but includes answering “questions about growing up, about relationships, sex, or making good decisions.” *Id.* Likewise, Scout leaders are instructed to “[b]e open and clear when talking to [Scouts]” about these same topics. *Id.* Scout leaders “necessarily teach by example” by their mere presence, and Scouts “rely on [Scout leaders] to be consistent in [their] behavior and beliefs.” *Id.* at 3–4. BSA refers to this leading by example as one of the “responsibilities” of its leaders. *Id.* at 4.

BSA views Scoutmasters as “leaders” of BSA. *Id.* at 32–34. To become a Scout leader, a candidate must be approved by the sponsoring institution, the local council, “and Boy Scouts of America.” *Id.* at 4. It is therefore patently false that a sponsoring organization alone could have approved of the appointment of a Scoutmaster, as insinuated by BSA here. In fact, BSA in *Dale* asserted without qualification that “[n]o adult leader can be appointed” without BSA’s annual approval. *Id.* at 4. Scout leaders “must pass muster under a number of informal criteria designed to select individuals capable of accepting responsibility for the moral education and care of other people’s children,” and meet the “qualities deemed necessary by BSA[.]” *Id.* at 4, 10. Scout leadership is “not open to the public,” and

BSA reserves the right to reject any prospective leader “for various views and behaviors which [*sic*] *Boy Scouts of America deems inconsistent*” with its values. *Id.* at 4, 10 (emphasis added).

BSA enforces these strictures against local Troops. At issue in *Dale*, BSA “revoked” a Scout leader’s registration for being openly gay. *Id.* at 8; *see also id.* at 5 (discussing BSA’s refusal to allow gay Scout leader in California case). The Troop did not do it; the local council did not do it. It is BSA that excludes homosexuals from positions as Scout leaders (in *Dale’s* case an Assistant Scoutmaster), applying this to all Troops in the nation. *Id.* at 5–6 (after a 1981 lawsuit by another gay man seeking to act as a Scout leader, “Boy Scouts of America promulgated a series of position statements for Scout officials”). BSA excludes these men because “private expressive associations have the right to choose leaders[.]” *Id.* at 20. Notably, this means BSA views individual Troops as part of its own “private expressive association”—when it suits them.

Scout leaders are also intended to use a mentoring relationship as the primary tool to instill its values in boys. “Boys are encouraged to develop close personal relationships with [Scout] leaders because Boy Scouts believes that providing a close personal relationship with an adult outside the home helps boys in the difficult process of maturing into adulthood.” *Id.* at 41. After this stirring and successful defense of its right to exercise plenary control over Scout leaders before the Supreme Court,

BSA cannot now argue that it is simply the purveyor of pamphlets that LDS could choose to follow or reject.

BSA cites *Mauch* and a number of cases from other jurisdictions that have held in different contexts that BSA did not control Scoutmasters during the acts that caused injury. However, these cases do not address BSA's liability for negligence that is within the scope of BSA's authority to regulate—specifically in this case, BSA's stated right to exclude anyone it wishes from Scouting. N.K. is not dispensing with “niceties” of agency law in assigning liability here; instead, he is simply taking BSA at its word in recognizing BSA's insistence that it alone controls who can participate.

Merely the level of control shown here is enough to prevent summary judgment on the issue of agency. In *Mayfield v. Boy Scouts of Am.*, 643 N.E.2d 565, 569 (Ohio Ct. App. 1994), the Court held that the control exercised by BSA over Scout leaders was sufficient to create a jury question about agency where a boy was hit in the face by a tree being felled in the course of a Scout camp-out:

[T]here is some evidence that Boy Scouts of America *retained a degree of direction and control* over Pack 157 and Hutson. Boy Scouts of America's policies, procedures, rules, and regulations governed Pack 157 and its leaders. Boy Scouts of America provided Hutson with Scouting booklets and manuals that included instructions on supervision and training. Boy Scouts of America's liability insurance covered Hutson as an adult volunteer leader, and Hutson was required to wear a particular Boy Scouts of America uniform at Scouting activities. Boy Scouts of

America also retained the authority to discharge Hutson if it was determined that Hutson was an atheist, a convicted felon, a homosexual, or if Hutson registered females into Pack 157.

Id. at 569 (emphasis added). That same right to control would seem to extend to many, if not all, duties of a Scout leader on behalf of BSA. See *Lourim v. Swensen*, 977 P.2d 1157, 1160 (Or. 1999) (a “jury ... could infer that ... the assaults were a direct outgrowth of and were engendered by conduct that was within the scope of [the Scout leader’s agency] ... [or] the direct result of the relationship sponsored and encouraged by the Boy Scouts, which invested [him] with authority to decide how to supervise minor boys under his care.”).

Contrast *Mayfield* and *Lourim* with *Mauch v. Kissling*, 56 Wn. App. 312, 313, 783 P.2d 601 (1989), and other cases cited by BSA. In *Mauch*, a Scout rode in an airplane with a Scoutmaster who “made low altitude overflights ... to drop newspapers and ice cream to the Scouts at the camp” and then crashed. *Id.* Even then, the issue was not agency but apparent agency, where “there must be evidence the principal had knowledge of the act which was being committed by its agent.” *Id.*, at 316. There were no allegations that BSA had the right to control the overflights of a camp. *Mauch* held that the Scoutmaster was not BSA’s apparent agent, and in doing so, the Court quoted from a 1935 California case, *Young v. Boy Scouts of America*, 51 P.2d 191 (Cal. Ct. App. 1935), that discussed in *dicta* the agency nature of BSA’s relationship with Troop

leaders. *Id.* at 193-94. However, the agency relationship or lack thereof in *Young* was not the Court's basis because it then "assume[d] that this Scoutmaster is to be considered as the servant and agent of the defendant corporations ..." *Id.* at 194. None of this precedent applies here.⁸

BSA also cites *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998) (restaurant employees murdered during restaurant robbery), and *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808 (Iowa 1994) (employee assaulted at restaurant by third party), but what the franchisors controlled in those cases was not the harm-producing lapses. Compare those cases with *Miller v. McDonald's Corp.*, 945 P.2d 1107 (Or. Ct. App. 1997), where McDonald's control over the food preparation process was sufficient reason to hold the franchisor liable. *See also Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 166 Wn. App. 844, 855, 271 P.3d 373 (2012) ("[t]he significance of the principal's right to control the agent's operation pertains particularly to the control or right of control over those activities from whence the actionable negligence flowed.").

⁸ BSA also cites *Mitchell v. Hess*, 08-C-847, 2010 WL 1212080 (E.D. Wis. Mar. 23, 2010), which rejected liability for BSA based on BSA issuing trip permits when leaders take Scouts to conferences. However, *Mitchell* contains no analysis of agency issues, whatsoever, and was decided in what can only be considered an exercise in policymaking from the bench. Indeed, the Court in *Mitchell* made no mention of whether the Scoutmasters were agents of the local council, even though "requiring Troops to obtain Local Tour Permits, the Council further reinforced its safety training by insisting that specific safety measures were followed[.]" *Id.* at *5. The ultimate basis for the Court's rejection of liability there was simply this: "I am satisfied that the strongest reason to preclude liability under the circumstances of this case on public policy grounds is because allowing 'recovery would enter a field that has no sensible or just stopping point.'" *Id.* at *6.

Notably, if Hall was merely openly gay instead of a transient child molester, then BSA—and LDS—would argue vociferously that they had the power to exclude him from Scouting. *See* CP 1671. Were that the case, these Respondents would undoubtedly be trumpeting the “close personal relationship” that Scouts share with their leaders to prevent any gay adult from being allowed to volunteer. Furthermore, far from simply seeing “the danger of molestation in general” in its IV files, BSA promoted their program as one that was safe and beneficial for boys largely because BSA’s selection and control over volunteers made it quite different from the general population.

Because of BSA’s and PHC’s strict control over leadership and participation in Scouting, they had the right to exclude unregistered people from participation, and knowing the program was dangerous, had the obligation to warn participants of the dangerous condition. Scoutmaster Danford acted as each of the Respondents’ agent in excluding people from Scouting, and all Respondents had a “special relationship” with Hall because they could control him by physically excluding him from Scouting and/or LDS premises.

D. Negligence Can be Based on Failure to Correct or Warn About Dangerous Conditions

Actual or constructive knowledge of a risk is one of the elements needed to impose liability for third party acts, along with a special

relationship. *C.J.C.*, 138 Wn.2d at 724. N.K.’s position is that the nature of the risk giving rise to liability is variable, not the elements of special relationship, knowledge of danger, and causation.⁹ Only *Niece* made explicit that there is no conceptual distinction to be made based on where the danger originates: “there is no reason to differentiate between foreseeable harms caused by potentially hazardous physical conditions (*McLeod*), visitors (*Shepard*) or [employees/agents].”

None of the Respondents provide a compelling justification for refusing to apply binding precedent of the Washington Supreme Court in *McLeod*. This case involves a child who was sexually assaulted in a locked building controlled by LDS during Scout events, and the assault was foreseeable based both on common sense and BSA’s particular knowledge of the dangers of the Scouting program. Indeed, BSA knew that unregistered adults had been known to abuse children. CP 1714 (answering affirmatively the question of whether “the confidential files provide an accurate record of those registered or *unregistered volunteers* ... who had allegedly sexually molested youth”) (emphasis added).

LDS argued their Scouting program did not present an obvious danger by giving a complete stranger control over a group of boys and access to a lockable “cabin”—a situation functionally identical to

⁹ Respondents misread N.K.’s opening brief at 33 in that regard.

McLeod.¹⁰ *McLeod* has never been overruled, despite all Respondents' attempts to limit its reach. In *McLeod*, the factual allegations were:

... that the school boys who committed these crimes were fifteen years of age; that respondent knew or should have known that acts of indecency do occur when children of that age are not supervised; and that the school children had unrestricted access to a darkened room located in an out-of-the-way part of the building, to which room entrance could be made through only one door.

42 Wn.2d at 324. Despite being “unusual, improbable and highly unexpected,” the chance of rape was within “the general field of danger” because it was obvious that “the darkened room under the bleachers might be utilized ... for acts of indecency[.]” *Id* at 322. “[T]he fact that the particular harm turned out to be forcible rape rather than molestation, indecent exposure, seduction, or some other act of indecency, is immaterial.” *Id.* at 322. LDS had at least constructive knowledge that leaving children alone with a shifty stranger could be dangerous—and the man who thought Hall was untrustworthy was the one who left him in charge of the Troop. It would not matter if the entire rest of the ward thought Hall was wonderful; Danford did not, and Danford controlled access to the Troop on behalf of the Respondents. Further, BSA’s experience with the IV files only makes the molestation more expectable, and would trigger a duty to train its agents.

¹⁰ LDS’s arguments highlight why it was error for the trial court to deny N.K. discovery of LDS’s knowledge of child sexual abuse, including abuse in Scouting.

Therefore, under Washington law, an obviously dangerous situation creates liability for institutions taking charge of children, irrespective of whether later cases have discussed dangers from individuals. This Court and the trial court are bound by that precedent, and the alternative precedent cited by Respondents is neither persuasive nor binding under these facts, and in any case it does not preclude the imposition of liability when a church or youth group allows a stranger to take sole authority over a group of 11 to 13 year old boys. *Someone* is responsible for granting Hall control of Troop 155.

E. At the Very Least a Jury Must Decide Causation

“A proximate cause is one that in natural and continuous sequence, unbroken by an independent cause, produces the injury complained of and without which the ultimate injury would not have occurred.” *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn. App. 326, 330, 966 P.2d 351 (1998). However, this “but for” causation does not prevent assessing liability for acts outside the immediate control of a defendant. *C.J.C.*, 138 Wn.2d at 727 (“a principal may not turn a blind eye to a known or reasonably foreseeable risk of harm ... simply because the injury is arbitrarily perpetrated off premises or after hours.”).

For instance, causation can lie where a defendant provides authority over and access to children:

... a jury could reasonably find Wilson's position in the Church was a causal factor in the resulting harm. Wilson was a prominent member of the Church, placed into positions of trust over children. This position not only brought him into close connection with the children of the congregation, it allegedly inspired confidence to place the plaintiffs into his care

Id. at 725.

In this case, “[w]hether there was a causal connection between the harm and the fact of [Hall’s] position in [Troop 155], or whether the risk of harm was or should have been reasonably foreseen at the time the harm occurred, are questions of fact to be determined by the jury.” *See id.* at 727. N.K. and his mother both testified that Hall’s role in Scouting was an important causal factor in N.K.’s abuse. N.K. testified that the first time he was abused by Hall it was in his home, but that he *only* allowed Hall in his home because Hall was a Scout leader in the Troop. CP 1197. N.K.’s mother testified that she allowed her son to spend significant time alone with Hall because of Hall’s involvement in LDS and with Scouting:

[Hall] was a friend, but it would have been inappropriate for him to spend time with our son if he had not been active in the church and a Scout leader of Troop 155. The only reason we allowed our son to participate in activities with him, including camping trips, sleep-overs, Scout meetings, and other Scout activities, is because he was active in the church and a leader of Troop 155.

CP 1365-66. N.K.’s mother further confirmed that had she known about abuse in Scouting, she would have taken steps to protect her son, as anyone would. CP 1366. N.K. also testified that a significant amount of

abuse occurred in the direct context of Scouting activities. CP 1188-91. Keeping Hall out of Scouting would have removed the imprimatur that his association with Scouting engendered.

LDS's causation argument posits that because N.K. was first abused in his home, then somehow even subsequent abuse could not have been caused by LDS's negligence in allowing Hall to commandeer its Troop. BSA attempts to argue that because Hall did not register, its conduct could not cause N.K.'s abuse even though it had the right to approve and exclude unregistered adult volunteers. PHC argues that Hall was a family friend, so there is no connection to Scouting or the church. None of these contentions are correct. Each of the Respondents had the right to control who Danford allowed to participate in Scouting activities, and who was entitled to be a Scout leader.

Unquestionably from a physical standpoint, if Scoutmaster Danford had done his job and remained around the Troop, Hall would not have been able to physically isolate and molest N.K. at Scouting activities. Both N.K. and another witness testified to abuse at the Scout cabin, some during Scout sleepovers. CP 1188-91, 1276. If Danford was present, Hall would not have had the opportunity to abuse these boys. The Scout cabin also locked, CP 1741, Hall had a key, CP 1198, and he had to be left alone with Scouts in the cabin for abuse to occur. LDS had control over its own property, so it must have given Hall a key to the cabin, and with the key, a

private place to molest boys. Indeed, LDS's Bishopric affirmatively authorized Hall's participation in Scouting, CP 1314 ("the Bishopric decide[d] that [Hall] would be a Boy Scout volunteer"), so a jury could easily infer that LDS provided Hall with the key to the cabin.

Likewise, BSA and PHC controlled who could participate in Scouting, and they controlled training for Scout leaders. CP 1672. Yet Danford failed to exclude Hall, and he received no training on recognizing the signs of child abuse or the risk of molestation in Scouting. CP 1741, 1744, 1746, 1752. A jury could reasonably find that failing to train Danford to exclude unregistered adults and/or failing to train him to recognize patterns of child molestation gleaned from the IV files causally contributed to N.K.'s abuse. BSA had the right and unfettered ability to disclose the prevalence of child molestation in its closed, access-controlled organization. Nevertheless, it did not, and N.K. and his mother relied on that lack of exclusion and disclosure to N.K.'s detriment.

Finally, the idea that Hall abused N.K. because he was a family friend is materially disputed by N.K.'s testimony that he allowed Hall in his home for the first instance of abuse *only* because of Hall's role in Scouting. It also discounts his mother's testimony that she would have found it suspicious if a mere "family friend" wanted to go camping and

spend significant time alone with her 12 year old son.¹¹ A jury could reasonably understand that Hall’s Scouting role—irrespective of Hall’s actual agency or status with BSA or PHC—gave him more than a mere opportunity to abuse N.K.; it gave Hall *cover*. Based on these facts, a jury could certainly find that N.K.’s abuse could have been avoided in total or in part if Hall had been excluded from Scouting.

F. The Trial Court Erred in Preventing N.K. from Obtaining Any Evidence Regarding LDS’s Knowledge of the Danger

It is undisputed that LDS refused to disclose its knowledge of the danger of child sexual abuse, and despite two motions to compel and a motion for reconsideration, it is undisputed that the trial court rejected every effort by N.K. to discover that information. The trial court erred in doing so because N.K. has a constitutional right to discovery, and no court, let alone a Washington court, has ever concluded that a religious entity can shield its knowledge of a danger.

1. N.K.’s Recitation of the Facts and Rulings is Correct

The devil is in the details when it comes to the “salient points” at the start of LDS’s brief on this issue:

¹¹ PHC presents the mother’s declaration testimony as some type of “contradiction” with her deposition testimony that must be ignored by the Court under *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107, 1109 (1989). But the deposition question was not “Is one of the reasons you let Dusty –or you let Kevin stay at Dusty Hall’s apartment is because he was affiliated or he was connected with the Boy Scouts?”

- LDS asserts it “had no responsive information” regarding its knowledge and handling of child sexual abuse, but then admits such information exists in its disciplinary files. LDS Br. at 40.
- LDS suggests the trial court merely limited the time frame of N.K.’s discovery requests and CR 30(b)(6) notices, LDS Br. at 40, but ignores that N.K. had to file two motions to compel against LDS because it refused to abide by the trial court’s order, CP 566-78, 1093-1105, 1810-21, which the trial court then denied. CP 700-01, 1958, 1987-88.
- LDS claims the disciplinary files contain only confidential statements made during a disciplinary hearing, LDS Br. at 40, but ignores that (1) LDS told the trial court it had never reviewed the files,¹² CP 492-93, (2) not every investigation involves a confession, such as investigations that are conducted when the member refuses to confess, CP 555-56, 571, (3) its own policies state the disciplinary files include more than just a report of the disciplinary hearing, such as a summary of the evidence, the testimony that was received, and the decision that was entered, CP 561-62, 572, (4) LDS admitted the outcome of “serious” transgressions was shared with the general membership and reflected on the person’s non-confidential membership file, CP 527-29, 561-62, 571, and (5) N.K. repeatedly made clear that he was only requesting non-privileged information that was included or memorialized in the files, which LDS claims is the only remaining record of that information, CP 688.
- LDS claims in the same bullet point that it did not argue the First Amendment prevents a secular court from ordering it to account for its knowledge of child sexual abuse, but in the next sentence states “[t]he Church argued that the First Amendment protects its right to follow Church doctrine by maintaining the confidence of the disciplinary files and using them solely for ecclesiastical and not risk-management purposes.” LDS Br. at 40-41.

¹² As discussed in more detail below, LDS’s attorney represented that he had never reviewed the files, but LDS also represented that certain high-ranking leaders have access to the files. It is therefore unclear why LDS relies on statements made by its attorney and risk manager to inform the Court what is contained in the files, rather than statements by those who have actually reviewed the files. This is also why N.K. specifically asked the trial court to allow him to depose a CR 30(b)(6) witness about these files.

2. The Trial Court Abused Its Discretion by Limiting N.K. to One Year of Notice Evidence (and then Denying Him Any Notice Evidence)

N.K. asked LDS to produce a CR 30(b)(6) witness to testify about the records it maintained on individuals who have been accused of sexually abusing children. CP 180. The trial court limited N.K. to information from 1975-1977. CP 414. In practical terms this was one year of evidence because Hall began abusing N.K. in April 1977.¹³

The trial court erred in limiting N.K. to one year of notice evidence because it was manifestly unreasonable to do so. The key issue in this case is whether LDS took reasonable steps to protect N.K. when it knew or should have known that men like Hall were using the Boy Scout program to groom and abuse children. By limiting N.K. to one year of notice evidence, the trial court prevented N.K. from obtaining the evidence he needed to prove the notice requirement, particularly where LDS claims it had no knowledge of the danger posed by Hall, no knowledge of the danger posed by the Boy Scout program, and no knowledge of the danger of allowing a drifter to take charge of a Troop.

By limiting N.K. to one year of notice evidence, and later denying him any notice evidence, the trial court improperly prevented N.K. from

¹³ As discussed below, the trial court eventually denied N.K. any notice evidence because LDS refused to produce a CR 30(b)(6) witness on this topic and the trial court denied N.K.'s motion to compel the witness or answers to his written discovery requests.

showing that these risks were foreseeable harms. *C.J.C.*, 138 Wn.2d at 721-22 (a survivor of childhood sexual abuse must prove the defendant failed to take reasonable steps to protect him from foreseeable harm).

3. LDS Refused to Honor the CR 30(b)(6) Notices and the Trial Court Denied Two Motions to Compel and a Motion for Reconsideration

It is disingenuous for LDS to suggest “N.K.’s attorneys, for reasons unknown, never took the depositions as limited in time by the order,” LDS Br. at 41, because (1) N.K. tried to take the depositions, but LDS refused to produce witnesses, and (2) the trial court denied every effort N.K. made to obtain this information.

After the trial court limited N.K. to the 1975-1977 time frame, N.K. requested a CR 30(b)(6) witness from LDS to testify about its knowledge and handling of child sexual abuse during that time frame, including “allegations of childhood sexual abuse by a Boy Scout volunteer.” CP 532-41. However, LDS refused to produce a CR 30(b)(6) witness, stating it would “be in touch” and “[i]f we wind up filing a motion for protective order, we understand that the dep (if it occurs at all) will need to occur after the fact discovery cutoff.” CP 543.

After no response and no motion for a protective order, N.K. re-requested the deposition. CP 545. LDS refused, CP 547-49, the parties held a CR 26(i) conference, CP 551-52, but LDS maintained its objections. CP 492-93. N.K. then moved to compel the testimony: “...

Plaintiff has tried to obtain this evidence in just about every way possible, including interrogatories, requests for production, and a CR 30(b)(6) notice.” CP 566-77. N.K. asked the trial court to compel the deposition, but “[i]f COP opposes this motion and refuses to produce a CR 30(b)(6) witness, the Court should order COP to respond to Plaintiff’s interrogatories and requests for production.” CP 567.

The trial court denied N.K.’s motion, concluding information regarding LDS’s knowledge of the danger was “(a) protected by the state clergy-penitent privilege; (b) protected by the First Amendment to the United States Constitution, (c) irrelevant and not reasonably designed to lead to the discovery of admissible evidence, and (d) not limited in scope pursuant to this Court’s previous discovery orders.” CP 700-01.

N.K. moved for reconsideration. CP 1093-1105. When the trial court did not timely rule on that motion, N.K. filed a separate motion to compel LDS “to supplement its discovery responses regarding its knowledge and handling of child sexual abuse between 1971 and 1977, including the files that it revealed for the first time in response to Plaintiff’s separate motion to compel a CR 30(b)(6) witness on this topic.” CP 1810-21.¹⁴ Again, N.K. explained he was filing the motion “because he has tried to obtain this evidence in just about every way possible,

¹⁴ As discussed below, in response to N.K.’s motion LDS revealed for the first time that it possessed “risk management files” that contain information regarding abuse of children between 1975-77.

including interrogatories, requests for production, and CR 30(b)(6) notices, but [LDS] has refused to produce it.” CP 1811.

The trial court did not rule on N.K.’s motion for reconsideration until three days after it granted LDS’s motion for summary judgment, at which time it denied N.K.’s motion. CP 1947-49, 1958. On the fourth day, it denied N.K.’s motion to compel written discovery. CP 1987-88.

Given this procedural history, it is unclear why LDS suggests N.K. abandoned the deposition topics. Nothing could be more untrue.

4. The Trial Court Concluded LDS Knowledge of Child Sexual Abuse Was Not Discoverable

It is unclear why LDS suggests the trial court did not conclude information regarding its knowledge of the danger was not discoverable, LDS Br. at 41, because (1) that is what LDS argued below, CP 591-93, CP 1936-37, and (2) that is what the trial court concluded when it denied N.K.’s motions to compel and motion for reconsideration. CP 547-49, 591-93; CP 700-01, 1958.

5. Neither the Washington Constitution Nor the Federal Constitution Allow a Religious Entity to Conceal Non-Privileged Information

It is undisputed that LDS possesses information regarding its knowledge of child sexual abuse before N.K. was abused, LDS just believes it can shield all such information, including non-privileged information, by washing it through its internal disciplinary process. CP

585; LDS Br. at 43-46 (stating it “had no records or information of reports of sexual abuse during 1975-77 outside of the privileged disciplinary council context”). The trial court erred by agreeing with LDS and denying N.K. access to that information. CP 547-49, 591-93; CP 700-01, 1958.

a) LDS Cannot Use a Privileged Process to Shield Non-Privileged Information

The record in this case demonstrates why it was error for the trial court to conclude LDS has no duty to account for the non-privileged information in its disciplinary files. At the outset, it is important to note that this case raises a very different issue than *Jane Doe v. Corp. of the President of Church of Jesus Christ of Latter-day Saints*, 122 Wn. App. 556, 90 P.3d 1147 (2004), which was exclusively relied upon by both LDS and the trial court. Whereas the issue in *Doe* was whether the plaintiff could obtain a copy of the report generated as a result of the pedophile’s confession, which the Court concluded was privileged on the record before it, N.K. specifically sought CR 30(b)(6) testimony regarding non-privileged information that is contained in the disciplinary files:

Unlike *Doe*, plaintiff does not seek all of the Church’s confessions or the resulting disciplinary files. Instead, plaintiff asked [LDS] to produce a witness who can answer basic questions about [LDS] knowledge of child sexual abuse in 1975, 1976, and 1977, including abuse by Scout volunteers. With the existing record in this case, Plaintiff understands that information [LDS] learned *solely inside* a disciplinary council is privileged, but [LDS] admits information it learned *outside* is not privileged.

CP 688 (emphasis in original).

N.K. stressed this distinction throughout his motions, CP 574-76, 687-88, 1096-97, 1816, particularly after LDS admitted that information it receives outside of a disciplinary hearing is not privileged, CP 588-89, but the trial court still allowed LDS to shield non-privileged information.

The trial court also erred in relying on *Doe* because the record in this case is different than the record that was presented in *Doe*.¹⁵

First, while disciplinary records may be “commonly” generated after a confession, not all records reflect confessions. Rather, a member can deny the allegations (or skip town, like Hall) and LDS will still investigate and conduct a hearing. CP 556, 571. LDS ignores this.

Second, the outcome of the disciplinary process is not confidential or privileged. Instead, the outcome was *shared with the entire membership*, CP 561-62, and “those who are known to have engaged in serious misconduct such as child abuse are typically excommunicated or disfellowshipped. This disciplinary status would appear on a membership record if the person moved to a new congregation.” CP 527-29, 571. While the file might contain privileged communications, nowhere does LDS explain how the result is privileged when it is so broadly disclosed.

¹⁵ LDS notes that N.K.’s counsel was the plaintiff’s counsel in *Doe*, which is correct, but that is also why N.K.’s counsel presents this Court with a very different record and issue than what was presented in *Doe*.

Third, the disciplinary files contain more than just “information confidentially conveyed to clergy within the confines of the disciplinary council.” LDS Br. at 46. Rather, they include a summary of the evidence, the testimony that was received, and the decision that was entered. CP 561-62, 572.¹⁶ While at first glance that may seem like privileged communications, it ignores the fact that much of this information was likely obtained before the hearing (e.g., outside of a confessional setting). For example, if a parent complained to her Mormon bishop that her son was sexually abused by a Scout leader, LDS must account for that non-privileged fact, even if the Scout leader later confessed and the only remaining record of the mother’s complaint is in the LDS disciplinary file. CP 492-93. This is particularly true where LDS has taken the position that “the only information available to respond to plaintiff’s request” is contained in the disciplinary files. CP 589.

The Washington Supreme Court recently addressed this issue in *Lowy v. Peacehealth*, __ P.3d __ (Wash. June 21, 2012). In *Lowy*, the Court addressed “whether, in civil litigation, a party may decline to produce requested discoverable information on that basis that to locate the information would require consulting privileged documents.” *Id.* at *1. The plaintiff alleged she was injured by negligence at the defendant

¹⁶ Any conflict between the self-serving declaration LDS relies upon and its internal procedures highlights why the trial court erred in denying N.K. a CR 30(b)(6) deposition where such conflicts could be addressed through cross-examination.

hospital, and like here, she sought a CR 30(b)(6) witness to testify about the defendant's notice of similar problems. *Id.* Like LDS, the defendant admitted its records contained the information, but it refused to review privileged quality assurance records in order to identify and gather the non-privileged information. *Id.* The defendant "contends that it cannot be required to consult a privileged list of unfavorable [records] in order to identify and produce [non-privileged] records it concedes are discoverable." *Id.* at *7. Like N.K., the plaintiff argued the privilege did "not prevent the hospital from conducting an internal review of its [privileged records] in order to locate unprotected information" and that she was "not seeking discovery of the [privileged records], but only the unprivileged records that could be located by the hospital's review of the [privileged records]." *Id.* at *1, 7.

The Court agreed with the plaintiff. At the start of its analysis, it observed that parties have a constitutional right to discovery: "The right of access [to the courts] includes the right of discovery authorized by the civil rules, subject to the restrictions contained therein." *Id.* at *3 (quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). It noted privileges must be strictly construed and limited to their purpose because they are against the policy of open discovery, and pointed-out that it previously rejected efforts to use the privilege "as a shield to obstruct proper discovery of information generated outside

review committee meetings.” *Id.* at *3-4 (quoting *Coburn v. Seda*, 101 Wn.2d 270, 277 (1984)). “Privileges must be construed narrowly because privileges impede the search for truth.” *Id.* at *4 (quotations omitted).

The Court then rejected the same argument LDS makes here:

[The defendant’s] position that it may not consult its [privileged] quality improvement data in order to comply with discovery in essence amounts to a claim that the statute shields it from having to produce unprotected documents despite the fact that they could easily be produced without undue burden. This claim ... would permit and even encourage a health care provider to require all complaints, incidents of infections, complications, or incident reports of any kind to be created for and thus become [privileged] quality improvement committee records. Hospitals might also limit the use of search software, databases, and other tools to locate negative outcomes only to its quality improvement committee so as to shield bad results from discovery. ...

Our legislature did not intend quality improvement committees to institutionalize a conspiracy of silence or to create unnecessary barriers to a patient’s quest for the truth. Our rules of discovery are grounded upon the constitutional guaranty that justice will be administered openly. ... Our legislature did not intend that defendants could conceal discoverable documents not created specifically for a quality improvement committee and not privileged by moving [the ability to account for them] under a quality improvement committee’s umbrella of secrecy. But this sort of hide and seek gamesmanship would be encouraged were we to adopt the hospital’s position in this case.

Id. at *6, 9 (also holding “the statute is not a shield to obstruct access to records outside the scope of the privilege”).

The Court acknowledged privileges that exist to allow “candid communication” are important, “[b]ut inasmuch as privileges frustrate the search for truth, they are limited in scope so as to accomplish their intended purposes and no more.” *Id.* at *8. Importantly for this case, the Court recognized the attorney-client and clergy-penitent privileges are examples of such privileges, but then explained that “these privileges only protect actual communications and nothing more.” *Id.* For example, documents protected by the work product doctrine can be discoverable if the documents “give clues as to the existence or location of relevant facts.” *Id.* (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). To allow otherwise, the Court concluded, “would permit the lawyer’s office to be more than a shield; instead, it would become a fortress wherein the keys to find and unlock all secrets would be secure.” *Id.*

That is exactly what LDS is trying to do in this case, and it is why the trial court erred in refusing to hold LDS accountable for the non-privileged information in its disciplinary files. Rather than strictly construe the privilege, the trial court concluded all information in the files is privileged, regardless of whether it was learned or shared outside of the confessional, and regardless of whether the disciplinary files are the only remaining source of the information. By doing so, the trial court allowed “the [bishop’s office] to be more than a shield; instead, it [became] a fortress wherein the keys to find and unlock all secrets [is] secure.” *Lowy*

rejects this effort to “institutionalize a conspiracy of silence” because it deprives N.K. of his constitutional right to discovery.

b) No Washington Court or Any Other Court Has Ever Concluded a Religious Organization Has a First Amendment Right to Ignore a Danger to Children

LDS is simply wrong when it suggests the First Amendment shields it from its secular obligations.

First, N.K. does not seek to violate the confessional. Instead, as discussed at-length above, he seeks non-privileged information that LDS received or shared outside of the confessional.

Second, it is unclear how LDS can argue the files are “confidential and are used for strictly penitential purposes” when the results are shared with the general membership and a sexual abuser’s “disciplinary status would appear on a membership record if the person moved to a new congregation.” CP 527-29, 561-62, 571.

Finally, no court in the country has ever concluded LDS can ignore foreseeable harm to children because protecting them might have an incidental burden on its religious practices. While the First Amendment may prevent secular courts from deciding who is right or wrong in a purely internal church dispute, the First Amendment does not immunize a religious entity from liability for breaching a secular duty.

This distinction is well-illustrated by the only case cited by LDS in its brief, *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 698-709 (1976), which involved an internal church dispute over whether a priest was properly defrocked, the validity of a division of internal church hierarchy, and the validity of amendments to the church's constitution. The Court concluded a secular court could not resolve those internal church disputes because they required interpretation of religious doctrine in order to decide who was right. *Id.* at 718-25. Nowhere does LDS explain how those internal church disputes are in any way analogous to the secular dispute in this case over its secular duty to protect N.K. and other children from sexual abuse, and nowhere does LDS explain how accounting for its knowledge of that danger would require this Court to interpret religious doctrine.

This distinction is also well illustrated in the Washington case of *Gates v. Seattle Archdiocese*, 103 Wn. App. 160, 168, 10 P.3d 435 (2000), where a secular court was asked to pass judgment on whether the plaintiff was a "good pastor" or whether he was a "bad pastor" based on the job responsibilities for an assistant pastor. The Court declined to do so because "a court would necessarily have to determine what duties would further the spiritual needs of the parish" before knowing what would be "unreasonable." Such a searching inquiry is prohibited because it would "require an evaluation of religious scripture, doctrine, and principles." *Id.*

Although it did not cite it to this Court, the other case cited by LDS to the trial court, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), does not support its position, either. In *Kedroff*, the Court held the First Amendment does not provide religious entities with immunity: “[l]egislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense.” *Id.* at 109-10. To the extent LDS suggests the First Amendment protects it from having to account for non-privileged information in its files, *Kedroff* rejected that argument, too: “... legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights.” *Id.* at 118 (quoting *Ass’n v. Douds*, 339 U.S. 382) (1950); see also *Agostini v. Felton*, 521 U.S. 203, 233-34 (1997) (“[i]nteraction between church and state is inevitable ... and we have always tolerated some level of involvement between the two. Entanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.”).

These cases highlight why LDS is wrong when it suggests there is as an “absolute constitutional protection” when it comes to a religious entity’s freedom to act, rather than its freedom to believe:

[The First] Amendment embraces two concepts – freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

Cantwell v. State of Connecticut, 310 U.S. 296, 303-04, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940).

As the Court observed in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990), more than a century of free exercise jurisprudence contradicts LDS's argument that "an individual's religious beliefs excuse him from compliance with an otherwise valid law ...":

The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed 244 (1878), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion

commanded the practice. “Laws,” we said, “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” *Id.*, at 166-167.

Employment Div., Dept. of Human Resources of Oregon, 494 U.S. at 879.

More recently, many courts around the country have had an opportunity to apply these same principles as society has addressed child sexual abuse that remained hidden for decades behind the doors of religious and non-religious groups alike. For example, in *Hutchison v. Luddy*, 606 A.2d 905 (Pa. Super 1992), the Catholic Church refused to disclose a file that church law designated as a “secret archive.” The Court flatly rejected the Church’s First Amendment arguments:

Insofar as the canons of the Church are in conflict with the law of the land, the canons must yield. Here, it is the ... rules of discovery which are controlling. Merely because Canon 489 is controlling in the internal operation of the affairs of the Church does not mean that it permits evidence pertaining to sexual molestation of children by priests to be secreted and shielded from discovery which is otherwise proper.

* * *

We hold, consistently with the decided cases, that where the only action required of a religious institution is the disclosure of relevant, non-privileged documents to an adversary in civil litigation, such action, without more,

poses no threat of governmental interference with the free exercise of religion....

Id. at 908, 912 (citations omitted).

The United States District Court of Delaware undertook a similar analysis in *Pagano v. Hadley*, 100 F.R.D. 758 (D. Del. 1984). In *Pagano*, the Catholic Church moved to quash a subpoena seeking documents from a priest's personnel file. The court, in rejecting the Church's First Amendment arguments, held that the production of the personnel file does not trigger unlawful entanglement because it "will not interfere with the Bishop's right to believe as he chooses and to engage in the religious observances of his faith." 100 F.R.D. at 761. The court noted that "the production of existing documents needed for civil litigation in response to a subpoena simply does not involve any entanglement ... Information in the possession of the Church has always been subject to civil process." *Id.*

While some portions of LDS's disciplinary files may be privileged, nowhere does LDS provide any evidence that church doctrine prevented LDS from reviewing them in order to protect the children in its care, and nowhere does LDS explain why it would violate its religion to account for that information, particularly non-privileged information that it learned or shared outside of a confessional setting. For example, if LDS's leaders received reports from parents that "drifters" like Hall were using Boy Scouts to target and molest children, N.K. is allowed to obtain that discovery. Whether the "drifters" were later disciplined by LDS is

irrelevant to whether LDS received notice of that danger (which it conceded is not privileged). *C.J.C.*, 138 Wn.2d at 727-28.

While LDS is silent on how its religion would be burdened by accounting for its knowledge of the danger,¹⁷ N.K.'s opening brief identified Washington's compelling interest in protecting children from sexual abuse and providing them redress. N.K.'s Opening Brief, at 48.

To the extent there is any entanglement, which neither LDS nor the trial court identified, it is incidental and subordinate to Washington's compelling interest. This is particularly true where the First Amendment prohibits LDS from usurping that interest. *See e.g. Watson v. Jones*, 80 U.S. 679, 706 (1871) (if a church "should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else"); *see also C.J.C.*, 138 Wn. 2d at 727-28 (article I, section 11 states it "shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state").

Finally, as discussed above and outlined in N.K.'s opening brief, it is worth repeating that the vast majority of courts in this country have

¹⁷ At most, LDS states that access to the disciplinary files is restricted to a few people, but nowhere does it explain why it would violate LDS's religious practices to have those people review the files and account for the non-privileged information contained therein. LDS makes *no argument* that doing so would burden its religious practices, which is notable as it must show "excessive burden" in order to concern the First Amendment.

rejected LDS's arguments. N.K.'s Opening Brief, at 48-49. Neither LDS nor the trial court made any effort to distinguish those many cases.

The trial court erred in concluding the First Amendment prevents N.K. from discovering non-privileged information regarding LDS's knowledge and handling of child sexual abuse.

6. The Disciplinary Files Contain Relevant Information

It is unclear why LDS suggests the disciplinary files "are irrelevant," LDS Br. at 48, when it admitted the files are the only source of information regarding its knowledge and handling of child sexual abuse.

It is also unclear why LDS suggests N.K. "sought information about abuse by any Church member, anywhere," LDS Br. at 48 (emphasis in original), when N.K.'s motion to compel included a letter to LDS where he stated "[w]e are willing to work with you on the scope of the requests, such as your concerns about including instances of incest, but otherwise our topics follow the Court's earlier order regarding the appropriate scope of discovery in this case." CP 552.

Regardless, N.K. moved to compel discovery regarding LDS's knowledge and handling of child sexual abuse, including abuse in the Boy Scout program, so he could establish that LDS failed to take reasonable steps to protect N.K. from that danger. For example, by showing LDS knew or should have known that men, like Hall, were using the Boy Scout program to target and molest children, like N.K. To the extent such

information is contained in the disciplinary files, it is relevant and discoverable. *C.J.C.*, 138 Wn.2d at 721-22 (a survivor of childhood sexual abuse must prove the defendant failed to take reasonable steps to protect him from foreseeable harm).

7. Whether or Not LDS Considers the Disciplinary Files “Investigations” is Irrelevant

It is unclear why LDS suggests its disciplinary files “were outside the scope of the discovery request,” LDS Br. at 49, when it is undisputed that N.K. specifically moved to compel LDS to account for “its knowledge and handling of childhood sexual abuse,” CP 572, “even if [LDS] has to review disciplinary files in order to account for it.” CP 575; CP 687-88.

It is also unclear why LDS asserts the disciplinary files do not reflect “investigations” when its own policies call it an “investigation” when a member refuses to confess and the local leader gathers more evidence: “If a member denies an accusation, but the bishop or stake president has reliable evidence supporting the accusation, the bishop or stake president should conduct an *investigation* to obtain further evidence.” CP 556 (emphasis added). Regardless, it is undisputed that (1) LDS never moved for a protective order on this issue, (2) it never raised this issue with the trial court, and (3) the trial court did not deny N.K.’s motion to compel because it concluded N.K. failed to request this information in discovery. *Lowy*, at *10 (“[a]bsent a protective order, [a

defendant] is required to review its own privileged records to identify relevant discoverable records”).

G. The Trial Court Erred in Denying N.K. Discovery of the Risk Management Records Because the Records Contain Information Regarding Sexual Abuse Between 1975-77

LDS concealed the existence of the risk management records until after N.K. filed his first motion to compel. CP 687. In response to that motion, LDS disclosed that LDS “has some records relating to acts of sexual abuse that allegedly occurred in the years 1975-1977...” CP 677. N.K. pointed this out in his reply, CP 687, in his motion for reconsideration, CP 1095, and in his second motion to compel, CP 1817, but the trial court denied all of those motions.

The fact that these records were not generated until after 1977 is a red herring because information LDS received after 1977 about abuse that occurred before or during 1977 is reasonably calculated to lead to the discovery of admissible evidence regarding what LDS knew or should have known about the danger of child sexual abuse (e.g., a Scout victim comes forward in 2005 and claims his family told the president of LDS in 1976 that he was being molested by his Scout leader). CR 26(b)(1).

It is unclear why LDS claims N.K. did not request these records in discovery when he asked LDS to describe all “allegations, complaints, or concerns you received regarding allegations of sexual misconduct involving Boy Scouts prior to 1978 arising from (1) Troop 155, and (2) all

Boy Scout Troops you sponsored across the country,” and to produce documents reflecting the same. CP 1855-56. Moreover, in his motion to compel, N.K. made clear that “our request is not limited to requests that were received prior to 1978; rather, we asked for allegations, complaints, or concerns that your client has received regarding allegations of abuse that occurred prior to 1978.” CP 1911.

Finally, the fact that the records “deal with a vast array of allegations of sexual abuse” and “contain mostly privileged information” is another red herring because N.K. did not ask for all of the records or privileged information. Instead, N.K. requested, and moved to compel, non-privileged information regarding “allegations, complaints, or concerns [that LDS] received regarding allegations of sexual misconduct involving Boy Scouts prior to 1978 arising from (1) Troop 155, and (2) all Boy Scout Troops [LDS] sponsored across the country.” CP 1814, 1855-56, 1954.

IV. CONCLUSION

The Court should reverse the trial court’s dismissal of N.K.’s case because it erred in concluding the Respondents had no duty to protect N.K. from Hall because they had a special relationship with both N.K. and Hall. BSA and PHC controlled who could participate in Scouting, they knew unregistered volunteers like Hall would participate, and they accepted money for N.K. to participate in their Scouting program. LDS,

on the other hand, exercised that right of control on behalf of BSA and PHC, it appointed and relied on Danford to carry out its obligations, and it invited N.K. to participate in its Troop.

Moreover, the Court should reverse the trial court's dismissal of N.K.'s case because, at most, a jury must decide whether it was reasonably foreseeable that N.K. would be harmed if BSA, PHC, and LDS allowed a complete stranger to take charge of a Boy Scout Troop of young boys, particular where their Scoutmaster felt he was untrustworthy and BSA and PHC knew that men like Hall posed a danger to N.K.

Finally, the Court should reverse the trial court's decision to deny N.K. his constitutional right to discovery regarding LDS's knowledge and handling of child sexual abuse because that information goes to the heart of N.K.'s claim that LDS failed to protect him from that danger. The information N.K. seeks is not protected by any privilege, LDS failed to identify any burden it would suffer from holding it accountable for that information, and even if it established some minimal burden, it is outweighed by Washington's compelling interest in protecting children from sexual abuse and providing them with redress,

N.K. respectfully requests the Court reverse the trial court's summary judgment orders and discovery orders, and remand this case for trial and the completion of discovery.

Respectfully submitted this 9th day of July, 2012.

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CERTIFICATE OF SERVICE

I, Bernadette Lovell, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Pfau Cochran Vertetis Amala PLLC, 403 Columbia Street, Suite 500, Seattle, WA 98104, attorneys for Plaintiff/Appellant.

C. On July 9, 2012, I caused a copy of the foregoing Reply Brief of Appellant to be served upon the following via Fax Mail Hand-Delivery Legal Messenger.

Clerk of the Court
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APPENDIX A-1

GRANTED

No. 99-699

Supreme Court, U.S.

FILED

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CLERK

IN THE
Supreme Court of the United States

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

v. *Petitioners,*

JAMES DALE,

Respondent.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a state law requiring a Boy Scout Troop to appoint an avowed homosexual and gay rights activist as an Assistant Scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridges First Amendment rights of freedom of speech and freedom of association.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America.

2. Respondent James Dale.

Boy Scouts of America and Monmouth Council, Boy Scouts of America are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters approximately 318 not-for-profit corporations as local Councils such as Monmouth Council to support Boy Scouting and other Scouting programs in particular geographic areas, and charters numerous churches, synagogues and other community groups in localities throughout the country to operate Boy Scout Troops and other Scout units.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey, 1a-101a,¹ is reported at 160 N.J. 562, 734 A.2d 1196 (1999). The opinion of the Superior Court of New Jersey, Appellate Division, 102a-154a, is reported at 308 N.J. Super. 516, 706 A.2d 270 (1998). The opinion of the Superior Court of New Jersey, Chancery Division, 155a-224a, is unreported.

JURISDICTION

The decision of the Supreme Court of New Jersey was entered on August 4, 1999. 1a. The Writ of Certiorari was granted by this Court on January 14, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ; or the right of the people peaceably to assemble” U.S. Const. amend. I.

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. XIV, § 1.

1. Numbers followed by “a” refer to pages in the bound Appendix submitted with the Petition for Writ of Certiorari. Numbers preceded by “JA” refer to pages in the bound Joint Appendix. Numbers preceded by “R” refer to pages in the joint appendix submitted below. Numbers preceded by “L” refer to pages in the bound Joint Lodging Materials.

The pertinent New Jersey statutes, New Jersey Statutes Annotated, title 10, chapter 5, sections 10:5-4, 10:5-5(I), 10:5-5(hh) and 10:5-12(f)(1), are reprinted *infra* at pp. xii-xv.

STATEMENT OF THE CASE

Boy Scouts of America

Petitioner Boy Scouts of America is a private, non-profit organization. Its mission is to instill the values of the Scout Oath and Law in youth:

It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.

The values we strive to instill are based on those found in the Scout Oath and Law:

Scout Oath

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

Scout Law

A Scout is . . .

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

JA 184. At virtually every meeting and ceremony, Boy Scouts and their adult leaders recite the Oath and Law in unison. JA 175-176, JA 274-288, JA 464. The Oath and Law provide a positive moral code for living; they are a list of "do's" rather than "don'ts," setting forth affirmative character traits. JA 187-189, JA 215-226. Through the Boy Scouting program, boys learn how to live by this moral code. JA 450.

Boy Scouting takes place primarily in Troops, small units typically consisting of 15 to 30 boys led by a uniformed Scoutmaster and Assistant Scoutmasters. JA 172. Almost 65 percent of Boy Scout Troops are sponsored by churches or synagogues, more than 25 percent are chartered to private community organizations, and fewer than 10 percent are chartered to public institutions. JA 159. Boy Scouting is an integral part of many church youth programs. JA 155-161, JA 722-723 (Catholic), JA 707-709 (United Methodist), JA 710-713 (Conservative Jewish), JA 714-718 (Lutheran-Missouri Synod), JA 719-721 (Latter-day Saints), JA 724-726 (Southern Baptist), JA 727-730 (Presbyterian).

Responsibility for inculcating Boy Scouting's values is entrusted to the volunteer Scoutmaster and Assistant Scoutmasters. JA 180-181, JA 232-233, JA 244, JA 246, JA 261, JA 299-300, JA 303. If a boy is in doubt about how to conduct himself, the *Boy Scout Handbook* tells him that he may look to his Scoutmaster, "a wise friend to whom you can always turn for advice." R 2539. "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your . . . Scoutmaster." JA 211. In turn, the *Scoutmaster Handbook* advises adult leaders to be responsive: "Be accepting of their concerns about sex. Be very open and clear when talking with them." JA 249.

Because Boy Scouts and their leaders are together 24 hours a day on weekend campouts and in summer camp, JA 173-174, the Scoutmaster and Assistant Scoutmasters necessarily teach by

example as much or more than they teach by proscription. Boy Scouts do not simply see one aspect of an adult leader's character; they see it all. The *Scoutmaster Handbook* tells leaders: "Your Scouts need to rely on you to be consistent in your behavior and beliefs. Your actions also demonstrate what you expect of them." "[P]ractice what you preach. . . . The most destructive influence on boys is adult inconsistency and hypocrisy." JA 257.

Given these responsibilities, Boy Scouting seeks to appoint leaders who will represent Boy Scouting's "[h]igh moral standards." JA 300. No adult leader can be appointed without approval of the sponsoring institution, the local Council (such as petitioner Monmouth Council) that oversees Scouting in the geographical area in question, and Boy Scouts of America. JA 359, JA 387, JA 392. As noted by the New Jersey Supreme Court, adult volunteers must not only commit to the Scout Oath and Law and the Declaration of Religious Principle, but must pass muster under a number of "informal criteria designed to select only individuals capable of accepting responsibility for the moral education and care of other people's children in accordance with scouting values." 38a, JA 182-183, JA 299-303. Adults have been denied leadership positions in Scouting for various views and behaviors which Boy Scouts of America deems inconsistent with the Scout Oath and Scout Law, from openly adulterous behavior to the bringing of alcohol to Scouting events to known substance abuse outside of Scouting. JA 694-695, JA 751-752, JA 760.

With respect to sexual behavior, Boy Scouting "espouses family values" based on marriage and fatherhood. JA 457-459, JA 697. The *Boy Scout Handbook* describes how a young man attains "[t]rue manliness" by accepting his "responsibility to women," his "responsibility to children" when he marries and has a family, his responsibility to his religious beliefs, and his

responsibility to himself. JA 210-211. "Abstinence until marriage," the *Handbook* counsels, "is a very wise course of action." JA 210.

Official Scouting materials addressed to the boys do not refer to homosexuality or inveigh against homosexual conduct; rather, they teach family-oriented values and tolerance of all persons. JA 203-208, JA 221-222. In keeping with the view that boys learn best by positive example, rather than by "thou shalt nots," the handbooks for boys do not catalog immoral behavior for Boy Scouts. It cannot be inferred that unmentioned misconduct is consistent with Scouting's moral code.

For most of Scouting's history, no one could have had any doubt about the organization's view on homosexuality. See *Boy Scouts of America v. Teal*, 374 F. Supp. 1276, 1277 (E.D. Pa. 1974) (Higginbotham, J.). Indeed, homosexual sodomy was a criminal offense in New Jersey until 1979, N.J. Stat. Ann. § 2A:143-1 (repealed 1979), and homosexuals were barred from immigration until 1990, 8 U.S.C. § 1182(a)(4) (repealed 1990). After 1981, when an openly gay man sought to become a leader in a California Boy Scout Troop, see *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998),² Boy Scouts of America promulgated a series of position statements for Scout officials who might be asked to articulate Boy Scouting's position. One such statement promulgated on February 15, 1991 — prior to the institution of the suit at

2. Curran affirmatively alleged that members of Boy Scouting "must hold to the Judeo-Christian belief that to be a homosexual is to be immoral per se," claiming that this requirement violated California's public accommodation law. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 48 Cal. App. 4th 670, 678, 29 Cal. Rptr. 2d 580, 588 (1994) (quoting Curran's Complaint). *review granted and opinion superseded by* 17 Cal. 4th 670, 952 P.2d 218 (1998).

issue and prior to the amendment of New Jersey law to cover sexual orientation — declared:

We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed

and explained that not accepting homosexual members as leaders was based “solely upon our desire to provide the appropriate environment and role models which reflect Scouting’s values and beliefs.” JA 458. Other official statements, to similar effect, are dated March 1978, June 1991, May 1992, and January 1993. JA 453-461. Nine current and former Scout leaders or officials testified by certification or deposition that the organization regards homosexual conduct as inconsistent with the Scout Oath and Law. JA 160-161, JA 183, JA 312, JA 444, JA 451, JA 465, JA 692-693, JA 746, R 3254.

Boy Scouting makes no effort to discover the sexual orientation of any person. JA 460. Its expressive purpose is not implicated unless a prospective leader presents himself as a role model inconsistent with Boy Scouting’s understanding of the Scout Oath and Law. Boy Scouting does not have an “anti-gay” policy, it has a morally straight policy.

State Public Accommodations Laws

The New Jersey public accommodations law forbids discrimination on the basis of race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, or nationality. N.J. Stat. Ann. § 10:5-12(f)(1) (West 1993). See *infra* at pp. xiv-xv. “Affectional or sexual orientation” is defined as “male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.”

N.J. Stat. Ann. § 10:5-5(hh). See *infra* at p. xiii. Scouting programs “discriminate” on the basis of sex, age and creed. In jurisdictions where substance or alcohol abuse is treated as a disability, Scouting “discriminates” on that ground as well.

The vast majority of states in the Union, many cities and counties, and the federal government have laws prohibiting places of public accommodation from discriminating on the basis of various criteria. Most states attempt to avoid obvious freedom of association problems with such statutes by confining their reach through statutory exclusions. The New Jersey statute excludes: (1) any institution or club “which is in its nature distinctly private,” (2) any “educational facility operated or maintained by a bona fide religious or sectarian institution,” and (3) “the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control.” N.J. Stat. Ann. § 10:5-5(l). See *infra* at pp. xii-xiii.

Numerous suits have been brought against Scouting on behalf of girls, atheists, and avowed homosexuals who have not been permitted to participate in the organization. Four state supreme courts and the U.S. Court of Appeals for the Seventh Circuit have ruled that Scouting is not a place of public accommodation.³ Other cases remain pending.⁴

3. See, e.g., *Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998); *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Comm’n on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

4. See, e.g., *Broward County Human Rights Board v. Boy Scouts of America*, No. PA-754-11-99 (Broward County Human Rights Div.) (complaint filed Nov. 12, 1999) (Board alleges discrimination against

Respondent James Dale

James Dale had been a prominent Boy Scout in Monmouth Council and achieved the rank of Eagle Scout. Dale ceased to be a Boy Scout at the age of 18, when youth membership automatically ends. JA 14-16, JA 180. As is not uncommon, Dale registered as an Assistant Scoutmaster for his Troop after his youth membership expired. JA 16. Since he had gone away to college; however, Dale had very little involvement with Boy Scouting or the Troop as an adult leader. JA 465, JA 632-633, R 3346-3350.

After going to college, Dale came to regard himself as homosexual, came to believe that homosexual conduct "is not immoral," and "became deeply involved in gay rights issues and maintained a high profile on campus." JA 126-127, JA 495, JA 503, JA 526-527. He became Co-President of the Rutgers University Lesbian/Gay Alliance in his sophomore year. JA 126, L 10. On July 8, 1990, the Newark *Star-Ledger* published a picture of Dale and an interview with Dale as a gay activist describing the needs of homosexual teens for gay role models. L 10.

Adult leaders "throughout Monmouth Council" saw the *Star-Ledger* article and forwarded it to Council headquarters. JA 753, R 3576. As a result, Dale's registration as an adult

agnostics and homosexuals); *Richardson v. Chicago Area Council of Boy Scouts of America*, No. CCHR 92-E-80 (Chicago Comm'n on Human Relations 1996), *aff'd in rel. part*, No. 96 CH 3266 (Ill. Cir. Ct. Aug. 12, 1999), *appeal docketed*, No. 99-3018 (Ill. App. Ct. Aug. 23, 1999) (gay activist seeking to be uniformed professional); *Downey-Schottmiller v. Chester County Council of the Boy Scouts of America*, No. P-3986 (Pa. Human Relations Comm'n July 27, 1999), *appeal docketed*, No. 2291 CD 1999 (Pa. Commw. Ct. Aug. 27, 1999) (atheist activist seeking to be volunteer leader); *Pool v. Boy Scouts of America*, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998) (openly gay men seeking to be volunteer leaders), *sub judice*.

volunteer Boy Scout leader was revoked. JA 753, JA 135. Upon request for review, Dale was informed by higher Scouting authorities that he was ineligible to serve as Scout leader because "Boy Scouts of America does not admit avowed homosexuals to membership in the organization." JA 138. At that time, public accommodations law in New Jersey did not extend to sexual orientation.

About 18 months later, the legislature amended New Jersey's public accommodations law to extend to "sexual orientation." N.J. Stat. Ann. §§ 10:5-5(l), 10:5-5(hh), 10:5-12(f)(1). *See infra* at pp. xii-xv. Eleven days later, Dale sued petitioners, seeking reinstatement as an Assistant Scoutmaster and compensatory and punitive damages, and alleging that volunteer service as an Assistant Scoutmaster was one of the "advantages" of "a place of public accommodation." JA 10-28. In his Complaint, Dale alleged that "the only gay Scouts singled out for exclusion are those, such as James Dale, who, in part as a result of Boy Scout training, become leaders in their community and are open and honest about their sexual orientation." JA 11.

Upon filing the Complaint, Dale stated in an interview published in *The New York Times*:

I owe it to the organization to point out to them how bad and wrong this policy is. . . .

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

JA 513. After filing his law suit, Dale proclaimed on television:

. . . [Y]es, I am gay, and I'm very proud of who I am I have pride, I stand up for what I believe in, I mean, what you see is what you

get. I'm not hiding anything. But the Boy Scouts don't like that.

JA 470.

The Superior Court of New Jersey, Chancery Division

All parties moved for summary judgment. The Superior Court of New Jersey, Chancery Division, granted petitioners' motion, 224a, ruling that Boy Scouting is not a place of public accommodation and in any event is a "distinctly private" group exempted from coverage under the public accommodations law.

The Chancery Court also held that it would be unconstitutional to force a Troop to accept respondent as a volunteer leader. The court described the expressive character of Boy Scouting:

Youth membership in scouting is restricted to boys between 11 and 18. To become a member, each must submit a completed Boy Scout application and health history signed by his parents; each must repeat the Pledge of Allegiance; demonstrate the Scout salute, the Scout sign and handclasp and how to tie a square knot. Each, with his parents, must complete a child protection program; participate in a Scoutmaster conference and pay the national dues. Each must understand and agree to live by the Scout Oath, Law, motto, slogan and Outdoor Code.

Similarly, Adult Leadership is not open to the public. One must be . . . over the age of 21 (except, for assistant scoutmasters, over 18). He must possess the moral, educational and emotional qualities deemed necessary by BSA

for leadership before he will be commissioned. He must be recommended by the Scout Executive and approved by the Local Council executive board. He must subscribe to the Statement of Religious Principle, the Scout Oath and the Scout Law.

Each troop meeting begins with the recitation of the Scout Oath and Law. On a regular basis there then follows a group discussion of various parts of the Oath and Law stimulated by the Scoutmaster or troop leader. Before the close of each meeting, it is the usual practice that the Scoutmaster offer the boys a moral lesson, known as the Scoutmaster's Minute.

At each level of advancement, the individual boy describes to his Scoutmaster or review board of adult leaders how he is living his life in accordance with the Scout Oath and Law.

222a-223a. The Chancery Court found that "[s]ince its inception Scouting has sincerely and unswervingly held to the view that an 'avowed,' sexually-active homosexual is engaging in immoral behavior which violates the Scout Oath (in which the person promises to be 'morally straight') and the Scout Law (whereby the person promises to keep himself 'clean')." 223a. Relying on Justice O'Connor's concurring opinion in *Roberts v. United States Jaycees*, 468 U.S. 609, 631 (1984), 212a-215a, the Chancery Court held that petitioners "have First Amendment freedom of expressive association rights preventing government from forcing them to accept Dale as an adult leader-member." 212a-214a, 224a.

The Superior Court of New Jersey, Appellate Division

The Appellate Division reversed by a 2-1 vote, holding that Boy Scouting was a public accommodation and that Boy Scouting had no First Amendment right to exclude Dale because of his "statements as a 'gay activist,'" "his 'message,'" or "his avowed homosexuality." 139a. The majority noted much evidence with respect to Boy Scouting's expression, including the following:

- 1) Dale's 1972 *Scoutmaster's Handbook* advised leaders:

'You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons.

* * * *

What you are speaks louder than what you say. This ranges from simple things like wearing a uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.' 108a, JA 543.

- 2) In 1978, Boy Scouts of America prepared a policy statement providing 'that an individual *who openly declares* himself to be a homosexual would not be selected to be a volunteer [S]cout leader, be registered as a unit member, or be employed [by the Boy Scouts of America] as a professional. . . . ' Later position statements affirmed that stance. 109a, JA 453-461 (emphasis added).

The majority first dispensed with the freedom of intimate association claim, focusing on the national membership numbers of Boy Scouts of America rather than on the

relationships in individual Troops, 131a, as this Court's decisions in *Roberts*, 468 U.S. at 619-620, and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 546-547 (1987), require.

While not disputing that Boy Scouting is an expressive association, the majority concluded that enforcement of the New Jersey law would not "significantly impair" its ability to "express its fundamental tenets" because an "anti-gay" view was not "what 'brought [the original members] together.'" 135a-136a (quoting *Roberts*, 468 U.S. at 623). Boy Scouting does not exist to "provide a public forum for its members to espouse the benefits of heterosexuality and the 'evils' of the homosexual lifestyle." 135a. The majority concluded that the official statements issued by Scouting on the subject of homosexuality from 1978 to 1993 did not represent the "beliefs that brought the boy scouts together" because the latest one had been issued 76 years after the founding of Boy Scouts of America. 141a.

The majority rejected application of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), as a "pure speech" case. 147a-148a. It distinguished parades from Boy Scouting because parades involve "people marching in costumes and uniforms, carrying flags and banners with all sorts of messages" and constitute "'public dramas of social relations'" in which the protected expression extends beyond banners and songs to "its communicated symbolism as well." 145a (quoting 515 U.S. at 568-569). The majority concluded that Scouting could claim no constitutional "privilege" to exclude Dale "when the sole basis for the exclusion is the gay's exercise of his own First Amendment right to speak honestly about himself." 149a.

Judge Landau dissented on the First Amendment issue. He noted that what had "been lost in the majority's opinion"

was that Dale “has been prominently publicized as an avowed, practicing homosexual and also as a leader in organizational activities given to the promotion of the interests of gay and lesbian students.” 150a-151a. Judge Landau stated that although Scouting must be aware that statistically some of its leaders are likely to have been homosexuals and “[t]here obviously has been no anti-gay witch hunt in the Boy Scout movement,” Scouting “condemns homosexual practice as morally unacceptable and so acts negatively with respect to its open avowal because it is inconsistent with one of the expressed moral policies of the organization.” 152a. Citing *Hurley*, 515 U.S. at 581, Judge Landau wrote:

We may not compel the Boy Scouts to alter a message which they wish to convey by including messages more acceptable to others. This principle is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by signs.

153a.

As for the majority’s questioning the “fundamental nature” of Scouting’s view of homosexual conduct, Judge Landau responded that “it is not for this court to tell the Boy Scouts what to believe or what to profess.” Boy Scouts of America’s “consistent litigation stand . . . and the representations of [its] governing officials are enough for me.” He also responded that “whether or not the Boy Scouts’ stand on homosexuality is fundamental to that organization’s creation is entirely irrelevant.” 153a-154a.⁵

5. Judge Landau opined that Dale might remain a member without holding a leadership position. 151a, 154a. However, there are no roles for adult “members” beyond serving as volunteer leaders for youth.

The Supreme Court of New Jersey

The Supreme Court of New Jersey affirmed. It held that Boy Scouting is a place of public accommodation, that the statutory exemptions are inapplicable, and that the First Amendment provides no defense.

The Statutory Question. The court ruled that Boy Scouting was a public accommodation on the basis of “various factors.” Scouting publicly solicited members through, among other things, “the symbolism of a Boy Scout uniform” worn in public places. Furthermore, Scouting received several benefits from government, including a federal charter, the support of Presidents and members of Congress, access to some military facilities and equipment, use of public buildings and spaces for meetings, and sponsorship of some Troops by government entities. 24a-30a.

The court refused to apply several exceptions to the public accommodations law. First, the court held that Boy Scout Troops are not “distinctly private” within the meaning of the law. 31a-39a. It held that “the principal determinant of ‘distinctly private’ status” is the organization’s “selectivity.” 32a-33a. The court found that Boy Scouting encouraged local Councils and Troops “to see that *all* eligible youth have the opportunity” to join. 35a. Even though members must “comply with the Scout Oath and Law,” the Scout Oath and Law did not operate as “genuine selectivity criteria” because the record disclosed “few instances in which the Oath and Law have been used to exclude a prospective member.” 37a. “Here, there is no evidence that Boy Scouts does anything but accept at face value a scout’s affirmation of the Oath and Law.” *Id.* The court found it “[m]ost important” that Boy Scouting “does not limit its membership to individuals who belong to a particular religion *or subscribe to a specific set of moral beliefs.*” 37a-38a (emphasis added). *But see* 53a (Boy Scouting “expresses a belief in moral values and . . .

encourage[s] the moral development of its members.”). While adult leadership standards were more restrictive than youth membership, Boy Scouting could not be held to be private only with respect to leaders, “a small subset of the larger group.” 38a.

Second, Boy Scouting could not qualify as an “educational facility operated or maintained by a bona fide religious or sectarian institution,” 39a (quoting N.J. Stat. Ann. § 10:5-5(1)), because Scouting was “nonsectarian.” 40a. Repeated expression of belief in God through recitation of the Scout Oath did not qualify Boy Scouting as a religious institution; its commitment to education did not qualify it as an educational facility. 39a-40a & n.10.

Third, despite the close relationships between adult leaders and Boy Scouts, JA 250, the responsibility of adult leaders to act as role models of Scouting values, JA 446, and the round-the-clock supervisory role of adult leaders on camp-outs and other outings, JA 741, the court concluded that Boy Scouting did not act in loco parentis because a Boy Scout leader does not “maintain, rear and educate” children in the place of the parent. 40a-41a (quoting *Miller v. Miller*, 97 N.J. 154, 162 (1984)).

The First Amendment. The court rejected petitioners’ assertion of First Amendment freedoms of intimate association, expressive association, and speech. It held that Boy Scouting is not “sufficiently personal or private to warrant constitutional protection’ under the freedom of intimate association.” 48a (quoting *Rotary*, 481 U.S. at 546). Although a Troop is typically composed of 15 to 30 boys and their adult leaders, the court relied on *Rotary*, 481 U.S. at 546, for the proposition that “a local club with as few as twenty members did not qualify as [an intimate association].” 48a-49a. Other factors included Scouting’s attempts at inclusiveness, and its practice of inviting “nonmembers” to

attend recruiting meetings and award ceremonies. 49a-50a. Moreover, the court added, an adult leader does not “have private or intimate relationships with troop members.” 49a.

The court rejected the expressive association defense by rejecting Boy Scouting’s statements of its moral values and substituting the court’s own definition of Scouting’s moral messages. 52a. Furthermore, the court held that the statute satisfied the compelling state interest in eliminating sexual orientation discrimination “without regard to an organization’s viewpoint.” 63a.

The court acknowledged that Scouting engaged in expressive activity “designed to build character and instill moral principles.” 64a. “We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members.” 53a. However, the court found that it was not a “shared goal[]” or “single view” of Scouting’s members to “associate in order to preserve the view that homosexuality is immoral.” 53a (quoting *Roberts*, 468 U.S. at 622), 56a. “The words ‘morally straight’ and ‘clean’ do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral.” 55a. The court noted the absence of reference to homosexual conduct in the youth material, but failed to note the references in the *Boy Scout Handbook* to sexual responsibility, marriage, and fatherhood. It dismissed Boy Scouting’s 1978 Position Statement as “[un]disseminated” and four later position statements as “self-serving.” 54a. Having essentially agreed with the Appellate Division that Scouting was not sufficiently “anti-gay” to receive First Amendment protection for its views, the court nevertheless labeled Scouting’s stated position on homosexual conduct as “prejudice,” “bigotry,” “assumptions in respect of status,” and “invocation of stereotypes.” 56a, 59a, 61a.

With respect to freedom of speech, the court distinguished *Hurley* because in the court's view Dale did not "come to Boy Scout meetings 'carrying a banner'" and his "status as a scout leader [was] not equivalent to a group marching in a parade" since there was "no indication that Dale intends to actively 'teach' anything whatsoever about homosexuality as a scout leader." 65a-66a.

In a concurring opinion, Justice Handler concluded that only an organization with "a core purpose," "a unifying purpose that motivates its members to join together as an association," could support an exclusion of a person whose views are incompatible: "The critical point is that a 'specific expressive purpose' must be clear, particular, and consistent." 82a-83a. In Justice Handler's interpretation of Scouting values, Scouting accepted diverse "individual morality." 92a-93a. Reciting New Jersey's 1979 "repudiation" of its own sodomy laws, he insisted that Scouting's views must have changed with "contemporary times": It is "untenable to conclude, in the absence of a clear, particular, and consistent message to the contrary, that Boy Scouts . . . remains entrenched in the social mores that existed at the time of its inception." 99a-100a. Boy Scouting must accept "Dale's open avowal of his homosexuality." 101a.

SUMMARY OF ARGUMENT

This case involves constitutional rights at the heart of our free society: the freedom of a private, voluntary, non-commercial organization to create and interpret its own moral code, and to choose leaders and define membership criteria accordingly. This Court has called it "beyond debate" that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth

Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

First, the New Jersey Supreme Court's decision that a Boy Scout Troop must appoint an open homosexual and gay rights activist as Assistant Scoutmaster violates Scouting's freedom of speech. An organization cannot speak except through its agents. The adult Troop leader is the embodiment of the ideals of Boy Scouting. In light of the roles of uniformed adult leaders and their symbolic position in Scouting, JA 180-181, JA 232, JA 244, JA 250, JA 257-258, JA 299-300, JA 446, JA 543, JA 741, to force Scouting to appoint persons who intend to be "open" and "honest" about their homosexuality, JA 133, would violate the organization's right to control its own message and to avoid association with a message with which it does not agree. On this point, this case is controlled by the Court's recent, unanimous decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

Second, the criteria for membership, leadership or other representative roles in an expressive association are themselves expressive, and constitutive of the identity of the organization. See *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 229-230 (1989). As Justice O'Connor has explained: "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts v. United States Jaycees*, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring). Without First Amendment protection against intrusion of public accommodations laws into the voluntary sector – where many organizations consist of members of or provide services to a single sex, ethnicity or religion – American society would be fundamentally transformed. A society in which each and every organization

must be equally diverse is a society which has destroyed diversity.

Third, the decision below violates Boy Scouting's freedom of intimate association. The Court has explained that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." *Roberts*, 468 U.S. at 618-619. The relationship of members and leaders is one of trust and friendship, which cannot be forced or compelled by the state.

ARGUMENT

REQUIRING A BOY SCOUT TROOP TO APPOINT AN AVOWED HOMOSEXUAL AND GAY RIGHTS ACTIVIST AS AN ASSISTANT SCOUTMASTER UNCONSTITUTIONALLY ABRIDGES FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION

A. Requiring a Boy Scout Troop to Appoint an Adult Leader Who Opposes the Organization's Moral Code Violates Freedom of Speech

Boy Scouts of America has certain moral beliefs and values that it wishes to convey to its members. Dale has moral beliefs and values that are, in at least one important respect, contradictory to those of Scouting. Under the First Amendment, private expressive associations have the right to choose leaders and spokespersons who are willing to communicate the organizations' chosen messages and inculcate their chosen values, and the right to decline the services of persons who would – either explicitly through speech or implicitly through public identity and conduct – communicate beliefs with which the organizations do not wish to be associated.

That fundamental principle of freedom of speech applies to all expressive groups, whether the state finds their beliefs admirable or objectionable.

The freedom at issue here has both affirmative and negative aspects. The affirmative aspect is the right of the expressive association to select leaders who will communicate the organization's beliefs. For Boy Scouts of America, the values of the Scout Oath and Law are communicated to youth members and to all by uniformed leaders. In a variety of ways in Boy Scouting – through the formal "Scoutmaster's Minute" at each Troop meeting when Scoutmasters discuss parts of the Oath and Law with the assembled Scouts, JA 175; through Boards of Review with the boys at times of rank advancement, when the boys explain to adult Troop leaders how they are attempting to live out the Oath and Law, JA 178-179, R 2562; in innumerable informal conversations on the trail, around the campfire, or in times of stress and confusion, when an adult leader's guidance is especially important, JA 445; and perhaps most of all, through personal character and example, JA 253, JA 257 – Troop leaders are entrusted with conveying Scouting values to boys. To require a Troop to appoint leaders who would not convey those principles deprives Scouting of its right to speak.

The negative aspect is the right *not* to be associated with ideas and beliefs the organization does not wish to endorse. The right to control its own message includes the organization's right to be silent about issues if it so chooses. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573-575 (1995). Boy Scouting does not convey an explicit "anti-gay" message to the boys under its care; but it does not wish to convey approval of homosexual conduct either. Dale, on the other hand, believes teenage boys need positive gay role models, JA 549, L 10, says that Boy Scout leaders should be able to be "open and honest

about their sexual orientation,” JA 133, and wishes to use the bully pulpit of the Scoutmaster’s position to communicate “how bad and wrong” Boy Scouting’s policy is. JA 513. Dale cannot force Boy Scouting to grant him a platform upon which to expound those beliefs, or to garb him in the uniform of a Scoutmaster when he does so.

1. *Hurley Controls This Case*

This case follows *a fortiori* from this Court’s unanimous decision in *Hurley*. In *Hurley*, this Court held that application of a state public accommodations law to force private organizers of a St. Patrick’s Day parade to include the Gay, Lesbian, and Bisexual Group of Boston (“GLIB”) was unconstitutional. 515 U.S. at 566. In a decision almost identical in its reasoning to that of the court below, the Massachusetts Supreme Judicial Court had held that the parade was a “public accommodation” under state law, that exclusion of GLIB from the parade constituted discrimination on the basis of sexual orientation, and that requiring the parade organizers to allow GLIB to march would not violate the organizers’ First Amendment rights. *Id.* at 563-564. The Massachusetts court rejected the organizers’ First Amendment claim on the rationale that the parade lacked any “specific expressive purpose” that would be threatened by the presence of the marchers. *Id.*

This Court unanimously reversed. The Court specifically rejected the lower court’s argument that “a narrow, succinctly articulable message is . . . a condition of constitutional protection.” *Id.* at 569. Moreover, the relative nonselectivity of the parade organizers in choosing participants did not deprive the group of the right to exercise selectivity when it chose to do so. “[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.” *Id.* at 569-570.

This Court found that GLIB’s participation in the parade was “equally expressive.” *Id.* at 570. Notwithstanding the fact that GLIB sought only to display its own name, and not to make any other political or moral statement, the Court recognized that self-identification of the group would serve the purpose of “celebrat[ing] its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade.” *Id.*

The Court held that requiring the parade organizers to include GLIB in their parade “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” *Id.* at 573. This includes the right to decide “what not to say.” *Id.* The organizing committee “clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.” *Id.* at 574. The Court noted that the “message it disfavored” was GLIB’s message “bear[ing] witness to the fact that some Irish are gay, lesbian, or bisexual,” and its “view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals.” *Id.*

To the extent there are any differences between this case and *Hurley*, this case presents an even stronger case for constitutional protection. The parade’s intended message was not readily apparent; the Scout Oath and Law embody a distinct moral message. JA 170-172. Even the court below concedes: “We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members.” 53a. Likewise, Dale’s intended participation in Scouting is “equally expressive.” *Hurley*, 515

U.S. at 570. By donning the uniform of an adult leader in Scouting, he would “celebrate [his] identity” as an openly gay Scout leader in precisely the same way that the GLIB marchers wished to conscript the parade to celebrate their identity as gay descendants of Irish immigrants, and to “bear witness” to his “view that people of [his] sexual orientation[] have as much claim to unqualified social acceptance as heterosexuals.” *See id.* at 570, 574.

Just as including the GLIB group in the St. Patrick’s Day parade would “violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message,” *id.* at 573, putting Dale in an adult leader’s uniform would interfere with Boy Scouting’s ability to control the content of *its* message. Indeed, the very service of an openly gay person as a role model would convey a message with which Boy Scouting does not wish to be associated.

2. The New Jersey Supreme Court’s Reasons for Refusing First Amendment Protection to Boy Scouting Are Insupportable

The New Jersey Supreme Court held that “Dale’s expulsion is not justified by the need to preserve the organization’s expressive rights,” 59a, for two reasons: (1) Boy Scouting does not hold a moral position regarding homosexuality, 53a-59a, 64a, and (2) Dale’s presence as an openly gay leader would not communicate any message regarding the morality of homosexuality. 65a-67a. These arguments fail both legally and factually.

As an initial matter, the decision below was based on characterizations of the facts of the case that contradict the findings of the trial court and are utterly indefensible on the record. In *Hurley*, this Court observed that it has a “constitutional duty to conduct an independent examination of the

record as a whole,” and is not bound by “the state court’s conclusion that the factual characteristics of petitioners’ activity place it within the vast realm of nonexpressive conduct.” 515 U.S. at 567.⁶ The Court is therefore “obliged to make a fresh examination of crucial facts.” *Id.* Those include the nature of Boy Scouting’s beliefs and the expressive quality of Dale’s participation as an openly gay Assistant Scoutmaster.

a. Boy Scouting’s Beliefs About Homosexual Conduct

The New Jersey Court’s assumption that Boy Scouting does not have a purpose “to promote the view that homosexuality is immoral,” 64a, is wrong for three reasons.

First, it is not the role of government to decide what a private organization’s message is. The New Jersey Supreme Court may think that Boy Scouts of America should interpret its Oath and Law as expressing nothing about sexuality, or as endorsing the morality of homosexuality. *See* 55a (Oath and Law “do not on their face, express anything about sexuality”), 59a (Boy Scouts of America’s “stance on homosexuality appears antithetical to the organization’s goals and philosophy”). But Boy Scouts of America thinks otherwise, and the Constitution protects its ability to control its own message. “[T]he point of all speech protection,” this Court has said, “is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.” *Hurley*, 515 U.S. at 574. *The very argument that the government may impose its own interpre-*

6. Here again, this is a more extreme case than *Hurley*. In *Hurley*, the factual characterizations of the lower court were in the form of actual factual findings based on a trial. 515 U.S. at 561-563. The factual characterizations of the New Jersey Supreme Court were imposed without benefit of a trial, and directly contradicted the Chancery Court’s findings on cross-motions for summary judgment.

tation on an organization's moral message raises First Amendment concerns of the highest order.

At a minimum, a reviewing court must give deference to an expressive organization's characterization of its own beliefs. The court below, however, gave no credence to either formal position statements or the testimony of Scouting officials. 54a. Indeed, it is evident that the court allowed its own strong disagreement with Scouting's position to color its judgment. See 59a-64a (denouncing "stereotypes," "prejudice," and "bigotry").⁷

Second, the court below misapprehended the legal standards for evaluating the content of an association's beliefs. According to the New Jersey Supreme Court,

Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality.

52a (emphasis in original).

None of this would be legally relevant even if true. The South Boston Allied War Veterans Council in *Hurley* did not "associate for the purpose of disseminating the belief that homosexuality is immoral," 52a, but it nonetheless had the right to exclude those who wished to make their own message "part of the existing parade." 515 U.S. at 570. And even if it

⁷ Most Americans are members of religions which regard homosexual conduct as sinful. JA 722-723 (Roman Catholic-28% of the population), JA 725-726 (Southern Baptist-10%), JA 714-715, (Lutheran-8%), JA 728 (Presbyterian-7%), JA 708-709 (United Methodist-4%), JA 711-712 (Orthodox and Conservative Jewish), JA 720 (Latter-day Saints). R 4771-4773.

were true that Scouting discourages leaders from discussing sexual issues, which it is not, *Hurley* established that the organization has the right to exclude those who wish to proclaim their sexual identity as part of the organization's message.

The government may not use a group's "multifarious voices" as a justification for intervention. *Hurley*, 515 U.S. at 569. It is not uncommon for groups to have members who "subscribe to different views," 52a, on some issues. Associations have the right to resolve such internal disagreements for themselves through their internal processes of governance. And even if it were true that Boy Scouts of America had never articulated moral disapproval of homosexuality until now, that would be completely irrelevant. A private organization has the right to decide for itself what it believes, and to change those beliefs when it sees fit.

Third, the lower court's characterization of Scouting's beliefs is simply incorrect. Five official position statements of the organization, JA 453-461, and nine current and former Scout officials and volunteers attested to Boy Scouts of America's moral view, JA 160-161, JA 183, JA 312, JA 451, JA 465, R 3254, JA 444, JA 746, JA 692-693, JA 761, and its expert attested to the fact that the "presence of avowed homosexuals in Scouting would interfere with transmitting the value that homosexual conduct is not morally straight or clean." JA 742. The National Director of Boy Scouting certified:

Boy Scouts believes that homosexual conduct is not 'morally straight' under the Scout Oath and not 'clean' under Scout Law. Consequently, known or avowed homosexual persons or any persons who advocate to Scouting youth that homosexual conduct is 'morally straight' under the Scout Oath, or 'clean' under the Scout Law will not be registered as adult leaders.

JA 746. While respondent introduced affidavits by a number of individuals connected to Scouting that they were unaware of this belief or did not agree with it, respondent presented no evidence that the organization had ever taken the position that homosexual conduct *is consistent* with the Scout Oath and Law.

The court below had no basis in fact or law for second-guessing Boy Scouts of America's statement of its own beliefs.

b. The Expressive Impact of Dale's Participation As an Openly Gay Uniformed Adult Leader

The New Jersey Supreme Court also rested its decision on the assertion that Dale's presence as a uniformed Assistant Scoutmaster would not interfere with Scouting's message because Dale would simply do his job and would not "teach" anything whatsoever about homosexuality as a scout leader." 66a. There are three reasons to reject that argument.

First, even if it were true that Dale would not participate in Scouting "to make a point" about sexuality, 66a, his very presence as an openly gay uniformed Boy Scout leader would inevitably make such a point. Boy Scout leadership is inherently expressive: "Adult leaders set a positive example for the boys by living the Scout Oath and Scout Law themselves." JA 181; *see* JA 543. If Boy Scouting were required to accept a known Ku Klux Klansman as a leader, this would interfere with the organization's message of racial harmony even if he never uttered a word on the subject of race while in Scout leader uniform. *See Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 729, 952 P.2d 218, 257 (1998) (Kennard, J., concurring) ("Could the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite?"). Whether he intends it or not, Dale's

presence as an openly gay Scoutmaster would convey the message that homosexuality is consistent with Scouting ideals and values.

The New Jersey Supreme Court implicitly recognized that placing an individual in the uniform of a Scout leader constituted symbolic speech when it noted "the symbolism of the Boy Scout uniform" when worn in public. 26a-27a. Yet the court failed to recognize the symbolism of allowing those who disagree with Scouting's message to don the Scout leader's uniform. Wearing the uniform of Boy Scouts of America is a "medium[] of expression" that Boy Scouts of America has the right to control. *See Hurley*, 515 U.S. at 569.

Second, the court misconstrued respondent's claim. Dale has never sought the right to serve as a silent Boy Scout leader, keeping his sexuality to himself; nor has he claimed that Boy Scouts of America would deny him a position on those terms. By his own allegations, "the only gay Scouts singled out for exclusion are those, such as [Dale], who . . . become leaders in their community and are open and honest about their sexual orientation." JA 11, JA 133. Dale's expressions to the media of pride in being gay cannot be put back in the bottle, and it is undisputed that he has no interest in doing so. JA 470 ("[Y]es, I am gay, and I'm very proud of who I am"; "Being proud about who I am is something the Boy Scouts taught me."), JA 513. Dale first came to the attention of Monmouth Council officials as a result of a speech regarding teenagers' need for gay role models, JA 753, L 10, and he explained that his quest for a leadership position in Scouting is "about giving adolescent boys a role model." JA 549.

Third, apart from the actual effect of appointing Dale as a leader, private organizations have the right to make leadership decisions for themselves, without threat of lawsuits, damages, punitive damages, and injunctions. The prospect of such suits

has a severe chilling effect on the exercise of First Amendment rights. See *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343-44 (1987) (Brennan, J., concurring). Each time an adult presents himself to a Boy Scout Troop as a potential leader, it is the responsibility of the Troop Committee, and ultimately of Boy Scouts of America, to evaluate his potential as a moral exemplar for the boys of the Troop. JA 299-303. To serve as an adult leader, a person must, *in Scouting's opinion*, "possess the moral . . . qualities deemed necessary . . . for leadership." 222a, JA 359. To subject such decisions to second-guessing by the government, armed with punitive sanctions, is a denial of that autonomy. See *Hurley*, 515 U.S. at 575 ("the choice of a speaker . . . is presumed to lie beyond the government's power to control").

B. The Decision Below Also Violates Boy Scouting's Freedom of Expressive Association

1. Private Expressive Associations Have the Right to Choose Their Own Members

As Tocqueville long ago observed, voluntary associations are at the heart of American civic life:

Americans of all ages, all stations in life, and all types of disposition are forever forming associations.

* * * *

Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world.

Alexis de Tocqueville, *Democracy in America* 513, 189 (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835).

This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Freedom of association is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Part of the freedom of association is "the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). See *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984) (First Amendment guarantees appellees' "freedom to associate or not to associate with whom they please"). Without the freedom to exclude those who disagree with the association's beliefs, the freedom of expressive association would be an "empty guarantee." *Id.* at 122 n.22. (quoting Lawrence Tribe, *American Constitutional Law* 791 (1978)). As this Court stated in *Roberts*:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. *Freedom of association therefore plainly presupposes a freedom not to associate.*

468 U.S. at 623 (emphasis added). See *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). Freedom of expressive association protects the right of any group,

whether expressing minority or majority views, or religious or secular views, to protect the strength of its "ideologies or philosophies" by limiting membership to those who accept them. *Roberts*, 468 U.S. at 627. See *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

2. Private Expressive Associations Have the Unqualified Right to Choose Their Leaders

The freedom to select leaders is even more essential to freedom of association. The personality, character, ideas, and commitments of a leader often define the character of the group. This Court has recognized the right of political organizations to select their leaders free of state interference. See *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989) ("Freedom of association means . . . a right to 'identify the people who constitute the association' . . . and to select a 'standard bearer who best represents the party's ideologies and preferences.'") (internal citations omitted). Similarly, courts have recognized the right of churches and synagogues to choose their own ministers and rabbis.⁸ Charitable youth organizations likewise have been afforded discretion to employ leadership representing their

8. See, e.g., *Gellington v. Christian Methodist Episcopal Church, Inc.*, No. 99-10603, 2000 WL 192100, at *6 (CA11 Feb. 17, 2000); *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (CA5 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187-88 (CA7 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (CA8 1991); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (CA4 1985); *McClure v. Salvation Army*, 460 F.2d 553, 560 (CA5 1972). After *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), these decisions can best be explained as arising from freedom of expressive association.

value systems.⁹ The selection of adult leaders in Scouting falls within this principle. As the California Supreme Court has noted:

In any organization, *the leader occupies a sensitive role with respect to the articulation and transmittal of the group's values.* This is particularly true of the Boy Scouts. The Scouting program is organized around the principle that *the most effective way to teach the values of Scouting is through the leadership, counseling and example of the Scoutmaster.*

9. See *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 703-705 (CA8 1987) (living by certain code of behavior constitutes bona fide occupational qualification for Girls Club counselors expected to act as role models); *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 414-415 (CA6 1996) (unmarried pregnant teacher dismissed for not setting Christian example); *Little v. Wuerl*, 929 F.2d 944, 951 (CA3 1991) (Catholic school permitted not to rehire divorced and remarried teacher because school could hire only those whose beliefs and conduct were consistent with its purposes); *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 (CA7 1987) (plaintiff's controversial beliefs regarding abortion would have prevented Catholic school from hiring plaintiff); *Harvey v. YWCA*, 533 F. Supp. 949, 954-955 (W.D.N.C. 1982) (unmarried pregnant woman who wished to model an alternative lifestyle to teenagers properly discharged because Christian sexual morality was bona fide occupational qualification for position of YWCA girls counselor); *Gosche v. Calvert High Sch.*, 997 F. Supp. 867, 871 (N.D. Ohio 1998) (Catholic school teacher properly dismissed because her sexual conduct was not fulfilling the legitimate expectation that she would "by word and example . . . reflect the values of the Catholic Church"); *Bishop Leonard Reg'l Catholic Sch. v. Unemployment Compensation Bd. of Review*, 140 Pa. Commw. 428, 436-437, 593 A.2d 28, 32 (Pa. Commw. Ct. 1991) (unemployment benefits denied to discharged teacher because her marriage to divorced man constituted violation of Catholic principles).

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 683, 952 P.2d 218, 226 (1998) (citations omitted) (emphasis added). We urge this Court to hold that private, non-commercial, expressive associations have the unqualified right to select their own leadership.

3. Boy Scouting's Expressive Association Claim Is Supported by the *Roberts* Trilogy

In a trilogy of cases, this Court held that the State could compel certain clubs to accept women as members. *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). These cases are distinguishable on two grounds. First, they involved quasi-commercial organizations. Second, the clubs did not have any moral code or philosophy that was logically related to their challenged membership criteria. In fact, the *Roberts* trilogy supports petitioners' expressive association claim.

a. As a Non-Commercial Expressive Association, Boy Scouting Enjoys Full Protection of the Freedom of Association

In *Roberts*, Justice O'Connor explained that, rather than apply a "compelling interest" standard indiscriminately to all private associations, the Court should distinguish between those that are "primarily engaged in protected expression" and those that are sufficiently "commercial" that they do not enjoy full rights of freedom of association. 468 U.S. at 633-636 (O'Connor, J., concurring). The Jaycees, which she pointedly noted are "otherwise known as the Junior Chamber of Commerce," are engaged in "the art of solicitation and management," which gives its members "an advantage in business." *Id.* at 639. Similarly, the purpose of the Rotary Clubs was to involve a "'cross section of the business and

professional life of the community.'" *Rotary*, 481 U.S. at 546 (citation omitted). Participation in such business and professional organizations is important to equality of opportunity in the commercial marketplace, and the First Amendment protection of their exclusionary practices is correspondingly lower.

Far from having commercial goals, Boy Scouting has goals exclusively related to personal, moral, and physical development. Adults do not participate in Scouting in order to gain "an advantage in business," but to help boys grow up to be morally straight young men. Indeed, in her *Roberts* concurrence, Justice O'Connor used Boy Scouting and Girl Scouting as illustrations of expressive associations enjoying full constitutional protection:

Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.

468 U.S. at 636 & n.* (quoting Paul Fussell's observation that *The Official Boy Scout Handbook* is "another book about goodness").

b. The Exclusion of Dale Is Related to Boy Scouting's Moral Beliefs

The Court in the *Roberts* trilogy held that those organizations could be required to accept female members because there was no logical connection between the political or ideological positions taken by the organizations and exclusion of women. The Act "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts*, 468 U.S. at 627. *Accord New York State Club Ass'n*, 487 U.S. at 13; *Rotary*, 481 U.S. at 548-549. The Court acknowledged the possibility "that women might have a

different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations," but found this supposition "[un]supported by the record."¹⁰ *Roberts*, 468 U.S. at 627-628. In cases where there is such a connection between membership criteria and the group's ideology, however, the *Roberts* trilogy makes clear that freedom of association protects the right of exclusion. Thus, in *Hurley*, this Court interpreted *New York State Club Association* as "recogniz[ing] that the State did not prohibit exclusion of those whose views were at odds with positions espoused by the general club memberships." 515 U.S. at 580. The dispositive question, therefore, is whether "compelled access" would "trespass on the organization's message." *Id.* at 580-581 (a "private club" may "exclude an applicant whose manifest views were at odds with a position taken by the club's existing members"); *New York State Club Ass'n*, 487 U.S. at 13 ("private" associational viewpoints protected).

As explained above, Dale's "manifest views" are that Boy Scouting's policy on homosexuality is "bad" and "wrong." JA 513. Accordingly, under *Hurley* and the *Roberts* trilogy, Boy Scouting is entitled to decline his offer of services as a volunteer leader. It is of no constitutional moment that Scouting has a broad message and is not focused on an "anti-gay" theme. See 53a, 135-136a, 153a. The First Amendment does not require that Scouting become an "anti-gay" organization to enjoy protection for its expression of what is "morally straight." As Justice O'Connor noted in *Roberts*, "protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young." 468 U.S. at 636 (citations omitted).

10. The Court did not question the organization's own statements regarding its philosophy or beliefs. It merely questioned whether those beliefs were logically related to the exclusion of women.

4. The New Jersey Supreme Court's Expansive Interpretation of the Public Accommodations Law Conflicts with Core First Amendment Principles

The New Jersey Supreme Court's interpretation of its state public accommodations law is considerably more expansive than that of other state supreme courts or the federal courts, which uniformly have found that Boy Scouting is not a place of public accommodation. See *supra* note 3. The court extended New Jersey law to organizations – like Boy Scout Troops — that are neither public nor quasi-commercial. The decision below declares that any organization that publicly solicits members, uses public facilities or has connections to government officials, and is "similar" to organizations previously recognized as public accommodations is subject to the law. 24a.¹¹ This interpretation is so sweeping that almost any organization could find itself the target of a state's desire to enforce conformity to its ideas of desirable social change. The logic of the decision below does not stop with petitioners or respondent. New Jersey prohibits covered groups from using membership or leadership criteria based on a broad range of prohibited characteristics: race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, or nationality. Thus, Boy Scout Troops would be forced to admit girls as members, Girl Scout Troops would be forced to admit boys, and a Croatian cultural society would be forced to admit Serbs. That would be an extraordinary limitation on freedom of association as it is commonly understood. See *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974)

11. Much of the conduct that the court used as a basis for declaring Boy Scouting a public accommodation – such as advertising in national media, 25a; wearing uniforms in public, 26a; meeting in public facilities, 29a-30a; and having members of Congress and military personnel as members, 28a; – is itself constitutionally protected.

("The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.") (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting)).

The decision below subjects virtually all contested membership and leadership decisions of covered private organizations to the superintendence of governmental authorities.

Moreover, although the court below assures us that respondent has no intention to use leadership status to "teach" anything whatsoever about homosexuality," 66a, it provides no guidance about what Boy Scouting may do if he does just that. What if, during a discussion of sexual morality, Dale interjects his own opinion? What if Dale brings his significant other to a Boy Scout banquet? What if Dale wears his Scouting uniform in a gay pride parade? At what point does Scouting have a right to sever its connection with Dale?

In the employment context, an employer's allowance of a "hostile environment" constitutes "discrimination." Employers must alter their speech (and police the speech of their workers) so as not to offend members of protected classes. New Jersey and several other jurisdictions have extended the logic of these decisions to public accommodations laws. See New Jersey Dep't of Law & Pub. Safety, *Sexual Harassment: Your Rights* (Jan. 1998) ("Sexual harassment . . . is against the law . . . when you try to enter or join an organization that solicits members from the general public"); New York City Comm'n on Human Rights, (visited Feb. 17, 1999) <<http://www.ci.nyc.ny.us/nyclink/html/serdir/html/missions.html#CHR>> (New York City Human Rights law bars public accommodations harassment "on the basis of race, color, creed, age, national

origin, alienage or citizenship status, gender, sexual orientation, disability, marital status . . . lawful occupation . . . and record of conviction or arrest").

The implications for First Amendment rights are profound. If Scouting were a place of public accommodation, and if it could not "discriminate" against openly gay applicants for leadership positions, how could it continue to teach that homosexual conduct is not morally straight?

C. As Intimate Associations, Boy Scout Troops Have the Constitutional Right to Decide for Themselves Whom to Select to Supervise Other People's Children

1. Boy Scout Troops Are Intimate Associations

The First Amendment also protects the "formation and preservation of certain kinds of highly personal relationships" from unjustified interference by the state. *Roberts*, 468 U.S. at 618. The relationships of the Scouts to their leaders "presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" *Rotary*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 619-620). In determining whether a group is an intimate association, the relevant characteristics are the group's "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Roberts*, 468 U.S. at 620. When the organization at issue has both a national entity and local groups, the focus is on the local groups, where the personal relationships actually occur. See *Rotary*, 481 U.S. at 546-547; *Roberts*, 468 U.S. at 621. See also Recent Cases, *Civil Rights — Public Accommodation Statutes — New Jersey Supreme Court Holds That Boy Scouts May Not Deny Membership to Homosexuals*, 113 Harv. L. Rev. 621, 624 (1999) ("a local [Boy Scouts of America] unit . . .

fosters close interpersonal and mentoring relationships that seem worthy of consideration"). All of the factors discussed in *Roberts* support Boy Scouting here.

Boy Scout Troops are small groups of boys and adults, JA 172; their functions are utterly non-commercial and unrelated to business opportunities; they engage in hiking and camp-outs far from the public gaze, JA 173, JA 741; they are involved in the transmission and cultivation of shared ideals and beliefs, JA 241, JA 446-447; they are an integral part of the youth programs of many churches and synagogues, JA 159, JA 707-730; and they discuss moral and intimate subjects, JA 209-214, JA 249.

A boy joining a Troop becomes a member of a Patrol, a subgroup composed of three to eight boys. JA 172. Scouting activities, such as camp-outs, are primarily conducted in Troops, with each Patrol camping together. JA 173, R 2536, R 2538. "The Troop and Patrol are organized for face-to-face interaction . . ." JA 446. Each Patrol has its own name, meetings, and its own leader. "[B]oys in a Patrol participate together as a team." JA 172, JA 235-236. At Troop meetings, Boy Scouts wear their uniforms. "The uniform gives the boy a sense of identity with other Boy Scouts and with Boy Scout values, and reminds him that he is expected to live up to these values." JA 174, JA 270. Troops are incontrovertibly small, closely knit groups. A typical Troop is a group of only 15 to 30 boys. JA 172. By contrast, the Jaycees chapters at issue in *Roberts* had more than 400 members each, 468 U.S. at 621, and the Rotary chapters in *Rotary* ranged from 20 to more than 900. *Rotary*, 481 U.S. at 546.

Troops have a distinct mission and purpose: to instill the values of the Scout Oath and Law in youth members and to equip them to become responsible men, citizens, and family members. JA 170-171. Scouts and, even more so, Scout

leaders must commit themselves to these values. JA 172, JA 182-183.

The relationship between Boy Scout and Scoutmaster is also intimate within the meaning of *Roberts*. In addition to serving as a role model for Boy Scouting values, JA 446, the adult leader is expected to serve as a "wise friend" to whom the Boy Scout can turn for guidance on all kinds of problems and issues, including sex. JA 211, R 2539. Boys are encouraged to develop close personal relationships with leaders because "Boy Scouts believes that providing a close personal relationship with an adult outside the home helps boys in the difficult process of maturing to adulthood." JA 181. Indeed, even after they have grown up, former Troop members often return to consult their Scoutmaster and ask for "advice on a variety of important life decisions." JA 741-742. Since Boy Scout Troops take many overnight camping trips and typically spend a week together in summer camp, JA 173-174, there is a far greater degree of intimacy among members than would be the case in a group that met only for formal meetings. JA 181-182, JA 741-742. Indeed, a Scout leader may spend "more time actually interacting directly with a Scout than do his parents." JA 741. When an 11 year-old boy away from home for the first time becomes afraid at night, skins his knee, or forgets his sleeping bag, he looks to his Scoutmaster for support.

Given these responsibilities for the moral education and care of other people's children away from home, considerable selectivity is exercised in choosing adult leaders. Such a role cannot be treated as an "advantage" of a "place of public accommodation," open to all members of the public. To impose the "public accommodation" straitjacket on an intimate association violates the First Amendment by stripping it of its ability to be selective.

2. As Associations Formed Principally of Parents to Provide Moral Education to Their Sons, Boy Scout Troops Enjoy Enhanced Constitutional Protection

This Court has repeatedly recognized constitutional protection of the right of parents to control the education and upbringing of their children. Whether framed in terms of freedom of association under the First Amendment, as in *Roberts*, 468 U.S. at 619-620, or as a liberty protected by the Fourteenth Amendment, as in *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), or as an interest protected by the Free Exercise Clause of the First Amendment, as in *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972), parental direction of the moral education of their children has a high place in the hierarchy of constitutional values. Different parents have different ideas about upbringing, and seek out different organizations to assist them in the task of moral education. In a free society, organizations fail or flourish according to the private choices of innumerable families.

There can be no doubt that parents are “direct[ing] the upbringing and education,” *Pierce*, 268 U.S. at 534-535, of their sons by placing them in Boy Scout Troops. Scouting’s *Rules and Regulations* unequivocally state that “[e]ducation is the chief function of the Scouting movement.” JA 411.

The fact that parents place their sons in the environment of a Boy Scout Troop in order to instill values in them strongly reinforces the claim for intimate associational protection. See, e.g., *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 742, 952 P.2d 261, 265 (1998). This Court has repeatedly emphasized that it is not for the state to interfere with parental choices regarding the upbringing of their children with respect to religious and moral values. For example, in upholding the right of Old Order Amish not to send their children to high school “because [of] the values they teach,” the Court held that

the state was not empowered to “save” children from their parents’ choice of education in “moral standards, religious beliefs, and elements of good citizenship.” *Yoder*, 406 U.S. at 210, 232-233. See *Pierce*, 268 U.S. at 534-535; *Meyer*, 262 U.S. at 399-400; *United States Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 541 (1973) (Douglas, J. concurring).

As this Court recognized in *Roberts*, the instrumental aspect of freedom of association — expressive association — and the intrinsic aspect — intimate association — may coincide. *Roberts*, 468 U.S. at 618. The Boy Scout Troop is a perfect example of both aspects coming together in a single group. The state may not dictate who parents select as the “wise friend,” R 2539, to undertake the moral education of their sons in Troops.

In a press interview, Dale was asked whether he would want a son of his to join Boy Scouting. His response is instructive:

Assuming that the discriminatory policy’s not there, I would definitely like the kid to be in the Scouts. But I would want to know who the people were that were influencing him — his Scoutmaster, the other Scouts. A kid can be highly impressionable, and I wouldn’t want some narrow-minded person leading my son’s troop. For all the hysteria around gays in the Boy Scouts, I think any parent who trusts just anybody with their child is crazy.

David Rakoff, *Camping Lessons*, N.Y. Times, Aug. 22, 1999, § 6 (Magazine), at 17. Putting aside any disagreement with Dale over what constitutes a good influence, he is exactly right. To say that public accommodations laws can apply to selection of Scoutmasters is to say that these positions must be open to all members of the general public — just like rooms

in hotels or seats on airplanes. That, in Dale's words, is "crazy." It also violates the First Amendment.

D. No State Interest Justifies These Infringements of First Amendment Rights

In *Roberts*, this Court held that even limited regulation of expressive associational activity could be justified only by a state interest that was both "unrelated to the suppression of ideas" and "compelling." 468 U.S. at 623. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 n.47 (1982); *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

Here, application of the public accommodations law is directly "[r]elated to the suppression of ideas" and, if permitted by this Court, would "hamper[] the organization's ability to express its views." *Roberts*, 468 U.S. at 623-624. When the New Jersey justices were not claiming that Scouting has no moral view on homosexuality, they were condemning Scouting's view as "prejudice" and "bigotry" and opining that the state has a vital interest in eradicating it. 59a, 61a. The concurring justice pronounced it "untenable" that Scouting "remain[ed] entrenched in the social mores that existed at the time of its inception." 100a. Dale himself admits that he seeks to wear the Scouting uniform because he wants "to point out to [Scouting] how bad and wrong this policy is." JA 513.

The court below wholly failed to identify a compelling interest that trumps Boy Scouting's First Amendment rights. The court made the same error here as did the Massachusetts court in *Hurley*: it failed to distinguish a compelling interest for existence of the statute *on its face* from the lack of a compelling interest for the statute *as applied*. See *Hurley*, 515 U.S. at 564-565. Whatever the State's interest in the public accommodations law in the abstract, the State has no legitimate interest in demanding that private associations open their doors to volunteer

leaders who do not share their philosophy. As Justice Souter observed in his opinion for the Court in *Hurley*, elimination of supposed bias is not a justification:

It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. *Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective.*

Id. at 578-579 (emphasis added).

The "compelling state interest" discussion in the *Roberts* trilogy should not be cited to preclude an African-American big sisters organization from mentoring youth of one race and sex, a Jewish dating service from presenting singles with the opportunity to socialize with those of the same religion, or Second Generation, an Asian-American theater company in New York, from accepting only second generation Asian-Americans as participants. American pluralism thrives on difference. Private groups need not act like governments or public utilities, serving the entire population. Gay rights groups might wish to exclude Biblical fundamentalists, in violation of the prohibition on discrimination based on religion. Single-sex associations such as male Promise Keepers prayer groups and Women Anglers of Minnesota are obviously valuable to the participants as single-sex groups. The autonomy of such groups is vital to a diverse and free civil society. See William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three*

Sources of Liberal Thought, 40 Wm. & Mary L. Rev. 869, 875 (1999) (“[I]f we insist that each civil association mirror the principles of the overarching political community, meaningful differences among associations all but disappear, constitutional uniformity crushes social pluralism.”).¹² Pluralism requires that we tolerate groups with which we disagree.

Tocqueville recognized the central role of the right of association to personal liberty:

The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems to me by nature almost as inalienable as individual liberty. Short of attacking society itself, no lawgiver can wish to abolish it.

Alexis de Tocqueville, *Democracy in America* 193 (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835).

We recognize that the underlying question of the morality of homosexual conduct is controversial, and that many people of good will believe that Scouting’s position on the matter is

¹² See also National Comm’n on Civil Renewal, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It* (1999); Nancy L. Rosenblum, *Membership & Morals: The Personal Uses of Pluralism in America* (1998); *Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society* (Mary Ann Glendon & David Blankenhorn eds. 1995); Aviam Soifer, *Law and the Company We Keep* (1995); Stephen L. Carter, *The Culture of Disbelief* 37 (1993) (“Although the influence of many intermediate institutions (particularly political parties, civic clubs, and state governments) has weakened over time, the continued vitality of intermediaries is crucial to preventing the reduction of democracy to simple and tyrannical majoritarianism, in which every aspect of society is ordered as 51 percent of the citizens prefer.”).

misguided. That is not the issue in this case. It is our belief that controversial questions of personal morality, often involving religious conviction, are best tested and resolved within the private marketplace of ideas, and not as the subject of government-imposed orthodoxy. We can respect the plea of many gay and lesbian Americans not to have the majority’s morality imposed upon them. By the same token, we ask that a contrary morality not be forced upon private associations like Boy Scouts of America, at the expense of its First Amendment freedoms of speech and association.

CONCLUSION

The judgment of the New Jersey Supreme Court should be reversed and the case remanded with directions that judgment be entered for Petitioners.

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Respectfully submitted,

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