

CERTIFIED FOR PUBLICATION

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

KATRINA YEAW, a Minor, etc.,)	
)	C023607
Plaintiff and Appellant,)	
)	(Super.Ct.No.95 AS04757)
v.)	
)	
BOY SCOUTS OF AMERICA et al.,)	
)	
Defendants and Respondents.)	
)	
)	

APPEAL from the judgment of the Superior Court of Sacramento County, John R. Lewis, Judge. Affirmed.

Allred, Maroko & Goldberg, Lisa Bloom, for Plaintiff and Appellant.

Weintraub, Genshlea & Sproul, Michael L. Dillard, Amy J. Winn, Hughes, Hubbard & Reed, George A. Davidson, and Carla A. Kerr, for Defendants and Respondents.

In this appeal we consider whether the Boy Scouts of America (Boy Scouts) is a business establishment within the meaning of the Unruh Civil Rights Act (Civ. Code, § 51; hereafter "the Act" or section 51) such that it is prohibited from discriminating against girls by excluding them from membership. We shall conclude the Boy Scouts is not a business establishment within the meaning of the Act.¹ Accordingly, the Boy Scouts may lawfully exclude females from membership in its ranks.²

Plaintiff Katrina Yeaw, an 11-year-old girl, brought this action by and through James Yeaw, her father and guardian ad litem, against the Boy Scouts of America and the Golden Empire

¹ The Boy Scouts argues that requiring it to admit girls to membership would infringe upon the First Amendment rights of intimate and expressive association of its members. Because we resolve this case on the basis of statutory interpretation, we do not address the constitutional issue.

The Boy Scouts does not argue that even if found to be a business establishment, exclusion of females would not constitute arbitrary discrimination (see *In re Cox* (1970) 3 Cal.3d 205, 216-217) because their presence in the Boy Scouts "basically [would] not accord with the nature of its business enterprise" (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 741) i.e., an enterprise whose programs are specifically designed to build character, inculcate values, and encourage physical fitness in young males as distinguished from programs suitable for the inherently different physical and emotional characteristics of young females (see *Isbister v. Boys Club of Santa Cruz* (1985) 40 Cal.3d 72, 87-88; Evid. Code, § 451, subd. (f)).

² The question whether the Boy Scouts is a business establishment within the meaning of the Act is presently before the California Supreme Court (*Curran v. Mount Diablo Council of the Boy Scouts (Curran II)* (Cal.App.) hg. granted June 2, 1994 (No. S039738); *Randall v. Orange County Council* (Cal.App.) hg. granted June 2, 1994 (No. S039161).)

Council. Plaintiff sought but was refused admission into Boy Scout Troop No. 349. It is undisputed plaintiff was denied membership solely because she is a girl.

In her complaint, plaintiff alleges the Boy Scouts is a business establishment within the meaning of section 51 and engages in prohibited discrimination by excluding girls from membership.

Pending trial, plaintiff sought a preliminary injunction enjoining the Boy Scouts to refrain from refusing to admit her to membership in a Troop. Plaintiff argued that because it could not be "seriously [] disputed" the Boy Scouts is a business establishment, there was a substantial likelihood she would prevail on the merits; furthermore, plaintiff argued, she would suffer irreparable damage if not admitted immediately into a Troop, because the longer the delay before she becomes a Boy Scout, the greater the likelihood she will be unable to complete the requirements to achieve the rank of Eagle Scout. Following hearing and argument the trial court denied a preliminary injunction. Plaintiff appeals. (Code Civ. Proc., § 904.1, subd. (a)(6).)

In denying the injunction, the court noted that because plaintiff was denied admission into a Troop, the Troop is the appropriate entity upon which to focus in addressing plaintiff's arguments under the Act. Relying principally on *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594 (*Warfield*), the trial court concluded each of the *Warfield* criteria for determining whether a private membership organization is a

business establishment within the meaning of section 51 warranted finding a Scout Troop is not a business establishment.

Significantly, the Boy Scouts is a membership organization whose benefits derive primarily, if not exclusively, from the interpersonal associations among its members. The relationships in Scouting are gratuitous, continuous, personal and social, and "take place more or less outside 'public view.'" (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 84, fn. 14.) As we shall explain, the Act was never intended to apply to organizations of this type. (*Warfield, supra*, 10 Cal.4th at pp. 599, 618-620 and fn. 10.) Accordingly, we shall affirm the trial court's order denying a preliminary injunction.

I

Defendant Boy Scouts of America is a private, nonprofit, congressionally chartered (36 U.S.C. §§ 21-29), volunteer organization which seeks to reinforce scouting skills and values in younger boys through the Cub Scouts and the Boy Scouts and in older teenagers through the Explorer Program. "These include citizenship, patriotism, self-reliance, courage, sportsmanship, respect for one's family, the ability to get along with others, involvement in the community, physical fitness, athletic and survival skills, an appreciation for nature, and the acknowledgment of a supreme being." (*Welsh v. Boy Scouts of America* (N.D.Ill. 1992) 787 F.Supp. 1511, 1518, affirmed 993 F.2d 1267.)

The charter of the Boy Scouts of America states that Boy Scouts was founded as an educational program for boys:

"The purpose of the corporation shall be to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred values, using the methods which were in common use by Boy Scouts on June 15, 1916." (36 U.S.C. § 23; see generally *Welsh v. Boy Scouts of America*, *supra*, 787 F.Supp. at pp. 1514-1518.)

For more than 80 years, the Boy Scouts has offered Scouting as a program of moral education for boys. The program seeks to reinforce the values of the Scout Oath and Scout Law through a program which appeals to boys and teaches them Scouting values. All Boy Scouts must understand and agree to live by the Scout Oath and the Scout Law. ³

Defendant Golden Empire Council is chartered by Boy Scouts of America to provide program support for scouting volunteers in Northern California. The Council is self-financed through donations, fundraising activities, and income from endowment. The Council oversees those aspects of Scouting which are beyond the

³ The Scout Oath is as follows: "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."

The Scout Law states: "A scout is . . . Trustworthy . . . Loyal . . . Helpful . . . Friendly . . . Courteous . . . Kind . . . Obedient . . . Cheerful . . . Thrifty . . . Brave . . . Clean . . . [and] Reverent."

capacities of a Troop, such as maintaining Scout camps and providing adult leadership training.

The majority of adult volunteers who participate in bringing the Scouting program to boys serve at the Boy Scout Troop or Cub Scout Pack level. Troops typically meet in locations provided by churches or community organizations chartered by the Boy Scouts of America to sponsor a Scout Troop. A Troop is self-financed. Its budget derives from members' dues supplemented by various fundraising efforts.

One of the principal units through which the Boy Scouts accomplishes its goals is the Patrol. Every boy is, first and foremost, part of a Patrol, a group of three-to-eight boys within a Troop. Each Patrol has its own name, its own badge, its own meetings, its own elected leaders and its own sense of identity. The members lead, plan and organize their own activities, thereby gaining skills in leadership, planning and cooperation. The Patrol becomes a close knit group of boys who have learned to provide for each other's personal needs. (See *Welsh v. Boy Scouts of America*, *supra*, 787 F.Supp. at p. 1519-1520.)

II

Section 51 provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in *all business establishments of every kind whatsoever.*" (Italics added.) The

decisive issue here is whether the Boy Scouts is a business establishment for purposes of section 51, such that it is prohibited from excluding girls from the "advantages" and "privileges" of membership.

The origins and background of the Unruh Act have been discussed extensively in a number of decisions and need not be repeated in detail. (E.g., *Warfield, supra*, 10 Cal.4th at pp. 607-609 (*Warfield*); *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1150-1154; *In re Cox* (1970) 3 Cal.3d 205, 212-216.) The general policy embodied in section 51 can be traced to the early laws concerning "public accommodations," i.e., "to the early common law doctrine that required a few, particularly vital, public enterprises--such as privately owned toll bridges, ferryboats, and inns--to serve all members of the public without arbitrary discrimination. [Citation.]" (*Warfield, supra*, 10 Cal.4th at p. 607.)

As enacted in 1959, section 51 provided in relevant part: "All citizens within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Stats. 1959, ch. 1866, § 1, p. 4424.) Subsequently, section 51 was amended to add "sex" and "disability" to the specified classes of persons against whom discrimination is prohibited. (See Stats. 1974, ch. 1193, § 1, p. 2568; Stats. 1987, ch. 159, § 1, p. 1094;

Stats. 1992, ch. 913, § 3, p.____.) In all other respects, section 51 is essentially as originally enacted.

Plaintiff asserts it has already been decided that the Boy Scouts is a business establishment subject to the Act. According to plaintiff, *Curran v. Mount. Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712 "squarely held" the Boy Scouts is a business establishment within the meaning of the Act. We disagree. *Curran* is a *pleading* case in which the only issue before the court was the sufficiency of a complaint alleging the Boy Scouts was a business establishment within the meaning of section 51. (See, *Curren, supra*, 147 Cal.App.3d at p. 719 ["Our only concern in this case is whether plaintiff has succeeded in stating a cause of action."].) *Curren* stands for the proposition that a complaint alleging the Boy Scouts has "businesslike aspects" is sufficient to withstand demurrer despite an allegation the Boy Scouts is a nonprofit organization. (See, *Curren, supra*, 147 Cal.App.3d. at p. 730; see also *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735 ["[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts."].)

Curran aside, the courts have applied the Act to nonprofit organizations. However, in these cases, the courts have relied principally on a showing the nonprofit organization had an underlying commercial purpose or function. In *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, the court found a nonprofit condominium owners' association had a "businesslike

purpose" and performed "all the customary business functions" of a commercial landlord. (33 Cal.3d at p. 796.) In *Pines v. Tomson* (1984) 160 Cal.App.3d 370, the court considered an operation called the Christian Yellow Pages which, despite its nonprofit status, was virtually indistinguishable from the Yellow Pages of the telephone company. (160 Cal.App.3d at p. 376.) In *Rotary Club of Duarte v. Board of Directors* (1986) 178 Cal.App.3d 1035, the court found "the primary purpose for the formation of the Rotary movement was commercial advantage" and "business concerns are a motivating factor in joining local clubs." (178 Cal.App.3d at pp. 1055, 1057.)

Warfield, supra, most recently dealt with the issue. There, upon dissolution of her marriage, the plaintiff wife was awarded the membership at a private, nonprofit golf and country club. However, because club bylaws allowed only male members, the club refused to transfer the membership to plaintiff and instead terminated the membership. Plaintiff brought suit against the club, charging violation of the Act. (10 Cal.4th at pp. 604-605)

The *Warfield* court noted there is nothing in the language or history of the Act to suggest the Legislature intended, as a general matter, to bring the membership decisions of truly private social clubs within the statute. Nonetheless, the club's business transactions conducted regularly on the premises with nonmembers were sufficient in themselves to bring the club within the Act. The court found, first, that the club regularly permitted nonmembers, for a fee, to use its facilities during sponsored events. Thus, the club received funds from nonmembers for use of

the golf course, tennis courts, and dining and bar facilities. "In carrying on such activities for a fee, the club operates as the functional equivalent of a commercial caterer or a commercial recreational resort--classic forms of 'business establishments' []." (10 Cal.4th at p. 621.)

Second, the club obtained income on a regular basis from fees charged for the use of its facilities, and the purchase of food and beverages on its premises, by "nonmember 'invited guests.'" (10 Cal.4th at p. 621.)

Finally, the club obtained a significant financial benefit from regular business transactions with nonmembers conducted at the golf and tennis pro shops located on the premises. (10 Cal.4th at p. 622.)

"[B]ecause of the involvement of defendant's operations in the variety of regular business transactions with nonmembers discussed above, the club properly must be considered a business establishment within the meaning of section 51. Although the club is a nonprofit organization, and there is no suggestion that the activities in question were intended to generate a profit that might be distributed to members, the direct and indirect financial benefits that the club derived from its business transactions with nonmembers nonetheless inured to the financial benefit of club members, because the revenue from such transactions permitted the members to maintain the club's facilities and services--which were reserved primarily for the benefit of the members--through the payment of dues and fees lower than would have been required in

the absence of the income obtained from nonmembers. In light of the explicit language of section 51 (encompassing 'all business establishments of every kind whatsoever'), which, as this court [has] observed . . . 'leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible,' we conclude that defendant club's regular business transactions with nonmembers render it a 'business establishment' for purposes of section 51." (10 Cal.4th at pp. 621-622.)

Unlike the club in *Warfield*, a Boy Scout Troop has no commercial attributes whatsoever. Nor can the Golden Empire Council, which has as its central purpose the promotion of Scout goals, i.e., "to foster the development of certain skills and values in male youths" (*Welsh v. Boy Scouts of America*, *supra*, 787 F.Supp. at p. 1518), be deemed a business establishment subject to section 51.

Plaintiff argues *Isbister v. Boys' Club of Santa Cruz, Inc.* (*Isbister*), *supra*, compels a finding the Boy Scouts is a business establishment subject to the Act. *Isbister* stands alone as the only case in which the Act has been applied to an organization that truly lacked a business purpose. The issue in *Isbister* was whether the Act applied to the Boys' Club of Santa Cruz, a nonprofit membership association that owned and operated a recreational facility for boys, such that it was prohibited from excluding girls from membership. A majority of the Supreme Court concluded the Boys' Club was a "business establishment" for purposes of the Act. (*Isbister*, *supra*, 40 Cal.3d at pp. 81-84.)

In so holding, the Court observed the function of the Boys' Club was to provide recreational facilities of the kind commonly associated with a "'place of amusement'" or a "'public accommodation.'" (*Isbister, supra*, 40 Cal.3d at p. 81.) The Court noted "the Club is classically 'public' in its operation. It opens its recreational doors to the entire youthful population of Santa Cruz, with the sole condition that its users be male. [Citation.] There is no attempt to select or restrict membership or access on the basis of personal, cultural, or religious affinity, *as a private club might do.*" (*Isbister, supra*, 40 Cal.3d at p. 81, italics added.)

The court continued: "While there are some organized activities, the emphasis is on drop-in use of the Club's facilities, thus minimizing any sense of social cohesiveness, shared identity, or continuity. Boys who join the Club have no power in its affairs and no control over who else may be members. A fee, though not a large one, is charged for the annually renewable membership. Thus, the Club provides an atmosphere deemed characteristic of a 'public accommodation' by the principal commentator on the Unruh Act; relations with and among its members are of a kind which take place more or less in 'public view,' and are of a 'relatively nongratuitous, noncontinuous, nonpersonal, and nonsocial sort.'" (Horowitz, [*The 1959 California Equal Rights in "Business Establishments" Statute--A Problem in Statutory Application* (1960)] 33 So.Cal.L.Rev 260, 287, 288.)" (*Isbister, supra*, 40 Cal.3d at p. 81.)

In a footnote, the Court stated that "while members are expected to benefit from the general social values and opportunities the Club's environment promotes, as they would from many community activities, the Club is not the selective, close-knit organization for which Professor Horowitz [described by the court as the principal commentator on the Unruh Act] reserved the terms 'social' and 'personal.'" (*Isbister, supra*, 40 Cal.3d at p. 81, fn. 9; see also *National Org. for W. Essex Ch. v. Little L. Base., Inc.* (N.J.Super 1974) 318 A.2d 33, 37-38 [A Little League program which uses public fields and extends an open invitation to boys to participate constitutes a place of public accommodation and thus cannot discriminate against girls.])

In response to a contention that extension of the Act to the Boys' Club would "threaten all private organizations which traditionally serve the special cultural or charitable needs of particular minority groups with common interests," the *Isbister* Court explained: "[W]e have emphasized that the Clubs' status as a 'business establishment' covered by the Act arises from its 'public' nature; it offers basic recreational facilities to a *broad segment* of the population, *excluding only a particular group* expressly recognized by the Act as a traditional target of discrimination." (*Isbister, supra*, 40 Cal.3d at p. 84; italics in original.)

In dissent, Justice Mosk lamented that the decision threatened "the Boy Scouts, Cub Scouts, Young Men's Christian Association, and similar organizations that maintain camps or physical facilities." (*Isbister, supra*, 40 Cal.3d at p. 93, dis.

opn. of Mosk, J.) The majority responded: "Justice Mosk complains that our interpretation threatens many traditionally sex-segregated institutions, such as fraternities and sororities, private schools and *scouting organizations*. *Nothing we have said compels that result*. The Act covers 'business establishments' of every kind, and these include traditional 'public accommodations.' Yet we have emphasized that the statute does not govern relationships which are truly private--to paraphrase [Professor] Horowitz' words, those which are 'continuous, personal and social' [citation] and take place more or less outside 'public view.' [Citation.] 'Private' groups and institutions do not fall prey to the Act simply because they operate 'nongraturitous' residential or recreational facilities for their members or participants" (*Isbister, supra*, 40 Cal.3d at p. 84, fn. 14 (italics added).)

The Supreme Court reaffirmed the limiting *Isbister* dictum in *Warfield, supra*. Although the *Warfield* court ruled in favor of the plaintiff, the court rejected the plaintiff's assertion that the language of section 51 evinces a legislative intent to apply the Act across the board to all private associations and organizations, including private social clubs: "Although, as is pointed out by an amicus curiae in support of plaintiff, the emphasized language from the *Isbister* decision technically is dictum, because no such private group was before the court in that case, *we view this dictum as strong and persuasive*. As we have explained, public accommodation statutes, as an historical matter, generally have not been applied to the membership policies of private social clubs that genuinely are selective in their

membership and in which the relationship among members is continuous, personal, and social." (*Warfield, supra*, 10 Cal.4th at p. 618 (italics added).)

Whatever else can be said about *Isbister* [see e.g., *Warfield, supra*, 10 Cal.4th at pp. 630-631, dis. opn. of Mosk, J., characterizing *Isbister* as "misguided and illogical" and concluding that "a youngster's 25-cent sidewalk lemonade stand is more a business establishment than was the Boys' Club of Santa Cruz"], it contains the clearest expression by the Supreme Court that a private, nonprofit organization that is selective in its membership, whose members share a sense of social cohesiveness, identity and continuity, whose activities take place more or less outside of public view, and whose primary purpose is social and not business, is not subject to the Act.

Among the factors to be considered in determining whether a private, nonprofit membership organization is subject to the Act, the most important is "the selectivity of the group in the admission of members." (*Warfield, supra*, 10 Cal.4th at p. 620.)

Plaintiff argues that because the Boy Scouts has "'millions'" of members worldwide it is not a selective organization. We disagree. "The more pertinent factor regarding selectivity is the nexus between the organization's purpose and its membership requirements." (*Welsh v. Boy Scouts of America* (7th Cir. 1993) 993 F.2d 1267, 1277 (*Welsh*).) While the Scouts "admit a large number of boys from diverse backgrounds, admission to membership is not without the exercise of sound discretion and judgment. This is evident from the Constitution and By-laws as well as the

Boy Scouts [sic] Oath and Scout Law. The Oath reflects the commitment of each member, and has remained unchanged since the publication of the Scouts [sic] first handbook in 1911. . . . [The] Oath offers a clear statement of the beliefs, principles and purpose of the Scouts, i.e., to nurture belief in God, respect for one's country and his fellow man, and being of good moral character. In order to maintain these principles, it is essential that the Scouts exercise selectivity." (*Welsh, supra*, 993 F.2d at p. 1276.)

Nothing in *Warfield*, or in section 51 itself, suggests an organization otherwise exempt from the Act loses its exemption because of its success in recruiting members. (Cf. *Welsh, supra*, 993 F.2d at p. 1277) Nor does an organization lose its exempt status because of its popularity. (Cf. *Welsh, supra*, 993 F.2d at p. 1277.)

The distinction between the Boy Scouts and the *Isbister* Boys' Club in selecting its members is obvious. The Boys' Club was entirely unselective among the universe of boys. "The purpose of Scouting, however, is to equip [boys] of all races, colors and creeds to fulfill their duty to God, to mature personally, and to help others. . . . [T]he Scouts organization not only is selective, but [] its very Constitution, By-laws and doctrine dictate that it remain selective." (*Welsh, supra*, 993 F.2d at p. 1277.) Thus, to become a Boy Scout, a boy must understand and agree to obey the Scout Oath (fn. 3, *ante*, p. 5.), which requires that he commit to do his duty to God and country. Boys are selected and accepted on the basis, among others, of "religious

affinity." Boys who refuse to profess a belief in God may be excluded from membership. (*Welsh, supra*, 993 F.2d at p. 1278.)

A second criterion involves the role in the organization of its physical facilities and whether they are used by both members and nonmembers of the organization. (See *Warfield, supra*, 10 Cal.4th at p. 620.) The Boys' Club in *Isbister*, not unlike a place of public accommodation, provided, among other attractions, a swimming pool and gymnasium for the use of its members. (*Isbister, supra*, 40 Cal.3d at p. 77.) Both boys and girls are capable of utilizing these facilities. (Cf. *Welsh, supra*, 993 F.2d at p. 1277.) In contrast, the Boy Scouts is not a single purpose organization operating a traditional public accommodation. While the Boy Scouts and Golden Empire Council (Council) may have certain administrative offices, and while the Council does own recreational facilities, the operation of such offices and facilities, unlike the Boys' Clubs' operation of recreational facilities in *Isbister*, is not The Boy Scouts' principal activity and reason for existence. The *Isbister* court was clear that nothing in its analysis necessarily extended to "organizations . . . which maintain objectives and programs to which the operation of facilities is merely incidental." (*Isbister, supra*, 40 Cal.3d at pp. 76-77; see also *Harris v. Mothers Against Drunk Driving* (1995) 40 Cal.App.4th 16, 22 [The proper analysis is whether the organization's physical facilities are incidental to the purposes and programs of the organization].)

"The kinds of activities in which Boy Scout [and] Cub Scout . . . groups typically engage are not dependent upon the

accoutrements of any particular location, let alone of a facility one would normally think of as a place of public accommodation." (*Welsh v. Boy Scouts of America, supra*, 787 F.Supp. at p. 1539.) Pack or Troop meetings, for example, typically take place "at private homes, public schools, and church facilities." (*Supra*, 787 F.Supp. at p. 1521.) "[T]he success of the Boy Scouts, and the attraction to boys and parents alike," lie not in its dependence on particular facilities or locations, but "in the sense of community among its participants." (*Supra*, 787 F.Supp. at p. 1539.)

The quality of the relationship among members is also an important criterion in determining whether an organization comes within the Act. (*Isbister, supra*, 40 Cal.3d at p. 81.) The relationships in scouting are continuous, personal and social and take place more or less outside public view. (Cf. *Isbister, supra*, 40 Cal.3d at p. 84, fn. 14; see Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute--A Problem in Statutory Application, op. cit. supra*, 33 So.Cal.L.Rev 260, 288-290 [The Act was not intended to reach relationships that are personal, social, continuous and gratuitous].) "A prospective scout seeks admission into a group of young boys for social interaction[.]" (*Welsh, supra*, 993 F.2d at p. 1274.) "[T]he typical Boy Scout gathering involves five to eight young boys engaging in supervised interpersonal interaction in a private home." (*Welsh, supra*, 993 F.2d at p. 1272.)

Moreover, unlike the relationship between a boy and the Boys' Club in *Isbister*, a relationship which could very well be

irregular and infrequent, a Boy Scout generally meets with his Patrol once a week and with his Troop once a month. (*Welsh v. Boy Scouts of America*, *supra*, 787 F.Supp. at pp. 1519, 1521 and fn. 21.) Any boy could "drop-in" at the Boys' Club pool. Boy Scouts, on the other hand, "do everything together." A Patrol is composed of a Scout's "closest friends in the Troop." Scout programs are designed to reinforce a sense of shared values and beliefs, group identification, belonging, unity and camaraderie. This sense of belonging is reinforced by the Scout uniform and the reminder that all Scouts have accepted a system of shared values and beliefs. There is a profound difference between organizations such as the Boys' Club, where membership merely serves as a means of access to a physical location or a facility, and a membership organization such as the Boy Scouts, "whose recreational aspects . . . must be viewed simply as a means to an end--the instillment of important social values in male youths." (*Welsh v. Boy Scouts of America*, *supra*, 787 F.Supp. at p. 1513; Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute--A Problem in Statutory Application*, *op. cit. supra*, 33 So.Cal.L.Rev 260, 289 [The Act is applicable only to "relationships in which the 'establishment' offers its facilities for compensation, and in which the relationship with the patron is relatively noncontinuous, and in which personal and social aspects of the relationships are relatively insignificant."].)

The final criterion concerns the purpose of the organization, i.e., whether the primary purpose served by the organization is social or business. (*Warfield*, *supra*, 10 Cal.4th at p. 620.)

Plaintiff notes the Boy Scouts is a multi-million dollar a year enterprise, selling everything from uniforms to pup-tents. (See *Welsh v. Boy Scouts of America*, *supra*, 787 F.Supp. at pp. 1520-1521 ["[Boy Scout] items are sold throughout the United States at local council service centers and Boy Scout-authorized outlets."].)

The marketing activities of the Boy Scouts are beside the point. The issue is one of access to the Boy Scouts as an organization, not to the right to participate in its businesslike attributes. Plaintiff sought admission into a Scout Troop. The Troop has no commercial attributes whatsoever. The Troop is simply the vehicle for carrying out the ideas and beliefs of Scouting in general, and, at the Troop level, the Scouts' primary function and purpose are recreational and social. "[T]he purpose of the Scouts is to train young boys to live according to the principles of duty to God, duty to others, and duty to oneself." (*Welsh*, *supra*, 993 F.2d at p. 1277.) Unquestionably, the primary purpose served by a Troop, and by the Scout organization in its entirety, is social and personal. (See *Welsh*, *supra*, 993 F.2d at pp. 1272, 1274.)

Plaintiff does not dispute the Boy Scouts has for over 80 years played an important role in the training, education and development of young men. Nor could plaintiff seriously argue the Boy Scouts' membership policies were adopted as a "subterfuge" to avoid the dictates of the Act. (Cf. *Welsh*, *supra*, 993 F.2d at p. 1276.) The exclusion of plaintiff here clearly is not arbitrary.

If the Act were to apply to the Boy Scouts, it is difficult to see how any nonprofit, private, membership organization could escape the smothering embrace of ubiquitous, omnipotent government. Must a church admit agnostics? Must "an organization that studie[s] Israeli culture and history [] admit into their [*sic*] group (meeting in a private home) a neo-nazi who believe[s] in, and [is] dedicated to, the destruction of Israel[?]" (*Welsh, supra*, 993 F.2d at p. 1274) No private group, regardless of the selectivity of, or the close personal relationship among, its members would be beyond the reach of section 51. "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." (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 623 [82 L.Ed.2d 462, 474-475].)

If the Legislature intended to regulate the entire spectrum of consensual human relationships, it should have said so (and be prepared to defend its policy prescription against First Amendment challenges). In fact, the original version of the bill that ultimately came to be known as the Act was expansive. It extended to "all public or private groups, organizations, associations, business establishments, schools, and public facilities. . . ." (Assem. Bill No. 594 (1959 Reg. Sess.), as introduced Jan. 21, 1959.) After a series of amendments all groups other than "business establishments" were eliminated. Thus the Legislature wisely drew back from enacting a law which would purport to compel voluntary, private membership associations to admit all who applied for membership.

We do not construe the Act to require the Boy Scouts to abandon principles "which have stood the test of time, having endured for more than eighty some odd years. The very purpose of the private club exception is to preserve the right of truly private organizations to maintain their unique existence." (*Welsh, supra*, 993 F.2d at p. 1277.)

"When the government . . . seeks to regulate the membership of an organization like the Boy Scouts in a way that scuttles its founding principles, we run [sic] the risk of undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs." (*Welsh, supra*, 993 F.2d at p. 1278.)

The judgment (order) is affirmed. Defendants shall recover their costs on appeal.

We concur: _____ Puglia _____, P.J.

_____ Nicholson _____, J.

_____ Morrison _____, J.