



July 8, 2015

WHY THE BSA MUST RECONSIDER THE ADULT LEADER STANDARDS

The existing BSA national policy that prohibits gay adults from serving as leaders is no longer legally defensible. However, the BSA's commitment to duty to God and the right of religious chartered organizations to select their leaders is unwavering. Those two principles can coexist with a new policy that will pass legal scrutiny and protect religious freedoms.

Evolution of the Law

After many years of litigation, the Supreme Court of the United States in 2000 upheld the BSA's right to exclude homosexual leaders in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In a close decision, the Court found that the BSA's First Amendment constitutional right of expression outweighed the state of New Jersey's interest in prohibiting discrimination in public accommodations based upon sexual orientation. The case involved a volunteer who was denied the ability to serve as a leader because he was a homosexual.

Only three years after deciding *Dale*, the U.S. Supreme Court reversed its own 1986 decision and declared that state anti-sodomy laws were unconstitutional. In the years that followed, public accommodation and employment laws prohibiting discrimination on the basis of sexual orientation proliferated. As of the end of 2014, almost half the states and over 140 local governments had enacted laws prohibiting discrimination on the basis of sexual orientation. Those laws and court decisions expanding gay rights indicated a change in the level of state interest in prohibiting discrimination and in the balance of how that interest would be measured against private organizations in the exercise of First Amendment rights.

Over the last three years there has been a sea change in the law with respect to gay rights. Executive orders now prohibit federal agencies, contractors, and subcontractors from discriminating on the basis of sexual orientation or gender identity. State laws prohibit judges from joining organizations that engage in invidious discrimination on the basis of sexual orientation. Same-sex marriage is now protected by the federal constitution, and benefits for same-sex couples have become the norm. Several conservative states have retreated from religious freedom legislation – most recently Indiana and Arkansas – due to the business community wanting to avoid appearing anti-gay.

On June 26, 2015, the Supreme Court concluded that same-sex couples have a right to marry protected by the Fourteenth Amendment to the U.S. Constitution. That decision will serve to accelerate local, state, and federal anti-discrimination laws protecting homosexuals. More importantly, the decision will further raise the level of legal protection based upon sexual



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orientation as well as the level of scrutiny of employers and places of public accommodation whose policies discriminate against homosexuals.

The Threat of Litigation in Multiple Jurisdictions

The BSA no longer has a policy stating that homosexuality is immoral and unclean, which was the basis for the BSA prevailing in *Dale*. Rather, the BSA's policy is that it does not have a position on the issue, it does not proactively inquire about sexual orientation, and sexuality is not an appropriate matter for discussion in the Scouting program. In 2013, the organization changed its youth membership standard to allow gay youth to be members. Many Scout councils openly oppose the current adult standard preventing homosexuals from serving as adult leaders. Some units and councils quietly acknowledge that they have gay adult leaders notwithstanding the national standard.

The Supreme Court's opinion recognizing the constitutional protection of same-sex marriage will likely be interpreted by many courts as formally announcing that the balance that led to the BSA prevailing in *Dale* has conclusively changed. It would be a losing effort for the BSA to continue protecting its policy.

Anticipating the Supreme Court's decision, activists, state officials and agencies, and litigants announced challenges to the BSA's adult standard. The first event foreshadowing the approaching legal battle occurred when the Greater New York Councils publicly announced in March of this year that it had hired and registered the first openly gay Eagle Scout for a summer camp staff position in open defiance of the National Council's membership standard. It is also clear that the employee in question is prepared to take his case to court, and national gay rights advocates are representing him pro bono.

Soon after the announcement by the Greater New York Councils, the New York Attorney General initiated an investigation of the BSA's employment policies. New York is historically a leader in challenging national organizations that discriminate and the courts of New York are renowned for their defense of state anti-discrimination laws and policies. Attorneys general in other states are also believed to be eyeing the New York investigation, and their national association over the last several years has become a model of interstate collaboration in litigating against target defendants in areas of common interest.

Not long after the New York Attorney General's announcement, a lesbian who was denied employment with the Denver Area Council in 2014 filed an action with the Colorado state agency charged with enforcing its anti-discrimination laws. The woman is represented by attorneys noted for their work on behalf of the LGBT community.

An Ohio volunteer's BSA registration was revoked in March of this year after he announced to the media that he was a gay Scout leader and that the BSA was taking no action against him. He has publicly stated that he intends to contest his removal. Camp staffers in



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California and Oklahoma have also complained to the media that they were denied employment because of their sexual orientation.

In addition to facing litigation in multiple jurisdictions, the BSA must also be mindful of the other means by which the federal government has and will use executive power to deter private action. During the Supreme Court argument on same-sex marriage, the Solicitor General was asked whether a Supreme Court decision recognizing a constitutional right to same-sex marriage could affect nonprofit organizations that discriminate on the basis of sexual orientation under the *Bob Jones University* case. That case held that the IRS could revoke the nonprofit status of an organization for discriminating on the basis of race. In response to the question, the Solicitor General stated “it is going to be an issue.”

Litigation in *Dale* and other constitutional cases has been costly. The resources required to litigate simultaneous cases in multiple jurisdictions would be staggering. More importantly, overly-broad court decisions could limit the BSA from maintaining any membership standard until an appellate court reaffirms the BSA’s and religious chartered organizations’ constitutional rights with respect to the duty to God. Let there be no doubt, the BSA will steadfastly defend the right of religious chartered organizations to select leaders whose beliefs are consistent with those of the religious organization.

No one seriously doubts that the BSA’s and its chartered organizations’ right to maintain duty to God is protected by the First Amendment. Chartered organizations are also protected by the Constitution in their exercise of religious freedom. The Supreme Court reaffirmed that right of religious organizations in its same-sex marriage opinion: “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.”

The inescapable consensus in the legal community is that a protracted legal battle to defend the BSA’s current standard excluding gay adult leaders is unwinnable. Many local councils, leaders and supporters now openly disagree with the standard. Both create a level of organizational risk that is too high given the potential results. As such, BSA National President Dr. Robert M. Gates has called upon the BSA’s National Executive Board to seize control of its own future, set its own course, and change the policy in order to allow religious chartered organizations—those religious organizations that sponsor units—to determine the standards for their Scout leaders, instead of leaving the matter for the courts or lawmakers to decide.

Moreover, by embracing the opportunity, the BSA can reduce the level of distraction and continue to focus on its mission of serving youth. Moving toward a policy that accepts and respects different perspectives and beliefs allows religious organizations—based on First Amendment protection of religious freedom—to establish their own standards for adult leaders and will help preserve the Boy Scouts of America for generations to come.