

IN THE SUPREME COURT OF THE UNITED STATES

**BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, ET AL.,
v. JAMES DALE**

No. 99-699

Washington, D.C.
Wednesday, April 26, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

GEORGE A. DAVIDSON, ESQ., New York, New York; on behalf of the Petitioners.

EVAN WOLFSON, ESQ., New York, New York; on behalf of the Respondent.

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PROCEEDINGS

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-699, Boy Scouts of America and Monmouth Council v. James Dale.

Mr. Davidson.

**ORAL ARGUMENT OF GEORGE A. DAVIDSON ON BEHALF OF
THE PETITIONERS**

MR. DAVIDSON: Mr. Chief Justice, and may it please the Court:

This case is about the freedom of a voluntary association to choose its own leaders. The New Jersey supreme court has held that the State and not Boy Scouting may decide who will wear the Scout leader's uniform and act as a role model of Scouting's values for a group of 10 to 15 boys in a Scout troop.

Far from a business networking organization, Boy Scouting is so closely identified with traditional moral values that the phrase, he's a real Boy Scout, has entered the language.

QUESTION: Do we take this case as one in which Dale was terminated because of the reasonable likelihood that he would use his position to advocate for his cause?

MR. DAVIDSON: Your Honor, Mr. Dale had created a reputation for himself by the newspaper article which appeared, and which -- the reputation which would have carried into the troop meeting and affected his ability to be a role model to the youths in his troop.

QUESTION: So if it were simply called to the Scouts' attention that he was a very private person, but had said to his family that he was a homosexual, that he could still be terminated?

MR. DAVIDSON: Well, as Mr. Dale alleges in his complaint and reaffirmed in his summary judgment affidavit, Scouting does not investigate the sexual orientation of applicants and only excludes those that are open about their sexual orientation. The cases we have had have been people that have been in the newsletter, or have written a letter for Boy Scouts, were recruited as testers by Act Up and that sort of thing, so the case, Your Honor, as posited we haven't seen.

QUESTION: Well, what is the position of the Scouts in the case that I have posited?

MR. DAVIDSON: Well, I would be prepared to defend any decision they might make in that situation. I think that's their right under the Constitution --

QUESTION: Is that on the grounds that from his status a certain amount of advocacy is likely? That's what I'm trying to get at.

MR. DAVIDSON: Well, Boy Scouts is concerned about two things, expression and conduct inconsistent with the oath and law. Boy

Scouts is not concerned about status.

QUESTION: Well, if a Boy Scout -- well, let's just keep it at troop leaders for now. If a troop leader simply said to other officials, not to the newspapers, not in any public forum anywhere, I am a homosexual, would he be excluded from his leadership position for that alone?

MR. DAVIDSON: If the -- whoever heard whatever statement was made learned that the person intended to engage in homosexual conduct felt that that was an appropriate --

QUESTION: That wasn't my question. I mean, you may want to elaborate on that, but if he simply says, I am a homosexual, would he be excluded from a leadership position for that?

MR. DAVIDSON: As I said in response to Justice Kennedy's question, that precise question hasn't come up. I believe that there would be the right to do that.

QUESTION: But you're defending an expressive policy, and that's one of the things that's confusing. Are you saying the policy is don't ask, don't tell, or is the policy, if you are gay you are not welcome in the Boy Scouts? Which is it?

MR. DAVIDSON: The policy is not to inquire. The policy is to exclude those who are open. That's alleged in the complaint. It's not been an issue in the case. That's what Mr. Dale alleges --

QUESTION: Well, do we answer the --

QUESTION: Well, where do we look, though, to determine what the policy is, because it is a little confusing, and let me add another question to the mix, and maybe you can clarify for us where we look. What about the heterosexual Scout leader who openly espouses the view that homosexuality is consistent with Scout law and oath, and that it's not immoral?

MR. DAVIDSON: If a --

QUESTION: Now, what about that person, and where do we look to see what the Boy Scout position is on these things?

MR. DAVIDSON: If that person were to advocate that position through Scouting channels in an effort to change policy, that would be permissible. As the record indicates in Mr. Bishop's affidavit and

Mr. Kaye's testimony, if such a person were to advocate the morality of homosexual conduct to youth in the program, that person would be excluded and, indeed, one of Mr. Dale's affiants was excluded on that ground.

QUESTION: Well, I take it from what you're saying, Mr. Davidson, that perhaps the Scouts have not adopted a comprehensive policy covering every single conceivable situation that might come up.

MR. DAVIDSON: Mr. Chief Justice, the Scouts have general moral principles in the morally straight and clean requirements of the oath and law, and they have to be interpreted by Scout leaders in situations as they have come up and certainly, in the case of those who have -- Mr. Dale has alleged are openly homosexual are not permitted to be Scout leaders, in furtherance of the efforts to pursue those moral values in youth.

QUESTION: So you want us to decide this case without reference to the likelihood of any public advocacy? It's just not necessary for us to address when we decide this case, in your view?

MR. DAVIDSON: Certainly not in Mr. Dale's case, who has really constantly reiterated his intention and desire to be open, and has had considerable media attention both before the case was filed and subsequently.

QUESTION: But you don't find that a necessary predicate for your case here? That's all I'm trying to ask.

MR. DAVIDSON: I'm saying that the First Amendment would protect application of exclusion of other people in other circumstances, but they're not presented here today.

QUESTION: When you -- I'm not sure what we're talking about when we say exclusion of people who are not openly homosexual. I mean, what if someone is homosexual in the sense of having a sexual orientation in that direction but does not engage in any homosexual conduct?

MR. DAVIDSON: Well, if that person also were to take the view that the reason they didn't engage in that conduct would it would be morally wrong --

QUESTION: Right.

MR. DAVIDSON: -- and that's the view that would be communicated

to youth, that case has not come up, but it's my understanding of the policy that that person would not be excluded.

QUESTION: But somebody who was homosexual and celibate, but who said, in my view it isn't morally wrong, would such a person be excluded?

MR. DAVIDSON: Justice Ginsburg, I'm not sure I got the notes right in that question, but if somebody said it was morally wrong, and that they didn't engage in it but did have homosexual inclinations, I believe that that person would be eligible for leadership, as I understand the policy.

QUESTION: So again you're saying it's not the status of being gay or being candid about who you are but --

MR. DAVIDSON: It's about the message that would go to youth in the program. The youth -- in accordance with a desire to --

QUESTION: Well, I'm -- I just -- I don't understand what is the Boy Scouts' policy, and I think we've all asked about that. Is it -- I took it from one of your answers that it is don't ask, don't tell. Am I wrong about that?

MR. DAVIDSON: The practice is not to inquire into the sexual orientation of leaders. The policy derives out of the morally straight and clean requirements of the law. There's formal position statements in the record attached to Mr. Rowley's affidavit that Scouting requires homosexual conduct, regards homosexual conduct as immoral and for that reason does not appoint openly homosexual persons in the role model position of Scout master.

QUESTION: Does that go for cohabiters also?

MR. DAVIDSON: I'm sorry, I couldn't quite --

QUESTION: People who live together, heterosexual unions but not blessed by marriage.

MR. DAVIDSON: Well, there's certainly adulterers or other people that have engaged in heterosexual behavior which Boy Scouts has not regarded as morally straight who have been excluded.

QUESTION: I don't mean -- just, the incidence of living together before marriage is not so uncommon these days. I didn't refer to an adulterer.

MR. DAVIDSON: Right.

QUESTION: Two people who live together but they're not married.

MR. DAVIDSON: I know of no particular instances of application of the policy in that connection. I was just trying to give a more general answer that heterosexual conduct which is not regarded as morally straight has resulted in the termination of leadership positions, or not welcoming someone into leadership in the first place.

QUESTION: Is it fair to say, then, that anyone who is openly homosexual and whose admission, or profession of that fact would be likely to come to the attention of the Boy Scouts themselves, be excluded?

MR. DAVIDSON: That's correct, Your Honor. The boys are --

QUESTION: Openly homosexual in the sense of practicing homosexuality?

MR. DAVIDSON: Well, being openly homosexual in -- communicates the concept that this is okay. This is an alright lifestyle to pursue. Whether the --

QUESTION: That the sexual expression of it is okay?

MR. DAVIDSON: Absent some further statement that it would be immoral to act on the impulses, in the culture in which these statements are made we talk about coming out. We don't talk about coming out as Canadian or heterosexual or anything else. This is a statement fraught with moral meaning.

QUESTION: Is it -- and I take it -- we may have touched on this, but I take it that the position that you've just described is not stated anywhere in a Boy Scouts manual, or even a troop leader manual? This is in effect sort of Boy Scout common law. It's determined by the council, and the council makes individual decisions, and that's the way the policy is expressed, is that correct?

MR. DAVIDSON: Well, the record shows, although the actual article is not in the record, that in the magazine sent to all adult Scouters in 1992 there was an article about the policy, so it's not a stealth policy, but the general principle of morally straight is really very, very widely known in the Scouting movement. It's --

QUESTION: The general principle is, but this particular application of the Scouts' view of the principle I take it is not stated in any official manual, either the handbook for boys that the Scouts get, or a troop leader's manual, is that right?

MR. DAVIDSON: Well, in Mr. Dale's 1972 Scout master's handbook there is a reference in dealing with incidence of sexual activity that might occur in a troop that speaks disapprovingly of homosexual conduct, but there's not a --

QUESTION: But that's --

MR. DAVIDSON: -- formal policy statement in the troop -- in either of those, of the publications, nor is there anything about adultery or any other -- or a number of other --

QUESTION: And I --

QUESTION: But --

QUESTION: -- I take it you've just touched on something that I think -- again, I think I understand your position, but I want to be clear. I understand that the Scouts' position on this does not in any way depend on a judgment that Mr. Dale is -- presents or would present an undue risk of homosexual conduct with the Scouts in his troop, is that correct? It's not a fear of conduct?

MR. DAVIDSON: Absolutely not, Your Honor. In fact, the issue of possible sexual abuse is one that's very important to Scouts. Every Scout handbook and Scout master handbook comes with an insert which is in the record at 2248 which talks about sexual abuse at some length. It never mentions the word homosexual. In fact, the only thing it says about gender is that there's a rising incidence of abuse by female adults.

QUESTION: But that's not at issue here.

MR. DAVIDSON: That's --

QUESTION: It's not alleged, and that's not the basis of it.

MR. DAVIDSON: -- not alleged. It's not the basis of policy in any way.

QUESTION: All right. Now, clarify for me, because I -- it is not clear to me yet. A heterosexual male adult who wants to be a Scout leader

who openly espouses the view that homosexuality is not immoral, and that it is consistent with Scout law and oath, is that person qualified for membership as a troop leader?

MR. DAVIDSON: That person could take that position in Scouting Councils to urge that a change be made, but if that -- unless that person were willing to -- if that person were to take that position to the youth in the program and urge it on the youth in the program, that person would not be able to continue as a Scout leader, and that's why Mr. Rice was terminated.

QUESTION: How about if he alleged in the community -- one moment, just -- how about if he just made speeches about this in the community as a whole?

MR. DAVIDSON: Well, I think this is a situation which, if it would be likely to come to the attention of the youth in the program, it would be open to --

QUESTION: All right.

MR. DAVIDSON: -- Scouts to terminate that person's membership. I can't cite a case that that's happened.

QUESTION: Did anything happen here, other than what's in the complaint, which I take it was that Mr. Dale, sometime in the past, was a member of the Gay Alliance at a university, gave some seminars, was interviewed then, and it was in the newspaper. Then he received a letter of termination.

MR. DAVIDSON: Right. He was then and there the copresident of Rutgers's Gay and Lesbian Group.

QUESTION: All right, yes, but there's nothing other than that, and when you use the word open, that's what open refers to, is talking to the newspaper reporter about his previous membership in the Gay Alliance?

MR. DAVIDSON: No, no. He was then a member of the Gay Alliance at the time he was -- yes. Yes.

QUESTION: We're -- are we thinking of the same thing?

MR. DAVIDSON: Oh, I'm sorry.

QUESTION: I'm thinking of a seminar that he was at, and there was a

newspaper article about him, is that right, which is in the complaint?

MR. DAVIDSON: That's correct, Justice Breyer.

QUESTION: And that's it.

MR. DAVIDSON: That's --

QUESTION: It's on the basis of that that he's terminated, and when you use the word open, you're referring to that?

MR. DAVIDSON: Right.

QUESTION: All right. And now, if a similar person had said every word exactly the same, but he was not gay, and it was -- would he be terminated?

MR. DAVIDSON: Well, it would be open to Scouts to make that determination, and it's also open to Scouts to --

QUESTION: Well, of course, it's always open to the Scouts to decide whom they're going to hire and not, but what I'm saying is, is there a policy that it would be identical were that person not gay? Everything's the same, newspaper article, et cetera. It just happens that the person being heterosexual says, and I think it's great, I think it's fine, okay. That's all. He did that at college. Would the Scouts terminate him?

MR. DAVIDSON: I have no information as to how that situation would be resolved. I would observe that it would be open to the Scouts to conclude that somebody who is himself presenting a personal example, as well as advocating, might be more unacceptable than somebody who was merely advocating.

QUESTION: I want you to proceed with the rest of your argument, but in answer to Justice Souter's question as to what documents, what about the 1978 memorandum, I think it was, that's quoted in the California supreme court case, which is a question and answer format, in which a high executive of the Scouts, I had thought, indicates that homosexuality in its troop leaders is incompatible with Scouting? You didn't give that in your answer to Justice Souter, and --

MR. DAVIDSON: Well --

QUESTION: -- it seemed to me that that was a rather strong statement.

MR. DAVIDSON: There are several position statements, of which that's the first, to the effect that Scouting does not appoint avowedly homosexual leaders. Whether the word avowedly is used in each statement or not, the policy is not to ask, so it only comes up when a person is wearing it on their sleeve.

But 5 years ago we came to this Court in an amicus curiae brief in the Hurley case to catalogue the numerous public accommodations cases that were being brought around -- against the Scouts around the country, and the case we bring here today we submit is a stronger case than Hurley in several respects.

In Hurley there was no readily apparent parade, message in the parade. Here, we have a moral code, which has been recited in unison at virtually every meeting by all the adults and boys in the program since 1910, in which they promise to be morally straight and clean in thought, word, and deed.

QUESTION: May I ask right there, is it the position that a person who is a homosexual, engages in homosexual conduct, cannot fit that definition?

MR. DAVIDSON: That's correct, Your Honor.

QUESTION: May I ask also whether it makes any difference in the balance that the Court strikes that the Scouts are a federally chartered institution and that Government entities such as schools and fire departments and police departments and so on sponsor troop units? Does that make a difference, particularly if the governmental unit itself takes the position that it would disagree with this determination that the Boy --

MR. DAVIDSON: Let me answer both of those questions in order. As to the Federal charter, virtually everything conducted in the corporate forum is necessarily chartered by a Government entity and, as this Court said in the Gay Olympic Games case, San Francisco Arts and Athletics, that doesn't deprive a corporation of its private character.

With respect to Government sponsorship, everybody who sponsors a Scout troop signs on to follow Scouting's values and procedures. If, for political or legal reasons, they shouldn't be doing that, their remedy is to not continue to support Scouting.

QUESTION: Well, I must say, I found it somewhat difficult to assess the relevance of this web of relations that the Boy Scouts have in New Jersey with schools and fire departments. I'm puzzled about

what weight, if any, to give to that.

If you prevail on your First Amendment argument here, and you prevail in this case, do you think the schools and the fire departments (a) would be permitted, or (b) required, under New Jersey law, to sever their relations with the Scouts?

MR. DAVIDSON: Well, with respect to the -- we have governments that are begging Scouting to go into Cabrini Green housing projects, and to have cub packs at women's prisons, but Scouting itself has pulled back considerably from government, taking the Career Awareness Exploring Program back and making it a nonmembership activity which doesn't involve oaths or membership or anything like that, so that many police and fire departments are no longer sponsoring Scouting units, because that's been moved over to Learning for Life.

But I'm not sure if Your Honor was based on, as a matter of New Jersey law, or a matter of constitutional law.

QUESTION: Well, no one thinks that -- or has suggested that this makes you a State actor, so I think the Fourteenth Amendment is out, but just as a matter of New Jersey law it would seem to me that the schools and the fire departments, to comply with the New Jersey law as interpreted by the supreme court, would have to sever the relation. Perhaps I'm wrong.

MR. DAVIDSON: Justice Kennedy, that may well be.

QUESTION: Are they places of public accommodation? I don't know. I -- if you --

MR. DAVIDSON: Justice Scalia, Kansas has held that a school is not a place of public accommodation, but there's authority in other States the other way. I don't know of any New Jersey authority.

QUESTION: Anyway, your point is if Government giving any assistance to the Scouts is a problem, you'd rather, no thank you, not have the assistance than have to change your policies.

MR. DAVIDSON: Right. The Scouts have said many times that their policies are not for sale, and if it costs the sponsorship, well that's -- so be it.

QUESTION: May I ask one follow-up question to the one I asked before -- if homosexual conduct violates the Scout code, being

straight and so forth, why is it relevant whether the man is open or not?

MR. DAVIDSON: Well, in two respects. First, if nobody knows about it, it doesn't become an issue.

QUESTION: But assume the Scouts find out about a person but he hasn't -- he just unwittingly let them find out, not intending to.

MR. DAVIDSON: If it becomes known to the Scouts, the person would not be an appropriate role model and presumably would not be permitted to continue.

QUESTION: So the policy is not limited to open gays. It's limited to all people --

MR. DAVIDSON: It's known or avowed. In practice, it has been avowed, and rather publicly avowed.

QUESTION: But my case is the one where it's found out against the wishes of the person who wanted to keep it secret, and wanted not to let the boys in the Scout troop know about it, but the administration finds out about it.

As I understand your position, he would be treated just like this man.

MR. DAVIDSON: Right. The right is that of Scouting to choose the moral leaders it wants for the children in the program.

QUESTION: But there were some briefs that suggested that Boy Scout troops who had taken the position not simply inside Boy Scout councils, but openly, that they welcomed Scout leaders without regard to sexual orientation.

The chapters -- troops had been open about that, and yet their charters hadn't been revoked. Is that so?

MR. DAVIDSON: There's some reference to troop 260 in one of the affidavits in the joint appendix. We should have but did not put in an affidavit in response to that from Grant Robinson, the Scout executive in the area where that troop was involved, indicating that the troop did agree to follow the policy in -- so as to be rechartered. That Robinson affidavit can be found at 4760 of the record.

I had --

QUESTION: So you are saying that it -- that a troop could only within the Boy Scouts' own councils, not in discussion with the young members of the troops, and not to the general public.

MR. DAVIDSON: That's correct, Justice Ginsburg.

QUESTION: You don't ask. You don't ask. I mean, if it never comes out, you don't make any effort to find out, is that right?

MR. DAVIDSON: That's correct, Justice Breyer.

QUESTION: All right. How are we supposed to know -- and this is genuinely bothering me. I don't -- how are we supposed to know whether the basic principle that the Scouts is operating on is thinking that this is very, very bad conduct, or is simply being quite concerned about public reaction?

I mean, if it were very, very bad conduct, it's surprising you don't look into it, but if what you're concerned about is public reaction, it all makes quite a lot of sense.

QUESTION: Do you ask, Mr. Davidson, if Scouts or proposed Scout leaders are adulterers? Is that one of the question?

MR. DAVIDSON: No, Justice Scalia.

QUESTION: Do you ask if they're ax murderers?

MR. DAVIDSON: No, Justice Scalia.

QUESTION: There are a lot of things you don't want them to be that you don't ask about, is that it?

QUESTION: My basic question is, how do I know, how are we supposed to find out whether the policy reflects very great concern about the conduct, or reflects very great concern about public reaction? That was my question, and how do we decide the mix of that?

MR. DAVIDSON: Well, I'm not sure as a matter of First Amendment law that one might decide for public reaction reasons to have a certain policy. I'm not sure of the legal relevance of that distinction.

QUESTION: That was something I was going to figure out later.

(Laughter.)

MR. DAVIDSON: But --

QUESTION: And I'm -- though I'm interested in your view, if you think this is --

MR. DAVIDSON: There's been no evidence that would raise any question of fact on that issue. There's been no question that the statements, the position statements aren't authentic and weren't issued by who they said they were issued by. There's simply no basis for any such conclusion.

QUESTION: Mr. Davidson, let me tell you one of the problems that I've got under the expressive association claim, and that is in weighing the strength of your interest under the First Amendment as against the State's claimed interest, if we get to that point, and it's quite true, as you've made it plain, and Justice Scalia's question made plain, that the official publications, the things that we immediately look to, the handbook, the material that's routinely given to Scout masters, does not expressly address this problem, and it does not expressly address the problem of ax murderers or adulterers and so on.

But we're at a point where this has become a fairly serious issue for the Scouts. You've had a lot of litigation on it, and here you are in the Supreme Court of the United States, and shouldn't we -- or maybe we shouldn't -- find some significance in the fact that the Scouts have not officially addressed this in any of their publications and taken an explicit stand in the various manuals that it puts out. Is that something that we should fairly consider in weighting the Scouts' expressive interest on this point?

MR. DAVIDSON: Justice Souter, this issue came up in one case in 1981, the Curran case. It never came up again for 10 years, until Mr. Dale sued in 1992. The -- there's no obligation to talk about every single application of the morally straight policy in every manual to enjoy First Amendment protection.

Every single Scout leader in 1992 read about this in a magazine article sent to them by Boy Scouts of America. This is a far stronger case than Hurley in terms of the message that Scouting is sending, as compared to the parade leaders. This is a case --

QUESTION: Well, except that -- I mean, I ask the question in terms of the expressive association claim. You're -- the problem in simply drawing a parallel to Hurley is that we're not at the point where

anyone is using the Boy Scouts, or proposing to use the Boy Scouts for expression.

Mr. -- the -- Mr. Dale has not, in effect, asked to carry a banner. He's saying, I'm not going to carry a banner, I'm not going to get into it, so there's a little difficulty with the Hurley analogy.

MR. DAVIDSON: Justice Souter, he put a banner around his neck when he put -- got himself into the newspaper and Scout leaders throughout Monmouth Council sent the article in to headquarters. He created a reputation. This is a place he goes once a week, a camping trip once a month, summer camp for a week. These are people that see him all the time. He can't take that banner off. He put it on himself and, indeed, he has continued to put it on himself in this week's Time Magazine, the Out 100, the New York Times --

QUESTION: But in effect -- I understand what you're saying, but you're saying he has created a kind of public persona for himself and therefore simply for him to be in the Scouts in that position does carry a message, and I understand that, that that's different from Hurley.

MR. DAVIDSON: Well, it's as if, in -- the GLB marchers sought to put on the uniform of the South Boston War Veterans Council. It requires Boy Scouting to identify with that message that Mr. Dale has created.

Mr. Chief Justice, I would like to reserve a bit of time for rebuttal.

QUESTION: Very well.

Mr. Wolfson, we'll hear from you.

ORAL ARGUMENT OF EVAN WOLFSON ON BEHALF OF THE RESPONDENT

MR. WOLFSON: Mr. Chief Justice, and may it please the Court:

The State of New Jersey has a neutral civil rights law of general applicability that is aimed at discriminatory practices, not expression. The law protects gay and nongay people within New Jersey against discrimination based on their sexual orientation. Although it is one of the least private public accommodations in the country, BSA is here today asking this Court to specially excuse it from compliance with that content-neutral --

QUESTION: Mr. Wolfson, I suppose literally the policy of New Jersey would require the Boy Scouts to admit girls as well. I mean, that's a status based on the sex of the young woman, and presumably your position would be they'd have to take girls as well.

MR. WOLFSON: Actually, that would not follow, Justice O'Connor --

QUESTION: Why not?

MR. WOLFSON: -- for several reasons. First of all, because --

QUESTION: Isn't that a status?

MR. WOLFSON: The New Jersey law itself, Your Honor, specifically creates an exemption for those public accommodations that are reasonably restricted, in the statute's words, to single status, and therefore the statute itself recognizes that there may be instances in which an organization that is nevertheless a public accommodation does not fall within the sex proscription otherwise in the statute.

QUESTION: Yes, but if we accept your position and New Jersey changes its law, New Jersey drops its exemption, then, I take it, as Justice O'Connor suggested, it would fall out that the Boy Scouts would have to admit girls.

MR. WOLFSON: Well, in that unlikely event, Justice Souter, that they were to actually drop this exception, which clearly is embedded in the law, that would -- it still would not follow, and this Court certainly need not reach that decision here today, because even were an organization under that public accommodations obligation, they would nevertheless then be able to make a First Amendment argument with regard to the burden on their expressive purposes and their ability to delivery their message, and that would be the case that would then be before the Court on whatever record exists there.

QUESTION: Well, they don't have an antigirl message, do they?

MR. WOLFSON: No, Your Honor, they do not.

QUESTION: And --

MR. WOLFSON: They do not, and in fact --

QUESTION: And they're saying that they do have -- however they may have expressed it, they do have an antihomosexual expression

message, so I suppose in the case of the girl who wanted to be admitted their position would be weaker than it is here.

MR. WOLFSON: Well, actually, Your Honor, there's far more in the record with regard to Boy Scouts' self-identity and purposes and concepts, and perhaps their pedagogy -- excuse me -- pedagogical approach, et cetera, that relates to boys, beginning with the name of the organization, right on, than there is in this record at all with regard to any effort to convey the asserted, implicit view on homosexuality that, as several questions of the Court indicated, is not reflected --

QUESTION: But this is -- you are relying on cases that involve exclusion of women, and there's a certain irony in that you're relying on the Jaycees case and the Rotary case, and this statute of New Jersey does include sex, as well as sexual orientation, and I don't even think New Jersey has said that the exception would cover such an organization.

You're speculating that it might, but is the best that you could come up with is that the Boy Scouts have an expressive policy against -- I don't know what. What --

MR. WOLFSON: Well, to answer your question, Justice Ginsburg, the best I can come up with regard to the admission of girls is that obviously that question is not presented before this Court, and the statute itself, and the legislature in enacting the statute, clearly intended to proscribe sex discrimination of the kind reflected in this Court's precedent, acknowledged in this Court's precedents with regard to Jaycees and others, acknowledged that nevertheless there may be some programs and some institutions that are able to show a reasonable restriction to single sex.

This Court need not reach the question on this record, and I'm certainly not here to defend any such exclusion, but this Court, in ruling for Mr. Dale, would have to -- would be addressing the record here, which shows an absence of any burden on Boy Scouts' ability to convey or express any message with regard to sexual orientation or homosexuality which the record reflects, in fact, is not conveyed to youth members and is not conveyed to any adult member or sponsoring organization or Scout master to communicate to the youth, and that is the much stronger record that supports our position here.

QUESTION: Well, what about a gay or lesbian group that takes the position that it does not want heterosexual members to participate, or be admitted?

MR. WOLFSON: What the State of New Jersey --

QUESTION: You would presumably think that this law would prevent that as well.

MR. WOLFSON: That's -- if that organization were a public accommodation, Your Honor, that had opened itself to all, that falls within the category of meeting those criteria, then that's correct, Your Honor. What the statute proscribes, what New Jersey has prohibited, is identity-based discrimination by --

QUESTION: Do you think there's a difference at all in application of such a policy to commercial entities and groups, as opposed to private membership groups? Does that weigh in the balance at all?

I mean, I can well understand how a public accommodation law should apply to commercial groups, or even to groups such as Jaycees, which essentially depend on a commercial nexus for its membership. Should it apply, do you think, or should the weight we give it in the context of a First Amendment claim be the same for a purely private organization?

MR. WOLFSON: I have two answers to that, Justice O'Connor. The first is that this Court has never held that the State's important interest in eliminating discrimination, as Roberts said, in the political, economic, and cultural life, and opportunities that present to people a matter of great importance to people, is limited to the commercial sphere, and there are good reasons why it should not be so limited.

My second answer would be that Your Honor in the Jaycees case, as, obviously, you're aware, talked about the importance of the significance when an association chooses its market, but in your opinion and, I think, correctly broadened beyond that, the choice of a market does not only refer to a choice to enter the commercial sphere, and this --

QUESTION: Well, Mr. Wolfson, if we compare the antidiscrimination laws such as New Jersey has enacted with the sort of Fourteenth Amendment principles of equal protection, the -- you know, we start out with people, with kind of immutable characteristics, blacks, national origin, and then presumably homosexuals are not quite the same. Supposing we would get even further.

I -- one of the briefs does, the City of Boston, includes in its prohibition against discrimination ex-convicts. Now, supposing New Jersey were to pass a law like that. At some point the compelling State interest is considerably dissipated, isn't it?

MR. WOLFSON: Well, first of all, we do not honor, Mr. Chief Justice -- sorry. We do not argue, Mr. Chief Justice, that a compelling interest is required here. The first step in the analysis would be any burden on the specific expressive purposes of the organization seeking to exercise its burden of showing an exemption from the statute, and then the Court, if necessary, would proceed to weigh that against a State's interest, but those need not be compelling.

But to specifically answer your question, Mr. Chief Justice, the determination as to what is entitled to strict scrutiny, and in that meaning of the word compelling, with regard to Federal constitutional law, is not the same compellingness, or significance of interest that the Court would assess with regard to assessing the State's interests against discrimination.

QUESTION: But wouldn't the State's interest be weaker if we're talking about, say, ex-convicts being discriminated against than it would about blacks being discriminated against?

MR. WOLFSON: Well, as this Court has clearly acknowledged, for example, in the Romer case and in the Hurley case, where it talked about the legitimacy and appropriateness of State civil rights laws that include sexual orientation discrimination within the cluster of prohibited classifications, in Romer the Court --

QUESTION: Well, that doesn't really answer my question at all. I asked you if the State interest would be weaker if we were talking about ex-convicts.

MR. WOLFSON: I think on this record it's difficult to answer that question, Your Honor, except that I would say that I think this Court would look to factors like, for example, the history of discrimination that has disadvantaged people according to a particular classification, and every court that is --

QUESTION: People certainly haven't liked ex-cons for a long time.

(Laughter.)

MR. WOLFSON: That's correct, Your Honor, and --

QUESTION: A discrete and disadvantaged minority, or hopefully a minority.

QUESTION: Your answer to this line of questioning seems to suppose

a dichotomy between an entity that's a public accommodation and an entity that has expressive rights. Surely there can be both.

MR. WOLFSON: Oh, absolutely, Your Honor, as the Jaycees case and others recognize.

QUESTION: If that's so, then in your view a Catholic organization has to admit Jews, a Jewish organization has to admit Catholics, and you can't have -- I mean, there are many. The B'nai B'rith has to have -- oh, I mean, I don't know if they do or not, but I mean, it seems odd. That's your view of the constitutional law?

MR. WOLFSON: No, Your Honor. The first step that the court looks to is whether the organization is the kind of organization that qualifies as a public accommodation.

QUESTION: We don't look to that.

MR. WOLFSON: No, that's correct, Your Honor.

QUESTION: So if the State of New Jersey were to say our public accommodations law applies to the Knights of Columbus, B'nai B'rith, every possible organization, if they were to say that, look to that, what would we do as a matter of constitutional law?

MR. WOLFSON: The constitutional question that would be before the Court in that case, as in this case, is whether the organization has born its heavy burden of winning an excuse from compliance with the law based on its ability to show, as the Roberts and other cases make clear, a specific expressive purpose that brings its members together that is being significantly burdened by the exercise --

QUESTION: Well, it need -- suppose that it says this is basically a Jewish organization, or this is basically a Catholic organization.

MR. WOLFSON: Well --

QUESTION: And it is. Suppose it is. Then what?

MR. WOLFSON: Well, that may very well be the kind of criterion that would have taken it out of being a public --

QUESTION: Fine. If that's so, if that's what we're supposed to do, then how are we supposed to determine, in your opinion, whether or not the relationship of the antigay to the Boy Scouts is or is not fundamental, or core, in the way that the -- in the way that I've just

described in respect to other organizations?

MR. WOLFSON: Right. There are two ways that I would answer that question, Justice Breyer. The first is to say that the approach set forth in the Roberts trilogy, in the cases in which these same kinds of claims have been assessed, is that the Court looks first for that specific expressive purpose that brings the members together, not simply the views that some may happen to hold, and not simply a policy or a practice of discrimination. That's, of course, present in every case. That's why we're in litigation in the first place.

The Court does a limited, threshold inquiry, according to the Roberts line of cases, to --

QUESTION: Why doesn't that exist here? That's what I don't understand.

I mean, is there any doubt that one of the purposes of the Boy Scouts, if not its primary purpose, is moral formation, the Scout's oath, and all that good stuff? Isn't that what you say -- he's a Boy Scout, as you say.

MR. WOLFSON: Right. That's correct, Your Honor, and --

QUESTION: Okay. So moral formation is. You concede that.

MR. WOLFSON: Is a --

QUESTION: And they say, and I don't know why we have any power to question it if the leadership of the organization says so, that one of the elements of that moral formation is that they think that homosexuality is immoral. Now, how does that not make it an essential part of Scouting's purpose?

MR. WOLFSON: What New Jersey has prohibited, Justice Scalia, is identity-based discrimination in its membership practices. It has not limited what Boy Scouts may say. It has not limited its ability to express whatever message it wishes to express. It has not limited its ability to require that members -- QUESTION: You think it does not limit the ability of the Boy Scouts to convey its message to require the Boy Scouts to have as a Scout master someone who embodies a contradiction of its message, whether the person wears a sign or not? But if the person is publicly known to be an embodiment of the -- of a contradiction of its moral message, how can that not dilute the message?

MR. WOLFSON: Assuming, arguendo for your question, that they have established that is such a message and such a purpose that they wish to convey -- I will assume that to answer your question, Justice Scalia -- nevertheless, a human being such as Mr. Dale is not speech. A human being is certainly not speech as to a view, or as to a message, other than perhaps the message, I am who I am, I am here, and this Court has taken great --

QUESTION: I don't know that our law requires that it be speech. I think our law simply prevents the State from diluting or imperiling the message that an organization wants to convey, whether the State does it by speech, or whether the State does it by dropping a bomb. It seems to me that's what's going on here.

MR. WOLFSON: Well, no. What's going on here, with respect, Justice Scalia, is that the BSA bears the obligation of showing that it needs a First Amendment shield to excuse it from this neutral law, content-neutral law.

QUESTION: Well, you seem to assume in your answer -- I think you assume in your answer to Justice Scalia that the Boy Scouts do have a moral message.

MR. WOLFSON: I accepted that for the arguendo, for the purposes of -
-

QUESTION: Well --

MR. WOLFSON: -- answering Justice Scalia's question.

QUESTION: -- who is better qualified to determine the expressive purpose and expressive content of the Boy Scouts' message, the Boy Scouts or the New Jersey courts?

MR. WOLFSON: What this Court would look to, as the New Jersey supreme court looks to, is the record as to what burden is placed on the organization's members' ability to deliver the specific expressive purpose for which they come together. That's what the right protects.

QUESTION: Well, are you saying, Mr. Wolfson, that it has to be a definite expressive purpose? I mean, supposing you have some of the kinds of organizations that Justice Breyer hypothesized: we're a Catholic organization and we just feel much more comfortable with Catholics, and we do Catholic work, or a Jewish organization.

Now, they don't have any great message of -- substantive message.

Can they be required under a -- if a public accommodations law such as New Jersey's is construed as broadly as New Jersey's is, to take on non-Catholics, or non-Jews?

MR. WOLFSON: Well, with respect, Your Honor, I don't believe that that's how the public accommodations law would be interpreted with regard to those organizations, but accepting that arguendo, the question before the Court would be, is there a specific expressive purpose of those organizations that is impaired or infringed, warranting --

QUESTION: So --

MR. WOLFSON: -- and if I may, I just want --

QUESTION: Well, but let's get away for a moment, because my question was intended to direct you away from freedom of speech to freedom of association.

MR. WOLFSON: Yes.

QUESTION: Which is also guaranteed by the First Amendment.

MR. WOLFSON: That's correct, Your Honor, as an instrumental right in furtherance of the expression of the members.

QUESTION: Well, now, I don't -- what's your authority for saying that freedom of association is simply an instrumental right to further expression of the members?

MR. WOLFSON: That was the statement of this Court in *Jaycees*, for example, Your Honor. This Court has declined, Mr. Chief Justice, to recognize some kind of free-floating of freedom to disassociation that can be exercised in the absence of some kind of expressive purpose as a defense against civil rights laws, for that would swallow civil rights laws, and that's what this Court held in the *Jaycees* case and others.

QUESTION: Well, of course, I'm not sure that the Scouts have made their principal arguments the right of intimate association. They're arguing the right of expression.

MR. WOLFSON: I'm sorry. I mean to say expressive association.

QUESTION: And in almost all of your answers it seems to me that you say once there is a public accommodation, that right of expression is

somehow secondary, or somehow must be subordinated. You simply cannot find that proposition in our cases.

MR. WOLFSON: I totally agree, Justice Kennedy. I'm certainly not arguing that at all. What I'm saying is that this Court has held that the creation and implementation of public accommodations laws fulfilling those important interests is a legitimate and important exercise of a State's power, and what is at issue here, Justice Kennedy, then is, has this organization shown that for its First Amendment expressive purposes there is a burden on its ability to convey its messages warranting excusal from that law.

Of course, the First Amendment would trump the public accommodations law in such a setting, but this Court has made it very clear that it will not simply allow the mere statement, we don't want to comply with the civil rights law, to be the exception that defeats the civil rights law.

QUESTION: All right. Let's assume, then, that the Boy Scouts tomorrow morning take formal steps to amend all of their official statements of objective, and they say in the Boy Scout manual, the troop leader's manuals and so on, that it is essential to our objective of moral decency that homosexual conduct not be permitted, and that those who avowedly engage in it or believe, indeed, that it is appropriate, may not be members of the organization. Would your case, on your view, then be different?

MR. WOLFSON: It certainly would be a different case, Your Honor. To ask that hypothetical gives an example of the --

QUESTION: Well, New Jersey law does not change. The New Jersey law in effect is saying that you may not make these kinds of status-based determinations.

MR. WOLFSON: That's correct, Your Honor, but if I understood the hypothetical you were giving, there were two elements in it.

QUESTION: Yes.

MR. WOLFSON: One was this establishment of a specific expressive --

QUESTION: Right.

MR. WOLFSON: -- purpose that has in fact not been shown here --

QUESTION: Yes.

MR. WOLFSON: -- with the additional point that the organization is actually requiring that it be conveyed to members and others.

QUESTION: Does the case, then, turn on the -- sort of the discussion that we were having with your brother a while ago on the sufficiency of the Boy Scouts' statement of its position as essential to its message? Does it turn, then, on how well they have made their message known?

MR. WOLFSON: No, Justice Souter, although we do make that argument, and make that point, and that is the threshold inquiry that the Roberts case and others has said this Court --

QUESTION: May I ask you just on that point, because it seems to me disturbing, when this case went off on summary judgment, and the fact that there were cross-motions. If I move for summary judgment, I say my case is so strong I should get summary judgment, no trial is needed.

But if I lose on that, it doesn't go that necessarily then judgment must be entered against me, because I can say, I think this record is so clear that I win, but if it's not all that clear, then give me the chance to show that this is really what my policy is, and that didn't happen in this case, did it?

I mean, there were -- the -- both sides were so sure of their positions they moved for summary judgment, and so when you talk about, well, they didn't prove, I'm a little uneasy, because there was no trial giving them that opportunity.

MR. WOLFSON: Well, I'm making two points, Your Honor. First of all, they did have an ample opportunity to put forth the millions of pages of documents. This is not an organization that's shy about publishing, as the Court has seen, and there's literally nothing there.

But beyond that, Justice Ginsburg, this Court need not even come to that point, and this is what I was starting to want to continue with with Justice Souter, which is that even were you to assume that they have the implicit moral they say they have, what they have failed to show is that their expressive messages, that their activities are burdened, and that they -- and they further have to be able to show --

QUESTION: Well, if they assume that they make their message not implicit, as you characterized it, but explicit in the way that I suggested in my hypothetical, is there not then a message which would clearly be burdened by having avowedly homosexual people in

leadership positions?

MR. WOLFSON: Then that would go the point raised by Justice O'Connor's question quite a time -- some time ago and picked up by other members of this Court, which is that they in fact permit, and the record is undisputed on this, nongay members and nongay sponsoring organizations, including the amici and others who participate --

QUESTION: Oh, and that might be a very good argument in that eventuality, but I take it that the fact of their having made the message explicit would entitle them to make a claim which you think they're not entitled to make here, and that is that they have a message which is quite clearly being burdened by avowedly homosexual people in leadership positions, and your argument then would be, well, you're not consistent about objecting to the burden, but they would be able to make a burden argument which, as I understand it, you think on this record is illegitimate, is that correct?

MR. WOLFSON: It would be correct they would then have a stronger showing of an expressive message, but that is only one piece of what they need to show --

QUESTION: Yes, and -- but doesn't it fall that if their message is clear, the burden upon the message, by putting an avowedly homosexual person in a leadership position, would be burdened in a way that they cannot, on your view, show it would -- a message would be burdened now. The two sort of go together. Make the message clearer, the burden becomes clearer --

MR. WOLFSON: What they still would have had -- well, that's correct up as far as it goes, but it doesn't mean it shows the significant burden that then gets to --

QUESTION: But it shows a more significant burden than you believe they are entitled to be given credit for now?

MR. WOLFSON: That's correct, but --

QUESTION: Okay.

MR. WOLFSON: -- this Court should also --

QUESTION: So if this is the basis on which you prevail, what you will have succeeded in doing is inducing the Boy Scouts of America to be more openly and avowedly opposed to homosexual conduct in all of

its publications. Is that what this case is all about?

MR. WOLFSON: Actually, Justice Scalia, there is most likely a reason why they have not -- why they in fact concede in their own brief that they are not an antigay organization, and they do not require members and sponsors and Scout masters to inveigh against homosexuality, or to teach anything about sexual orientation --

QUESTION: They --

MR. WOLFSON: -- and the reason for that, Justice Scalia, is not so much that they're afraid of losing the gay people. It's that they are afraid of losing the nongay people who, as Justice O'Connor's question pointed out, do not agree with this policy, whose charter is renewed year after year after year, despite their not sharing this moral view, or having disagreement over this, because that's not why they come into Scouting.

QUESTION: I think there's a distinction between being an antigay organization and having a policy of disapproving of homosexual conduct. You don't have to have as your *raison d'etre* to oppose homosexuality in order to believe that it is part of your moral code that that conduct is inappropriate, and that's the position that the Boy Scouts have taken.

MR. WOLFSON: But what this Court --

QUESTION: You insist that they go further and make that a prominent part of their promotion.

MR. WOLFSON: It's their burden, Justice Scalia, to show that their specific expressive purposes, not simply views they hold implicitly, but the expressive purposes of conveying any such views, are significantly burdened, and then that those outweigh the State's interest in this neutral law. The State --

QUESTION: How do we do that? That is, I'm back to Justice Scalia's earlier question, and the Chief's. Maybe you've answered it. I'm not sure.

I think we both agree that a basically Jewish or a basically Catholic organization, expression or not, maybe association, would be immune under the First Amendment. B'nai B'rith, Knights of Columbus, et cetera. I mean, you know -- don't we agree about that?

MR. WOLFSON: They certainly draw in many other strands, free

exercise or other principles that would protect them as well.

QUESTION: Do we agree that those basically religious groups, religiously oriented groups don't have to admit people of the other religion?

MR. WOLFSON: Beginning with the exception in the statute and on, Justice --

QUESTION: Forgetting the statute --

QUESTION: You're saying that if the church was a public accommodation they could keep out non-Catholics?

MR. WOLFSON: I'm sorry, Justice Stevens.

QUESTION: You're saying that if a church were a public accommodation -- I'm not suggesting a State would do that --

MR. WOLFSON: No.

QUESTION: -- that, but here we've got -- that the church could then deny admission to the church, to non-Catholics, the Catholic Church?

MR. WOLFSON: Well, in the unlikely event that it were a public accommodation, which it would not be, then what we also have operating with religion, and perhaps this goes to your question, Justice Breyer, is that that's addressing people on the basis of views. It's addressing people on the basis of message and expression. It is not the identity-based discrimination.

QUESTION: My question was -- maybe we don't agree on the assumption -- that if there are some groups, say religiously oriented groups that could keep out people of the other religion --

MR. WOLFSON: Yes.

QUESTION: -- that on the other hand if you take these basic organizing principles and push them to the periphery, so that now they're only a peripheral principle, and you accept that, you could submerge all civil rights laws? You said that at one point.

In other words, if you take what is a basic principle, and say the same law applies if it's just a secondary or tertiary or sort of peripheral principle, if we accept that as an excuse, there will be no civil rights laws left.

MR. WOLFSON: Certainly, if --

QUESTION: All right. Fine. If -- so I thought we were agreeing about those two things, and then I wanted to know what the Court is supposed to do to figure out when an association claims that a principle is very important, whether it is really central, or whether it is one of these things that you call peripheral, or tertiary, that it would submerge the civil rights laws. Are we supposed to -- how are we supposed to find that out?

MR. WOLFSON: With respect, Justice Breyer, I don't know that it turns on centrality so much as it turns on, in the words of the Court in the Roberts trilogy, specific expressive purpose, and the things that this Court would look to are, in the threshold inquiry would look to what does the record show with regard to purposes that bring the members together? Who are the members? What are they saying? What are they stating?

In the case here we have the amici, who clearly do not agree, and who constitute a huge share, not to mention the public entities, of the sponsors and members and participants of this organization.

But my further argument is that even where you assume *arguendo* that they have this implicit moral view, what the record clearly shows here is that they do not require any Scout master or sponsoring entity or whatever to convey that to youth, and in that case it's an easy determination for this Court to see that there's no burden on this conveying of expressive message central, specific or otherwise, because they themselves do not convey it. They themselves don't do it, and therefore these --

QUESTION: Mr. Wolfson, there seems to be some conflict on that point, because I believe counsel for the Boy Scouts told us -- he referred us to a page in the record that that one troop -- its charter was continued only when it agreed that it was going to have -- adhere to this policy, and that it wasn't going to advocate gays are okay.

MR. WOLFSON: But Mr. Dale is not here to advocate that he be allowed to advocate that gays are okay within Scouting, nor does New Jersey tell the Boy Scouts what they can or can't say within Scouting, nor does it tell them that they can't limit what is said within Scouting. What it tells them is, identity-based discrimination, the equation of a human being with forced speech, or a speech, or an assumed message, is off the table.

QUESTION: But of course, they're saying that it's not merely identity-based discrimination. They're saying it's advocacy-based, that by making the public statements that he has made, he in effect has put himself in a position of being identified, understood by people as an advocate, and therefore if he's in a leadership position in the Scouts, by that very fact he's going to carry sort of the aura of the advocacy with him.

How do you respond to that?

MR. WOLFSON: Well, in this specific case, Your Honor, Mr. Dale was expelled for taking part in a seminar outside of Scouting, in which he made no connection to Scouting, in which he asserted a view that, as questions have indicated, had nongay people asserted them, would have been perfectly fine and they would be entitled to remain in Scouting.

QUESTION: Well, your opposing counsel I think gave us an example of nongays who were taking that position who were challenged by the Scouts and backed down, so I don't know whether the differential treatment is as clear as I thought when I came in here.

MR. WOLFSON: Actually, Justice Souter, the record is crystal clear with regard to all the amici, all of the sponsoring organizations, from the United Methodist Church to the Reform Jewish groups, to the public schools and others, who make clear that their charter is renewed year after year, despite their difference -- in fact, their not even knowing that this was part of the alleged expressive purpose that they were supposed to be conveying, and --

QUESTION: Okay. Have they -- do they -- go ahead.

QUESTION: The sponsoring group is not the group that conducts the Scouting activities.

MR. WOLFSON: Actually, Justice Scalia, it is indeed the group that conducts -- what Boy Scouts does is franchise its program -- that's its word -- to the sponsoring entities who own and operate, Scouting says, the Scouting program.

QUESTION: Thank you, Mr. Wolfson.

MR. WOLFSON: Thank you, Mr. Chief Justice.

QUESTION: Mr. Davidson, we'll give you a minute. You don't actually have quite that much. We'll be generous.

(Laughter.)

**REBUTTAL ARGUMENT OF GEORGE A. DAVIDSON ON BEHALF
OF THE PETITIONER**

MR. DAVIDSON: Mr. Chief Justice, we've been in litigation on this precise issue for the last 19 years and 5 days, and I would just say this, that if you have to dissect each butterfly in order to classify it, there are not going to be many butterflies left.

Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:10 a.m., the case in the above-entitled matter was submitted.)

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