

## EFFECT OF CHANGES IN ADULT LEADER STANDARD ON RELIGIOUS CHARTERED ORGANIZATIONS

The BSA is considering no longer maintaining its adult leadership standard denying membership to homosexuals. At the same time, the BSA is reaffirming its longstanding practice of permitting religious chartered organizations to use the Scouting program to develop youth consistent with their organizational mission and in accordance with their religious beliefs. Religious chartered organization choice allows religious organizations for which same-sex relationships are inconsistent with their religious beliefs to continue to select adult leaders in accordance with those beliefs. Those religious organizations are exempt from most, if not all, state and local place of public accommodation laws and, even if they are not exempt, are protected by the First Amendment to the Constitution of the United States.

### BACKGROUND

#### The Contemporary Legal Climate

If the BSA were required to litigate today its defense in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), it would almost certainly lose. *Dale* was a narrow 5–4 decision that balanced the government’s interest in protecting against discrimination based on sexual orientation and the BSA’s right protected by the First Amendment to select its own leaders.<sup>1</sup>

In the 15 years since *Dale*, the government’s interest in protecting against discrimination based on sexual orientation has increased dramatically and is expected to continue to increase. More states and municipalities have laws prohibiting discrimination on the basis of sexual orientation. Anti-sodomy laws are now unconstitutional, after the Supreme Court in 2003 reversed its own decision from 1986.<sup>2</sup> Executive orders now prohibit federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity.<sup>3</sup> Same-sex marriage has been the law in most states and is now protected under the federal constitution.<sup>4</sup> Judges in California—including two who

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1. See 530 U.S. at 659.
  2. *Lawrence v. Texas*, 539 U.S. 558 (2003), reversing *Bowers v. Hardwick*, 478 U.S. 186 (1986).
  3. <https://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers>.
  4. *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015).

were in the BSA’s 2015 Silver Antelope class—will be pressured to resign from the BSA or resign as judges effective January 21, 2016, because the Supreme Court of California unanimously voted to revoke an ethical rule that permitted judges to belong to nonprofit youth organizations that discriminate.<sup>5</sup>

At the same time, it has become more challenging for the BSA to declare that homosexual conduct is not morally straight and not clean. There is increased opposition to that position within Scouting, including local councils openly opposing the policy. If *Dale* were litigated today, some BSA chartered organizations and local councils would file *amicus curiae* briefs stating that the exclusion of homosexuals from leadership is not part of the BSA’s expression.

As a result, the BSA is considering no longer having a policy that excludes homosexuals from adult leadership positions. Instead, the BSA would affirm that religious chartered organizations have the right under the law and the BSA’s policies to select adult leaders based on their religious beliefs.

### **The Role of Chartered Organizations in Selecting Leaders**

The BSA permits each chartered organization to select adult leaders in accordance with the chartered organization’s values and in order to achieve the chartered organization’s objectives. The BSA states that,

The Boy Scouts of America makes Scouting available to our nation’s youth by chartering community organizations to organize and operate Cub Scout packs, Boy Scout troops, Varsity Scout teams, Venturing crews, and Sea Scout ships for boys and young men and women. *These chartered organizations manage the units and control the program of activities to support their goals and objectives.*<sup>6</sup>

The BSA tells chartered organizations that “[c]ritical to the success of your Scouting program is the selection of quality leaders who represent the values of the Boy Scouts of America *and your organization*. The chartered organization has the responsibility for the selection of these individuals.”<sup>7</sup> In the checklist for selecting leaders, the BSA counsels chartered organizations to “[i]nclude any special qualifications *your organization may*

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5. Supreme Court of California, Press Release, “Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations That Discriminate” (Jan. 23, 2015) ([http://www.courts.ca.gov/documents/sc15-Jan\\_23.pdf](http://www.courts.ca.gov/documents/sc15-Jan_23.pdf)).
  6. *Scouting in the Community: The Chartered Organization* (Sept. 2008) (emphasis added).
  7. *Selecting Quality Leaders for Boy Scouts*, at 2 (2011) (emphasis added).

*require.*”<sup>8</sup> The BSA states that “[y]our organization has the Scouting program on charter from the Boy Scouts of America, *but the Scouting units and their leaders belong to your organization and are part of its ‘family.’*”<sup>9</sup>

The BSA’s policies give special deference to religious chartered organizations. The BSA does not require any religious chartered organization to accept an adult leader whose espoused personal beliefs are in conflict with the chartered organization’s religious principles.

### **Summary of Religious Chartered Organization Choice**

The change under consideration would eliminate the BSA’s prohibition on gay leaders, but it would be consistent with the BSA’s current policy of allowing each religious chartered organization to select unit leaders. The change in the BSA policy would still allow units chartered by religious organizations that as a matter of religious belief consider homosexual conduct inconsistent with their religion to limit adult leadership in accordance with that belief. Units not chartered by religious organizations could not exclude homosexuals who otherwise meet the BSA’s high adult leader standards and the chartered organization’s standards.

All other leader requirements, including “duty to God,” would remain in effect for *all* chartered organizations. Every adult leader must possess the moral, educational, and emotional qualities that the BSA considers necessary to provide positive leadership to youth. Every adult leader must abide by the Scout Oath, the Scout Law, the Declaration of Religious Principle, and the BSA’s behavioral standards.

Religious chartered organization choice would protect leadership selections of the Church of Jesus Christ of Latter-day Saints (the “LDS Church”), the Catholic Church, the United Methodist Church, churches in the Southern Baptist Convention, and Orthodox Judaism, as well as any other church, temple, mosque, or similar religious entity whose religious values are inconsistent with homosexual conduct.

### **Religious Chartered Organization Choice in Scouting**

The BSA has had a religious chartered organization choice for many years without incident. In the 1980s, the BSA defended its right to limit Scoutmasters to male role models, and the Supreme Court of Connecticut affirmed the right to exclude women from becoming Scoutmasters.<sup>10</sup> Less than two years after that litigation victory, the BSA chose to remove the gender requirement from adult leader positions. The BSA thus protected its right to select leaders and, after that right was protected, exercised its freedom to permit women to be Scoutmasters. The BSA thus created a choice that permitted religious chartered organizations not to include female Scoutmasters. The LDS Church, for

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8. *Id.* at 6 (emphasis added).

9. *The Chartered Organization Representative*, at 3 (2009) (emphasis added).

10. *Quinnipiac Council, Boy Scouts of America v. Commission on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987).

example, has never been required to accept women Scoutmasters, and no chartered organization is required to charter coeducational Venturing crews.

## DISCUSSION

We understand that some religious organizations are concerned that if they exclude homosexuals from leadership in Scouting units that they charter after the BSA changes its policy they will be vulnerable to lawsuits from the potential leaders they exclude. Those concerns should be allayed by the legal defenses that religious organizations have under place of public accommodation statutes and the First Amendment to the Constitution of the United States.

### **A. Most, If Not All, Place of Public Accommodation Laws Exempt Religious Organizations or Private Clubs**

Would-be adult leaders in the BSA who have challenged its leadership standards have used state or local place of public accommodation statutes as a legal basis to seek a position in Scouting. Place of public accommodation laws vary from jurisdiction to jurisdiction.<sup>11</sup> There is no national determination of whether the BSA is a place of public accommodation. Some jurisdictions have concluded that the BSA is a place of public accommodation.<sup>12</sup> Other jurisdictions have concluded that the BSA is not a place of public accommodation.<sup>13</sup>

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11. At present, 21 states and the District of Columbia prohibit discrimination on the basis of sexual orientation in places of public accommodation; many cities and counties also prohibit discrimination on the basis of sexual orientation even when state law does not.
  12. The New Jersey Supreme Court affirmed that the BSA is a place of public accommodation under that state's Law Against Discrimination, *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999), and the State of Washington Human Rights Commission previously stated that "[t]he Boy Scouts of America (BSA) would be considered a public accommodation under the Washington Law Against Discrimination (WLAD)," although the BSA has a First Amendment right under *Dale* that protects the BSA's membership and leadership decisions. Washington State Human Rights Commission, "Sexual Orientation/Gender Identity Questions" (previously available at <http://www.hum.wa.gov/faq/FAQSexualOrientation5.html>).
  13. See, e.g., *Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir. 1993), *cert. denied*, 510 U.S. 1012 (1993) (federal place of public accommodation statute); *Curran v. Mount Diablo Council of Boy Scouts of America*, 952 P.2d 218 (Cal. 1998) (California place of public accommodation statute); *Randall v. Orange County Council, Boy Scouts of America*, 952 P.2d 261 (Cal. 1998) (same); *Seabourn v. Coronado Area Council, Boy Scouts of America*,

The decisions concluding that the BSA is not a place of public accommodation all predate the decision in *Boy Scouts of America v. Dale*, and the most recent decision is from 17 years ago. The conclusions in those decisions are largely result-oriented and from a time in which the courts viewed homosexuals and the BSA in different lights. Some of the jurisdictions have since been very critical of the BSA, including branding it a “discriminatory” organization.<sup>14</sup> A court could conclude that the BSA is a place of public accommodation based on the size and inclusiveness of the Scouting program. And it is possible that some jurisdictions could reconsider whether to subject the BSA to place of public accommodation laws if presented with the question in the future.<sup>15</sup>

State and local statutes prohibiting discrimination on the basis of sexual orientation often exempt religious organizations.<sup>16</sup> As a result, a religious chartered

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891 P.2d 385 (Kan. 1995) (Kansas place of public accommodation statute); *Quinnipiac Council v. Commission on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987) (Connecticut place of public accommodation statute); *Schwenk v. Boy Scouts of America*, 551 P.2d 465 (Or. 1976) (Oregon place of public accommodation statute).

14. *See Evans v. City of Berkeley*, 129 P.3d 394 (Cal.), *cert. denied*, 549 U.S. 987 (2006) (revoking Sea Scouts free use of berth space in the city-owned marina because of the BSA’s “discriminatory policies against gays and atheists”); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004) (removing BSA local councils from a state employee charitable campaign because of the BSA’s policy on homosexuals on the ground that Connecticut did not “require” the BSA to change its views, but merely required the BSA to “pay[] a price” for “exercising its First Amendment rights”).
15. Both before and after the *Dale* decision, courts have found other private membership clubs to be places of public accommodation, which could serve as precedent for another court in the future to find the BSA to be a place of public accommodation. *See, e.g., Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 121 P.3d 671, 676 (Or. 2005) (Fraternal Order of Eagles); *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 9 P.3d 655, 672 (Wash. 2002) (en banc) (Fraternal Order of Eagles); *United States Power Squadrons v. State Human Rights Appeal Board*, 452 N.E.2d 1199, 1204 (N.Y. 1983) (United States Power Squadrons); *National Organization of Women, Essex County Chapter v. Little League Baseball, Inc.*, 318 A.2d 33, 39 (N.J. 1974) (Little League).
16. For example, New York protects the admission decisions of religious organizations in that state’s place of public accommodation statute. *See* New York State Human Rights Law § 296(11). Utah and Colorado exclude churches from their place of public accommodation laws. *See* Utah Code § 13-7-2(1)(c); Colo. Rev. Stat. § 24-34-601(1). In California, the Unruh Civil Rights Act does not apply to a truly private social club or to membership decisions of a charitable, expressive, and social

organization itself should be exempt from many place of public accommodation statutes. Those exemptions, however, also vary from jurisdiction to jurisdiction.

## **B. Religious Chartered Organizations Have an Expressive Association Defense Under the First Amendment**

The First Amendment to the Constitution of the United States provides, in part, that “Congress shall make no law ... abridging the freedom of speech.”<sup>17</sup> The right to freedom of expressive association is guaranteed by this provision of the First Amendment.<sup>18</sup> Government intrusion into the internal affairs of a private organization by forcing it to accept a member that it does not want is unconstitutional if the member’s presence affects in a significant way the organization’s ability to advocate public or private viewpoints.<sup>19</sup> This right to freedom of association “is a right enjoyed by religious and secular groups alike.”<sup>20</sup>

The First Amendment freedom of association of an organization protects the freedom to not associate with persons whose expression is inconsistent with the expression of the organization.<sup>21</sup> Although a state or local government can prohibit discrimination under a place of public accommodation law, the U.S. Constitution bans enforcement of those laws where the First Amendment freedom of association is in conflict with the public accommodations law. In *Boy Scouts of America v. Dale*, the Supreme Court concluded that the freedom of association protects an organization only (1) if forcing the membership of someone from a protected class would conflict with the expression of the private membership organization and (2) if the government does not

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organization. See *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 790 (Cal. 1995); *Curran v. Mount Diablo Council of Boy Scouts of America*, 952 P.2d 218, 238 (Cal. 1998); *Randall v. Orange County Council, Boy Scouts of America*, 952 P.2d 261, 266 (Cal. 1998); *Doe v. California Lutheran High School Association*, 170 Cal. App. 4th 828, 836-37 (2009).

17. U.S. Const. amend. I.

18. *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000); *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 580-81 (1995).

19. See *Dale*, 530 U.S. at 659.

20. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. \_\_\_\_, 132 S. Ct. 694, 706(2012).

21. See *Dale*, 530 U.S. at 647-48; *Hurley*, 515 U.S. at 573-75; *Board of Directors, Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984).

have a compelling interest that is greater than the expressive association interest of the private organization.<sup>22</sup>

The Supreme Court's decision in *Dale* was based on the precedent that allowed the organizers of the St. Patrick's Day Parade in Boston—the South Boston Allied War Veterans Council—to exclude an LGBT contingent from the parade.<sup>23</sup> In *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, the Supreme Court concluded that the First Amendment protected the parade organizers from the Massachusetts place of public accommodation law, and they were not required to include among the marchers a group imparting a message the organizers did not wish to convey.<sup>24</sup> The Court recognized that the parade included diverse voices that varied from each other and from the parade organizers' own expression.<sup>25</sup> Nevertheless, the selection of this group of voices and the exclusion of others were protected by the First Amendment. The Court held that,

a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper. The selection of

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22. See *Dale*, 530 U.S. at 659; *Hurley*, 515 U.S. at 572. The one published case involving a homosexual seeking employment with the BSA employed the same standard as in *Dale* of weighing the state's interest in eliminating discrimination against the private organization's interest in freedom of expressive association. See *Chicago Area Council, Boy Scouts of America v. Chicago Commission on Human Rights*, 748 N.E.2d 759, 767 (Ill. App. Ct. 2001), *cert. denied*, 763 N.E.2d 316 (Ill. 2001).

23. *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

24. *Id.* at 559.

25. *Id.* at 569-70, 574.

contingents to make a parade is entitled to similar protection.<sup>26</sup>

In drawing on yet another analogy, the Court held that “[r]ather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day.”<sup>27</sup>

The First Amendment, however, has its limits. According to the Supreme Court, “[t]he right to associate for expressive purposes is not ... absolute. Infringement on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>28</sup> Furthermore, an organization cannot “erect a shield against anti-discrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”<sup>29</sup>

### **C. Religious Chartered Organizations Have Establishment Clause and Free Exercise Clause Defenses Under the First Amendment**

The First Amendment to the Constitution of the United States also provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>30</sup> This provision is considered to include two clauses: the Establishment Clause and the Free Exercise Clause. By forbidding the “establishment of religion” and guaranteeing the “free exercise thereof,” the First Amendment ensured that the government “would have no role in filling ecclesiastical offices.”<sup>31</sup> The First Amendment thus “gives special solicitude to the rights of religious organizations.”<sup>32</sup>

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26. *Id.* at 569-70 (internal citations omitted).

27. *Id.* at 574.

28. *Roberts*, 468 U.S. at 624; *see Dale*, 530 U.S. at 648.

29. *Dale*, 530 U.S. at 653.

30. U.S. Const. amend. I.

31. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. \_\_\_\_, 132 S. Ct. 694, 706 (2012).

32. 132 S. Ct. at 703.



The Supreme Court has recently reaffirmed that both of these religion clauses bar the government from interfering with the decision of a religious group to select its ministers, as that term is broadly construed.<sup>33</sup> The Supreme Court explained that

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.<sup>34</sup>

The Free Exercise Clause and the Establishment Clause thus also protect religious organizations from government interference in the selection of leaders.<sup>35</sup>

The most recent application of the First Amendment religion clauses is *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>36</sup> Hosanna-Tabor “called” certain teachers and required them to complete academic courses in theology.<sup>37</sup> After respondent Cheryl Perich completed the required training, she became a “called” teacher and received the title “Minister of Religion, Commissioned.”<sup>38</sup> In addition to teaching secular subjects, Perich taught a religion class, led daily prayer and devotional exercises, and took her students to chapel services.<sup>39</sup> Perich developed narcolepsy, and the school terminated her employment.<sup>40</sup> Perich and the EEOC sued the school for discrimination

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33. *Id.* at 710.

34. *Id.* at 706.

35. *See Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 713-14 (1981) (courts should refrain from deciding issues about the merits of religious belief or practice).

36. 565 U.S. \_\_\_\_, 132 S. Ct. 694 (2012).

37. 132 S. Ct. at 699.

38. *Id.* at 700.

39. *Id.*

40. *Id.*

under the Americans with Disabilities Act.<sup>41</sup> Hosanna-Tabor argued that the suit was barred by the First Amendment because the claims concerned the employment relationship between a religious institution and one of its ministers.<sup>42</sup>

Hosanna-Tabor's arguments prevailed. The Supreme Court unanimously held that "it is impermissible for the government to contradict a church's determination of who can act as its ministers" under the so-called ministerial exception.<sup>43</sup> This ministerial exception "is not limited to the head of a religious congregation,"<sup>44</sup> but instead depends on the formal title given to an individual by the church, the substance reflected in that title, the individual's use of that title, and the important religious functions the individual performed for the church.<sup>45</sup> The purpose of the ministerial exception is to ensure that "the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,'—is the church's alone."<sup>46</sup> The Supreme Court concluded that an order reinstating Perich as a called teacher or penalizing the Church for terminating an unwanted minister would have violated the Church's freedom under the Religion Clauses to select its own ministers.<sup>47</sup>

In the recent decision on the right of same-sex couples to marry, the Court emphasized that the First Amendment protects the rights of religious organizations to adhere to religious principles that do not condone same-sex marriage.

[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.<sup>48</sup>

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41. *Id.* at 701.

42. *Id.*

43. *Id.* at 704. See *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 724-25 (1976); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 115, 119 (1952); *Watson v. Jones*, 13 Wall. 679, 727 (1872).

44. *Hosanna-Tabor*, 132 S. Ct. at 707.

45. *Id.* at 708.

46. *Id.* at 709 (quoting *Kedroff*, 344 U.S. at 119).

47. *Id.*

48. *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015), slip op. at 27.

There should be no doubt that the right of religious chartered organizations to select their Scouting leaders is protected by the First Amendment.

#### **D. The Risks of Legal Action Against Religious Chartered Organizations**

The risk that a homosexual activist might file a lawsuit seeking admission to a Scouting unit (e.g., a Boy Scout troop or a Cub Scout pack) of a religious chartered organization whose religious values are inconsistent with homosexual conduct cannot be eliminated. We live in a litigious society, and frivolous lawsuits are threatened and filed every day. However, any lawsuit challenging the religious requirements in a Scouting unit chartered by a religious organization would be unlikely to succeed or even make much progress.

##### **1. Hypothetical lawsuit against the BSA or a religious chartered organization to compel accepting a homosexual adult leader**

One kind of hypothetical lawsuit is the possibility of someone suing the BSA under a place of public accommodation law, alleging that part of the BSA remains discriminatory with respect to homosexual adult leaders. In order for a complainant to have standing, such a lawsuit could be brought by someone excluded from a particular Scouting unit chartered by a religious organization whose values are inconsistent with including a homosexual leader as a role model for youth in the unit. In this hypothetical lawsuit, the plaintiff would be seeking inclusion in a particular unit chartered by a particular religious organization.

Such a lawsuit against the BSA or the local council would be unlikely to prevail.<sup>49</sup> If the would-be leader is eligible to be a Scouting leader, he or she could become an adult leader in another Scouting unit chartered by a different organization. The BSA or its local council in this scenario should be dismissed from the case, because exclusion from the unit would not have been the result of the BSA's policy. Rather, the exclusion would be the result of the chartered organization's constitutionally protected values.

If a Scouting unit or its religious chartered organization were sued because either would not permit a homosexual to be an adult leader based on the chartered organization's religious beliefs, the unit and its chartered organization would have strong statutory and First Amendment protections. A hypothetical lawsuit might seek to force religious organizations to accept a homosexual adult leader. Such a lawsuit would be unlikely to proceed past the earliest stages and a motion to dismiss in light of the statutory exceptions for religious organizations in place of public accommodation statutes and the First Amendment defenses as articulated in *Dale*, *Hurley*, and *Hosanna-Tabor*, as discussed above. In many jurisdictions, the religious chartered organization would be specifically exempt from the place of public accommodation statute. Even if a court

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49. For purposes of this discussion, we have assumed that the BSA would be considered a place of public accommodation.

concluded that the religious organization were a place of public accommodation, the First Amendment as applied in *Dale*, *Hurley*, and *Hosanna-Tabor* should protect the decisions of the religious organization in selecting Scouting leaders. As a result of such long-standing law protecting religious expression, for example, atheists and agnostics do not sue to become Lutheran Sunday school teachers, and Lutherans do not sue to become Catholic catechism teachers.

It is hard to imagine how a suit would survive against the BSA, which might be a place of public accommodation but whose policy is not at issue, or against a religious chartered organization, whose policy is at issue but which is not a place of public accommodation. In the unlikely event the hypothetical lawsuit were to survive dismissal, however, the religious chartered organization would not be saved from an activist court willing to ignore constitutional protections by the BSA continuing to maintain a policy of excluding homosexual adults. A court that is not stopped by the First Amendment would not be stopped by BSA policy.

**2. Hypothetical lawsuit against the BSA to terminate a relationship with a religious chartered organization that does not include homosexual adults**

A hypothetical lawsuit instead might seek an injunction to require the BSA to revoke charters of the religious chartered organizations that are not willing to admit homosexuals as leaders. Rather than seeking to compel the inclusion of a homosexual adult leader in a particular unit, this hypothetical lawsuit would attempt to require the BSA to revoke a charter to a religious organization that allegedly discriminates on the basis of sexual orientation.

The BSA's right to grant charters to religious organizations is strongly protected under the law. The BSA has a strong legal defense that it cannot be enjoined or prevented from granting a charter to a religious organization that excluded homosexual adult leaders based on the organization's religious beliefs. A lawsuit seeking to enjoin the BSA would be unlikely to proceed past the earliest stages and a motion to dismiss. The BSA has the right under the First Amendment to associate with its religious chartered organizations and to deliver the Scouting program through a diverse collection of chartered organizations of the BSA's choosing. Like the newspapers, cable operators, or parades discussed in *Hurley*, the First Amendment protects the right of a private organization to combine "multifarious voices" into a "compilation of speech generated" by others.<sup>50</sup> In *Hurley*, "[t]he selection of contingents to make a parade" was entitled to First Amendment protection from the state place of public accommodation laws.<sup>51</sup> Here, the BSA has a constitutionally protected right to combine the multifarious voices from its chartered organizations—including its religious chartered organizations—into a

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50. 515 U.S. at 569-70.

51. *Id.* at 570.

compilation of groups that deliver Scouting values along with the chartered organizations' distinct values.<sup>52</sup> In spite of all of this, in the unlikely event that the BSA faced an injunction against associating with certain religious organizations, it would not have avoided that fate by maintaining its own policy that excluded homosexuals from adult leadership positions.

Religious organizations already prosper in a legal environment in which their affiliates that are committed to their faith obligations also participate in nonprofits that do not share those values. For example, Brigham Young University, Catholic University of America, Baylor University, and the faiths with which these schools are affiliated<sup>53</sup> do not condone homosexual conduct. The law schools at Brigham Young University, Catholic University of America, and Baylor University are accredited by the Association of American Law Schools ("AALS") and the American Bar Association ("ABA"). The sports teams at Brigham Young University, Catholic University of America, and Baylor University are accredited by the National Collegiate Athletic Association ("NCAA"). Each of these accrediting organizations is a nonprofit organization. Each of these accrediting organizations has a policy that either promotes diversity that includes sexual orientation or prohibits discrimination on the basis of sexual orientation.<sup>54</sup> Each of these accrediting organizations also has, as a matter of policy or practice, an exception for religious schools.

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52. The BSA could bolster its legal defense by making clear that it wants to have a diverse variety of chartered organizations to deliver the Scouting program. Any such references to diversity being part of the BSA's expression are not intended to appease liberal critics. Rather, they are designed to show that the BSA has expression that values its relationship with conservative religious organizations, and thereby strengthens the legal protections of those relationships.
  53. We use as examples the LDS Church, the Catholic Church, and the Southern Baptists because they are large religious chartering organizations and all believe that sexual activity should occur only between a man and a woman who are married and, therefore, do not condone homosexual conduct. The principles discussed here would apply to any religious faith that does not condone homosexual conduct.
  54. See AALS Bylaws, § 6-3(a) ("A member school shall provide equality of opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and tenure, applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual orientation.") (available at <http://www.aals.org/about/handbook/bylaws/>); ABA Standards and Rules of Procedures for Approval of Law Schools, Standard 205(a) (2014) ("A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.") (available at

Our research has shown no lawsuit or legal action initiated by a third party against any of these accrediting organizations seeking to change the school's religious principles or remove the school from the accrediting organization based on alleged discrimination. The greater challenge is likely to come from the accrediting organizations themselves, which occasionally exert pressure on member schools. By contrast, the BSA would not seek to exert pressure on any religious chartered organization. Rather, the BSA will help safeguard the religious chartered organizations by defending their protected expression and religious liberties in connection with the selection of unit leaders.

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[http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html)); NCAA LGBTQ Resources (“The NCAA will provide or enable programming and education which sustains foundations of a diverse and inclusive culture across dimensions of diversity including, but not limited to age, race, sex, class, creed, educational background, disability, gender expression, geographical location, income, marital status, parental status, sexual orientation and work experiences.”) (available at <http://www.ncaa.org/about/resources/inclusion/lgbtq-resources>).