

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BOY SCOUTS OF AMERICA AND MONMOUTH
COUNCIL, ET AL., Petitioners v. JAMES DALE

CASE NO: 99-699 c.2

PLACE: Washington, D.C.

DATE: Wednesday, April 26, 2000

PAGES: 1-53

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BOY SCOUTS OF AMERICA AND :

4 MONMOUTH COUNCIL, ET AL., :

5 Petitioners :

6 v. : No. 99-699

7 JAMES DALE :

8 - - - - - X

9 Washington, D.C.

10 Wednesday, April 26, 2000

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:10 a.m.

14 APPEARANCES:

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

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

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P R O C E E D I N G S

(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

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

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1 appeared, and which -- the reputation which would have
2 carried into the troop meeting and affected his ability to
3 be a role model to the youths in his troop.

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

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

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

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

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

25 MR. DAVIDSON: Well, Boy Scouts is concerned

1 about two things, expression and conduct inconsistent with
2 the oath and law. Boy Scouts is not concerned about
3 status.

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

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

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

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

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

25 MR. DAVIDSON: The policy is not to inquire.

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

4 QUESTION: Well, do we answer the --

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

12 MR. DAVIDSON: If a --

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

16 MR. DAVIDSON: If that person were to advocate
17 that position through Scouting channels in an effort to
18 change policy, that would be permissible. As the record
19 indicates in Mr. Bishop's affidavit and Mr. Kaye's
20 testimony, if such a person were to advocate the morality
21 of homosexual conduct to youth in the program, that person
22 would be excluded and, indeed, one of Mr. Dale's affiants
23 was excluded on that ground.

24 QUESTION: Well, I take it from what you're
25 saying, Mr. Davidson, that perhaps the Scouts have not

1 adopted a comprehensive policy covering every single
2 conceivable situation that might come up.

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

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

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

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

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

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

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

9 QUESTION: Right.

10 MR. DAVIDSON: -- and that's the view that would
11 be communicated to youth, that case has not come up, but
12 it's my understanding of the policy that that person would
13 not be excluded.

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

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

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

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

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

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

18 QUESTION: Does that go for cohabiters also?

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

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

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

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

4 MR. DAVIDSON: Right.

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

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

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

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

20 QUESTION: Openly homosexual in the sense of
21 practicing homosexuality?

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

25 QUESTION: That the sexual expression of it is

1 okay?

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

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

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

22 QUESTION: The general principle is, but this
23 particular application of the Scouts' view of the
24 principle I take it is not stated in any official manual,
25 either the handbook for boys that the Scouts get, or a

1 troop leader's manual, is that right?

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

7 QUESTION: But that's --

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

12 QUESTION: And I --

13 QUESTION: But --

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

21 MR. DAVIDSON: Absolutely not, Your Honor. In
22 fact, the issue of possible sexual abuse is one that's
23 very important to Scouts. Every Scout handbook and Scout
24 master handbook comes with an insert which is in the
record at 2248 which talks about sexual abuse at some

1 length. It never mentions the word homosexual. In fact,
2 the only thing it says about gender is that there's a
3 rising incidence of abuse by female adults.

4 QUESTION: But that's not at issue here.

5 MR. DAVIDSON: That's --

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

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

10 QUESTION: All right. Now, clarify for me,
11 because I -- it is not clear to me yet. A heterosexual
12 male adult who wants to be a Scout leader who openly
13 espouses the view that homosexuality is not immoral, and
14 that it is consistent with Scout law and oath, is that
15 person qualified for membership as a troop leader?

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

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

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

4 QUESTION: All right.

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

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

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

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

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

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

24 MR. DAVIDSON: Oh, I'm sorry.

25 QUESTION: I'm thinking of a seminar that he was

1 at, and there was a newspaper article about him, is that
2 right, which is in the complaint?

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

4 QUESTION: And that's it.

5 MR. DAVIDSON: That's --

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

9 MR. DAVIDSON: Right.

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

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

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

24 MR. DAVIDSON: I have no information as to how
25 that situation would be resolved. I would observe that it

1 would be open to the Scouts to conclude that somebody who
2 is himself presenting a personal example, as well as
3 advocating, might be more unacceptable than somebody who
4 was merely advocating.

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

14 MR. DAVIDSON: Well --

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

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

23 But 5 years ago we came to this Court in an
24 amicus curiae brief in the Hurley case to catalogue the
25 numerous public accommodations cases that were being

1 brought around -- against the Scouts around the country,
2 and the case we bring here today we submit is a stronger
3 case than Hurley in several respects.

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

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

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

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

22 MR. DAVIDSON: Let me answer both of those
23 questions in order. As to the Federal charter, virtually
24 everything conducted in the corporate forum is necessarily
25 chartered by a Government entity and, as this Court said

1 in the Gay Olympic Games case, San Francisco Arts and
2 Athletics, that doesn't deprive a corporation of its
3 private character.

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

9 QUESTION: Well, I must say, I found it somewhat
10 difficult to assess the relevance of this web of relations
11 that the Boy Scouts have in New Jersey with schools and
12 fire departments. I'm puzzled about what weight, if any,
13 to give to that.

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

19 MR. DAVIDSON: Well, with respect to the -- we
20 have governments that are begging Scouting to go into
21 Cabrini Green housing projects, and to have cub packs at
22 women's prisons, but Scouting itself has pulled back
23 considerably from government, taking the Career Awareness
24 Exploring Program back and making it a nonmembershp
25 activity which doesn't involve oaths or membership or

1 anything like that, so that many police and fire
2 departments are no longer sponsoring Scouting units,
3 because that's been moved over to Learning for Life.

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

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

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

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

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

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

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

4 QUESTION: May I ask one follow-up question to
5 the one I asked before -- if homosexual conduct violates
6 the Scout code, being straight and so forth, why is it
7 relevant whether the man is open or not?

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

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

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

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

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

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

25 As I understand your position, he would be

1 treated just like this man.

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

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

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

12 MR. DAVIDSON: There's some reference to troop
13 260 in one of the affidavits in the joint appendix. We
14 should have but did not put in an affidavit in response to
15 that from Grant Robinson, the Scout executive in the area
16 where that troop was involved, indicating that the troop
17 did agree to follow the policy in -- so as to be
18 rechartered. That Robinson affidavit can be found at 4760
19 of the record.

20 I had --

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

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

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

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

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

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

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

18 MR. DAVIDSON: No, Justice Scalia.

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

20 MR. DAVIDSON: No, Justice Scalia.

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

23 QUESTION: My basic question is, how do I know,
24 how are we supposed to find out whether the policy
25 reflects very great concern about the conduct, or reflects

1 very great concern about public reaction? That was my
2 question, and how do we decide the mix of that?

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

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

9 (Laughter.)

10 MR. DAVIDSON: But --

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

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

19 QUESTION: Mr. Davidson, let me tell you one of
20 the problems that I've got under the expressive
21 association claim, and that is in weighing the strength of
22 your interest under the First Amendment as against the
23 State's claimed interest, if we get to that point, and
24 it's quite true, as you've made it plain, and Justice
25 Scalia's question made plain, that the official

1 publications, the things that we immediately look to, the
2 handbook, the material that's routinely given to Scout
3 masters, does not expressly address this problem, and it
4 does not expressly address the problem of ax murderers or
5 adulterers and so on.

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

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

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

1 the parade leaders. This is a case --

2 QUESTION: Well, except that -- I mean, I ask
3 the question in terms of the expressive association claim.
4 You're -- the problem in simply drawing a parallel to
5 Hurley is that we're not at the point where anyone is
6 using the Boy Scouts, or proposing to use the Boy Scouts
7 for expression.

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

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

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

1 and I understand that, that that's different from Hurley.

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

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

8 QUESTION: Very well.

9 Mr. Wolfson, we'll hear from you.

10 ORAL ARGUMENT OF EVAN WOLFSON

11 ON BEHALF OF THE RESPONDENT

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

14 The State of New Jersey has a neutral civil
15 rights law of general applicability that is aimed at
16 discriminatory practices, not expression. The law
17 protects gay and nongay people within New Jersey against
18 discrimination based on their sexual orientation.

19 Although it is one of the least private public
20 accommodations in the country, BSA is here today asking
21 this Court to specially excuse it from compliance with
22 that content-neutral --

23 QUESTION: Mr. Wolfson, I suppose literally the
24 policy of New Jersey would require the Boy Scouts to admit
25 girls as well. I mean, that's a status based on the sex

1 of the young woman, and presumably your position would be
2 they'd have to take girls as well.

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

5 QUESTION: Why not?

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

8 QUESTION: Isn't that a status?

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

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

22 MR. WOLFSON: Well, in that unlikely event,
23 Justice Souter, that they were to actually drop this
24 exception, which clearly is embedded in the law, that
25 would -- it still would not follow, and this Court

1 certainly need not reach that decision here today, because
2 even were an organization under that public accommodations
3 obligation, they would nevertheless then be able to make a
4 First Amendment argument with regard to the burden on
5 their expressive purposes and their ability to delivery
6 their message, and that would be the case that would then
7 be before the Court on whatever record exists there.

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

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

11 QUESTION: And --

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

13 QUESTION: And they're saying that they do
14 have -- however they may have expressed it, they do have
15 an antihomosexual expression message, so I suppose in the
16 case of the girl who wanted to be admitted their position
17 would be weaker than it is here.

18 MR. WOLFSON: Well, actually, Your Honor,
19 there's far more in the record with regard to Boy Scouts'
20 self-identity and purposes and concepts, and perhaps their
21 peda -- excuse me -- pedagogical approach, et cetera, that
22 relates to boys, beginning with the name of the
23 organization, right on, than there is in this record at
24 all with regard to any effort to convey the asserted,
25 implicit view on homosexuality that, as several questions

1 of the Court indicated, is not reflected --

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

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

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

24 This Court need not reach the question on this
25 record, and I'm certainly not here to defend any such

1 exclusion, but this Court, in ruling for Mr. Dale, would
2 have to -- would be addressing the record here, which
3 shows an absence of any burden on Boy Scouts' ability to
4 convey or express any message with regard to sexual
5 orientation or homosexuality which the record reflects, in
6 fact, is not conveyed to youth members and is not conveyed
7 to any adult member or sponsoring organization or Scout
8 master to communicate to the youth, and that is the much
9 stronger record that supports our position here.

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

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

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

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

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

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

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

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

23 QUESTION: Well, Mr. Wolfson, if we compare the
24 antidiscrimination laws such as New Jersey has enacted
25 with the sort of Fourteenth Amendment principles of equal

1 protection, the -- you know, we start out with people,
2 with kind of immutable characteristics, blacks, national
3 origin, and then presumably homosexuals are not quite the
4 same. Supposing we would get even further.

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

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

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

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

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

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

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

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

22 (Laughter.)

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

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

1 QUESTION: Your answer to this line of
2 questioning seems to suppose a dichotomy between an entity
3 that's a public accommodation and an entity that has
4 expressive rights. Surely there can be both.

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

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

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

17 QUESTION: We don't look to that.

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

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

24 MR. WOLFSON: The constitutional question that
25 would be before the Court in that case, as in this case,

1 is whether the organization has born its heavy burden of
2 winning an excuse from compliance with the law based on
3 its ability to show, as the Roberts and other cases make
4 clear, a specific expressive purpose that brings its
5 members together that is being significantly burdened by
6 the exercise --

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

10 MR. WOLFSON: Well --

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

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

16 QUESTION: Fine. If that's so, if that's what
17 we're supposed to do, then how are we supposed to
18 determine, in your opinion, whether or not the
19 relationship of the antigay to the Boy Scouts is or is not
20 fundamental, or core, in the way that the -- in the way
21 that I've just described in respect to other
22 organizations?

23 MR. WOLFSON: Right. There are two ways that I
24 would answer that question, Justice Breyer. The first is
25 to say that the approach set forth in the Roberts trilogy,

1 in the cases in which these same kinds of claims have been
2 assessed, is that the Court looks first for that specific
3 expressive purpose that brings the members together, not
4 simply the views that some may happen to hold, and not
5 simply a policy or a practice of discrimination. That's,
6 of course, present in every case. That's why we're in
7 litigation in the first place.

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

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

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

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

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

21 MR. WOLFSON: Is a --

22 QUESTION: And they say, and I don't know why we
23 have any power to question it if the leadership of the
24 organization says so, that one of the elements of that
25 moral formation is that they think that homosexuality is

1 immoral. Now, how does that not make it an essential part
2 of Scouting's purpose?

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

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

25 QUESTION: I don't know that our law requires

1 that it be speech. I think our law simply prevents the
2 State from diluting or imperiling the message that an
3 organizaiton wants to convey, whether the State does it by
4 speech, or whether the State does it by dropping a bomb.
5 It seems to me that's what's going on here.

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

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

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

16 QUESTION: Well --

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

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

23 MR. WOLFSON: What this Court would look to, as
24 the New Jersey supreme court looks to, is the record as to
25 what burden is placed on the organization's members'

1 ability to deliver the specific expressive purpose for
2 which they come together. That's what the right protects.

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

10 Now, they don't have any great message of --
11 substantive message. Can they be required under a -- if a
12 public accommodations law such as New Jersey's is
13 construed as broadly as New Jersey's is, to take on non-
14 Catholics, or non-Jews?

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

22 QUESTION: So --

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

24 QUESTION: Well, but let's get away for a
25 moment, because my question was intended to direct you

1 away from freedom of speech to freedom of association.

2 MR. WOLFSON: Yes.

3 QUESTION: Which is also guaranteed by the First
4 Amendment.

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

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

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

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

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

1 QUESTION: And in almost all of your answers it
2 seems to me that you say once there is a public
3 accommodation, that right of expression is somehow
4 secondary, or somehow must be subordinated. You simply
5 cannot find that proposition in our cases.

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

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

22 QUESTION: All right. Let's assume, then, that
23 the Boy Scouts tomorrow morning take formal steps to amend
24 all of their official statements of objective, and they
25 say in the Boy Scout manual, the troop leader's manuals

1 and so on, that it is essential to our objective of moral
2 decency that homosexual conduct not be permitted, and that
3 those who avowedly engage in it or believe, indeed, that
4 it is appropriate, may not be members of the organization.
5 Would your case, on your view, then be different?

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

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

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

15 QUESTION: Yes.

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

18 QUESTION: Right.

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

21 QUESTION: Yes.

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

25 QUESTION: Does the case, then, turn on the --

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

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

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

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

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

1 opportunity.

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

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

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

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

1 organizations, including the amici and others who
2 participate --

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

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

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

24 MR. WOLFSON: What they still would have had --
25 well, that's correct up as far as it goes, but it doesn't

1 mean it shows the significant burden that then gets to --

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

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

6 QUESTION: Okay.

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

8 QUESTION: So if this is the basis on which you
9 prevail, what you will have succeeded in doing is inducing
10 the Boy Scouts of America to be more openly and avowedly
11 opposed to homosexual conduct in all of its publications.
12 Is that what this case is all about?

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

19 QUESTION: They --

20 MR. WOLFSON: -- and the reason for that,
21 Justice Scalia, is not so much that they're afraid of
22 losing the gay people. It's that they are afraid of
23 losing the nongay people who, as Justice O'Connor's
24 question pointed out, do not agree with this policy, whose
25 charter is renewed year after year after year, despite

1 their not sharing this moral view, or having disagreement
2 over this, because that's not why they come into Scouting.

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

10 MR. WOLFSON: But what this Court --

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

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

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

22 I think we both agree that a basically Jewish or
23 a basically Catholic organization, expression or not,
24 maybe association, would be immune under the First
25 Amendment. B'nai B'rith, Knights of Columbus, et cetera.

1 I mean, you know -- don't we agree about that?

2 MR. WOLFSON: They certainly draw in many other
3 strands, free exercise or other principles that would
4 protect them as well.

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

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

10 QUESTION: Forgetting the statute --

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

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

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

17 MR. WOLFSON: No.

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

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

1 addressing people on the basis of message and expression.

2 It is not the identity-based discrimination.

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

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

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

17 MR. WOLFSON: Certainly, if --

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

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

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

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

22 QUESTION: Mr. Wolfson, there seems to be some
23 conflict on that point, because I believe counsel for the
24 Boy Scouts told us -- he referred us to a page in the
25 record that that one troop -- its charter was continued

1 only when it agreed that it was going to have -- adhere to
2 this policy, and that it wasn't going to advocate gays are
3 okay.

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

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

21 How do you respond to that?

22 MR. WOLFSON: Well, in this specific case, Your
23 Honor, Mr. Dale was expelled for taking part in a seminar
24 outside of Scouting, in which he made no connection to
25 Scouting, in which he asserted a view that, as questions

1 have indicated, had nongay people asserted them, would
2 have been perfectly fine and they would be entitled to
3 remain in Scouting.

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

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

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

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

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

1 the Scouting program.

2 QUESTION: Thank you, Mr. Wolfson.

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

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

7 (Laughter.)

8 REBUTTAL ARGUMENT OF GEORGE A. DAVIDSON

9 ON BEHALF OF THE PETITIONER

10 MR. DAVIDSON: Mr. Chief Justice, we've been in
11 litigation on this precise issue for the last 19 years and
12 5 days, and I would just say this, that if you have to
13 dissect each butterfly in order to classify it, there are
14 not going to be many butterflies left.

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: The case is submitted.

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