Case No. 02-9000
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Plaintiffs – Appellants,

v.

NANCY WYMAN in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee; CAROL CARNEY in her capacity as Chair of the Connecticut State Employee Campaign Committee; and MARGARET DIACHENKO, RICHARD EMONDS, PALUEL FLAGG, CHRISTINE FORTUNATO, BURTON GOLD, CAROL GUILIANO, CAROL HAMILTON, MARILYN KAIKA, JOAN KELLY-COYLE, D'ANN MAZZOCA, BERNARD MCLOUGHLIN, MICHAEL NICHOLS, WILLIAM PHILLIE, CHERYL SWAIN, NOEL THOMAS, in their capacities as members of the Connecticut State Employee Campaign Committee.

Defendants – Appellees,

COMMISSION ON HUMANRIGHTS AND OPPORTUNITIES

Intervenor-Defendant – Appellee,

CONNECTICUT COALITION FOR LESBIAN, GAY, BISEXUAL, & TRANSGENDER CIVIL RIGHTS, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC. and GAY AND LESBIAN ADVOCATES & DEFENDERS,

Movants,

APPEAL FROM THE DISTRICT COURT OF CONNECTICUT

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF PLAINTIFF-APPELLANTS
SEEKING REVERSAL OF THE DISTRICT COURT

Peter Ferrara
Counsel for American Civil Rights Union
1232 Pine Hill Rd.
McLean, VA 22101
703-582-8466

CORPORATE DISCLOSURE STATEMENT

The American Civil Rights Union is a non-profit, 501(c)(3) corporation with no stock and no parent corporations.

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INTEREST OF AMICUS CURIAE

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the Reader's Digest and former Director of the USIA Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins.

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we are particularly concerned that the liberty interests of the Boy Scouts to promote their traditional moral values is properly understood.

This brief is filed under the authority of Rule 29 of the Federal Rules of Appellate Procedure, and has been authorized by the corporate officers of the American Civil Rights Union. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

A long-standing, fundamental, Constitutional doctrine provides that governments may not penalize a private actor for exercising its Constitutional rights. That doctrine is fully dispositive of this case, and requires reversal of the District Court below.

In *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), the Supreme Court held that the Boy Scouts of America has the Constitutionally protected right to choose its own adult leaders and members, based on its First Amendment rights to Freedom of Expression and Freedom of Association. The Court expressly held that this includes the right to exclude avowed homosexuals as adult leaders and members, which was the precise issue in that case.

In the present case, the state of Connecticut has openly penalized the Boy Scouts for exercising precisely these Constitutional rights, which the Supreme Court so recently recognized and upheld. The state has excluded the Boy Scouts from a program that enables state employees to contribute their own money to the Boy Scouts, and a wide range of other charitable organizations, through workplace payroll deductions, even though the Scouts have already participated in that program for a number of years, and other, similar groups continue to participate. The rationale for this exclusion was quite openly the exercise by the Scouts of the precise Constitutional rights upheld by the Supreme Court in *Dale.*

This action directly flies in the face of the well-established Constitutional doctrine prohibiting government penalties on the exercise of Constitutional rights. Consequently, the decision of the court below upholding the penalty on the Scouts must be reversed, and and summary judgement should be granted for the plaintiff Boy Scouts.

The Boy Scouts of America is an organization run by parents and local community volunteers coming together to instruct young boys in the traditional moral values in which they believe. These values include the belief that homosexual activity is morally wrong, a common belief rooted in religious teachings going back thousands of years. To call this activity discrimination is overheated hyperbole by those who simply oppose these traditional moral beliefs. The Boy Scouts do not discriminate. They engage in the teaching of traditional moral values, a Constitutionally protected activity that a state may not prohibit or penalize.

Those with different beliefs have Constitutionally protected rights to start their own youth organizations teaching their preferred moral values. But they may not use the power of the state to impose their values and beliefs on those who disagree.

ARGUMENT

I. THE CONSTITUTIONAL DOCTRINE PROHIBITING GOVERNMENT PENALTIES ON THE EXERCISE OF CONSTITUTIONAL RIGHTS IS WELL-ESTABLISHED.

Neither Federal, nor state, nor local governments, or any of their subdivisions, may penalize a private actor for exercising its Constitutional rights. This doctrine is well established by several precedents from the Supreme Court, as well as other courts.

Probably the lead case is *Perry v. Sinderman,* 408 U.S. 593 (1972). In that case, a state college refused to renew the contract of a non-tenured professor because he publicly criticized the college’s administration. Even though the professor was an at-will employee and had no entitlement to a contract renewal, the Court found that the college

had violated the Constitution because it had penalized the professor for exercising his First Amendment protected Freedom of Speech. The Court said,

> "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Such interference with constitutional rights is impermissable."

408 U.S. at 597 (quoting *Speiser v. Randall,* 357 U.S. 513 (1958).

In *Speiser,* the state of California denied a tax exemption to those who would not take a loyalty oath. The Court recognized that the First Amendment protects the right of citizens to refuse to take such an oath, because Freedom of Speech includes the right to choose what not to say. The Court concluded that the state had acted unconstitutionally because denying the tax exemption to those who refused the oath effectively penalized them for exercising this Constitutional right to refuse.

The Court said that for a state government to "deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for such speech." Id. at 518. Such a state practice, the Court said, would produce "a result which the state could not command directly. It can only result in a deterrence of speech which the Constitution makes free." Id. at 526.

The Supreme Court more recently reiterated the doctrine in *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990). That case involved a challenge to the practice of state officials of hiring personnel based on their affiliation with the political party in

power at the time. The Court found the practice unconstitutional because it penalized applicants for exercising their Constitutionally protected right to affiliate with whatever political party they chose, or no party. The Court said, "[W]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly", such as through penalties on the exercise of First Amendment rights. Id. at 77-78.

In another recent case, *Bd. of Comm'rs, Waubensee County v. Umbehr,* 518 U.S. 668 (1996), a County Board refused to renew the contract of a trash hauler because of the hauler's public criticism of the Board. Even though the hauler had no entitlement to the contract renewal, denying it on this basis was unconstitutional because it penalized the hauler for exercising his constitutional rights.

The Court said, "our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected… freedom of speech' even if he has no entitlement to that benefit." Id. at 674(quoting *Perry,* 408 U.S. at 597). The Court also said, "constitutional violations may arise from the deterrent, or chilling, effect of governmental [policies] that fall short of a direct prohibition against the exercise of First Amendment rights." Id. The Court noted as well that the doctrine applies not only to policies regarding government contracts and employment, but also to policies regarding the use of public facilities, the provision of government subsidies, and other government programs and activities. Id. at 680.

Most recently, in *Legal Services Corp. v. Velasquez,* 531 U.S. 533 (2001), the Court held that the Federal government may not deny Legal Services Corp. grants to

lawyers because they refuse to agree not to bring legal challenges against the validity of welfare laws. See also, *FCC v. League of Women Voters,* 468 U.S. 364 (1984)(grants cannot be denied to public broadcasters for refusing to agree not to engage in First Amendment protected editorializing).

The Second Circuit has recently recognized this doctrine as well. In *Planned Parenthood Federation of America, Inc. v. Agency for Intern. Development,* 915 F.2d 59 (2d Cir. 1990) *cert. denied* 500 U.S. 92 (1991), the Federal government refused to allow Planned Parenthood to participate in a Federal grant program unless it changed the organization's message to follow what Federal officials preferred the group to say. The grant refusal amounted to a penalty on the group's exercise of its First Amendment rights to choose its own message. The Court said that a government policy that forces private actors to choose between a government benefit and its First Amendment rights amounts to an unconstitutional condition.

The doctrine has recently been recognized in other circuits as well. *Kinney v. Weaver,* __F.3d__, No. 00-40557, 2002 WL 1764145 (5th Cir. July 31,2002); *Cuffley v. Mickes,* 208 F.3d 702 (8th Cir. 2000), *cert. denied,* 532 U.S. 903 (2001); *Anderson v. McCotter,* 100 F.3d 723 (10th Cir. 1996); *Hyland v. Wonder,* 972 F.2d 1129 (9th Cir. 1992), *cert. denied,* 508 U.S. 908 (1993). *See also, Hsu v. Roslyn Union Free Sch. Dist. No. 3,* 85 F.3d 839 (2d Cir. 1996)(School district sought to deny recognition and access to school facilities to a student Christian Club on grounds that club's policy of allowing only Christians to serve as club officers violated school's antidiscrimination policy. Court reversed the denial because the club had a right of expressive association to choose

officers that would best send the club's message, which was protected by the Federal Equal Access Act, as well as the Constitution.).[1]

As discussed in the next section, this doctrine is fully dispositive of the present case, and requires reversal of the District Court below.

II. THE STATE OF CONNECTICUT HAS DIRECTLY AND OPENLY PENALIZED THE BOY SCOUTS FOR THE EXERCISE OF THE CONSTITUTIONAL RIGHTS EXPRESSLY RECOGNIZED BY THE U.S. SUPREME COURT

"The Boy Scouts is a private, not for profit organization engaged in instilling its system of values in young people. The Boy Scouts assert that homosexual conduct is inconsistent with the values it seeks to instill." *Boy Scouts of America v. Dale,* 530 U.S. 640, 644 (2000). The Supreme Court also stated in that case, "The Boy Scouts asserts that it 'teach[es] that homosexual conduct is not morally straight,' Brief for Petitioners 39, and that it does 'not want to promote homosexual conduct as a legitimate form of behavior,' Reply Brief for Petitioners 5." 530 U.S. at 651.

In that case, the Boy Scouts dismissed James Dale as an adult scout leader because he had become an openly public, gay activist. Dale sued claiming discrimination under the state's public accommodations law, and the New Jersey Supreme Court upheld Dale's claim, ordering the Boy Scouts to reinstate him.

But the U.S. Supreme Court reversed. The Court held that applying the New Jersey discrimination law to the Boy Scouts in this way would violate the organization's right to expressive association under the First Amendment.

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[1] District Courts that have recently recognized and applied the doctrine include *Boy Scouts of America v. Till,* 136 F. Supp. 2d 1295 (S.D. Fla. 2001); *Brooklyn Institute of Arts and Sciences v. City of New York,* 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

The Court explained that the First Amendment protects the right of the Boy Scouts to choose and send the message it desires, and to express and teach the values in which it believes. The Court recognized that forcing the Boy Scouts to accept publicly avowed, practicing homosexuals as members and adult leaders would nullify it's message, teachings, and expression regarding its view of the morality and propriety of homosexual conduct.. As the Court said,

> "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express….
>
> The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.

530 U.S. at 648.

Yet, it is indisputable that the state of Connecticut through the Connecticut State Employee Campaign Committee ("State Committee") excluded the Boy Scouts from the Connecticut State Employee Campaign for Charitable Giving ("Charitable Campaign") precisely because of the exercise by the Boy Scouts of the exact constitutional rights upheld by the U.S. Supreme Court in *Dale.*[2] Consequently, the state has undeniably penalized the Boy Scouts for exercising these precise Constitutional rights so recently recognized and upheld by the U.S. Supreme Court.

But that penalty is unconstitutional under the doctrine and entire line of cases discussed in the previous section. A state, or any of its subdivisions, cannot penalize a

[2] For example, the court below stated that "If the BSA changes its policy in the future and no longer discriminates, and attests to that in its application to the Committee, the Committee could legally allow them to participate…." *Boy Scouts of America v. Wyman, et al.,* (slip opinion at 14). The court here echoed the same statement by Defendant Nancy Wyman, the State Comptroller and a state Committee member. (Affidavit of George A. Davidson, Ex. 17).

private actor like the Boy Scouts for the exercise of its Constitutional rights. This case consequently involves a straightforward application of well-settled law.

Besides the applicability of the long line of cases discussed in the previous section, this case is closely analogous to *Boy Scouts of America v. Till,* 136 F. Supp. 2d 1295 (S.D. Fla. 2001). In that case, a school district terminated its contract with the local Boy Scouts for use of school facilities. The district claimed that the Boy Scouts policy on homosexuals violated the district's policy prohibiting the use of school facilities by those that discriminate.

The court recognized that the Boy Scout organization has "a right to freedom of expressive association, which includes the right to exclude homosexuals as members or leaders in the organization." Id. at 1308. The court found that "it is because of the exercise of this right…that the school board seeks to ban the Boy Scouts from use of school facilities." Id. As a result, the court found that the exclusion of the Boy Scouts from school facilities was unconstitutional because "the School Board cannot punish another group for its own message" protected under the First Amendment. Id.

The decision of the Second Circuit in *Hsu* is also instructive. In that case, students at a public high school tried to form a student Christian Club. The school denied official recognition to the Club, however, because it required all officers to be professed Christians. The school argued that requirement violated the school's anti-discrimination policy.

But the Court recognized that the Club had a right to expressive association allowing it to limit offices to those who could best represent and promote the Club's overall message. This right was protected by both the Federal Equal Access Act and the

Constitution. The Court ruled that the school could not deny the Club official recognition and access to the school's facilities for choosing to exercise this right.

It is of no avail to argue in the present case that the Scouts have not been held in violation of state law, but the State Committee would be violating state law if it allowed the Scouts to participate in the Charitable Campaign with their "discriminatory" policy. The bottom line is that the state of Connecticut must organize its laws and bureaucracy so that it does not violate the Constitutional rights of the Boy Scouts. It cannot penalize the Boy Scouts by denying them participation in the Charitable Campaign because of the exercise of their Constitutional rights, regardless of the byzantine bureaucratic reasoning by which that result is brought about. The status under state law of the State Committee in complying with the Constitution in its treatment of the Boy Scouts is a matter for the state of Connecticut to work out and is not an issue in this case.

Respecting the clear Constitutional rights of the Boy Scouts in this case does not leave us with an invidious or undesirable result. The Boy Scouts of America is an organization run by parents and local community volunteers coming together to instruct young boys in the traditional moral values in which they believe. These values include the belief that homosexual activity is morally wrong, a common belief rooted in religious teachings going back thousands of years. To call this activity discrimination is overheated hyperbole by those who simply oppose these traditional moral beliefs. The Boy Scouts do not discriminate. They engage in the teaching of traditional moral values, a Constitutionally protected activity that a state may not prohibit or penalize.

Those with different beliefs have Constitutionally protected rights to start their own youth organizations teaching their preferred moral values. But they may not use the power of the state to impose their values and beliefs on those who disagree.

CONCLUSION

Based on the foregoing, the ACRU respectfully submits that the decision of the court below must be reversed. Indeed, since there is no dispute of fact barring the grant of summary judgement for the Boy Scouts, and the legal grounds for reversing summary judgement for the defendants also require granting summary judgement for the Boy Scout plaintiffs, there is no reason why this Court should not fully and finally resolve this case now by granting summary judgement for the Boy Scouts.

Respectfully Submitted,

American Civil Rights Union
Amicus Curiae

By_______________
Peter Ferrara
Counsel for
American Civil Rights Union
1232 Pine Hill Rd.
McLean, VA 22101
(703) 582-8466

Certificate of Service

I hereby certify that on this 24th day of December, 2002, 2 copies of the foregoing brief *amicus curiae* was sent first class, postage prepaid, to each of the following:

George A. Davidson
Carla A. Kerr
Hughes Hubbard and Reed
One Battery Park Plaza
12th floor
New York, New York 10004-1482

Attorney for Plaintiffs

William Prensky
Office of the Attorney General
55 Elm Street
Hartford, CT 06141-0120

Attorney for Defendants

C. Joan Parker
Commission on Human Rights and Opportunities
21 Grand Street
Hartford, CT 06106

Attorney for Defendant-Intervenor

____
Peter Ferrara