Re: The Legal Ramifications of BSA's New Youth Membership Policy

On May 23, 2013, the Boy Scouts of America (BSA) enacted a sweeping change to its corevalues by changing its long-standing membership requirements to state that "[n]o youth may be denied membership in the Boy Scouts of America on the basis of sexual orientation or preference alone." BSA also removed the prohibition against youth members "who are open or avowed homosexuals or who engage in behavior that would become a distraction to the mission of the BSA," thus no longer prohibiting such "open" homosexuality among its youth members. The change to its membership standards represents a complete redefinition of the requirement in the Scout Oath that all members be "morally straight." It jettisons over 100 years of teaching that homosexuality is incompatible with being "morally straight" and promotes a new radical definition that accepts all sexual orientations and preferences as moral. The policy change results in numerous legal ramifications for BSA and the churches and other religious organizations that charter local troops. Organizations that choose to maintain their chartered status with BSA are opening themselves to serious legal risks as outlined below.

BSA's Policy Change Undermines the Legal Protection It and Its Chartering Organizations Obtained in *Boy Scouts of America v. Dale*, Subjecting Them to Substantial Legal Risk.

The Supreme Court's holding in *Boy Scouts of America v. Dale* was premised upon the existence of a long-standing, unified national policy defining "open and avowed homosexuality" as incompatible with the requirement that Scouts be "morally straight." 530 U.S. 640, 652 (2000). Requiring BSA to violate its policy would undermine BSA's longstanding position that it "do[es] not believe that homosexuals provide a role model consistent with [BSA's] expectations." *Id.* at 652. Following *Dale*, the D.C. Court of Appeals affirmed that "[a]bsent a demonstrated change in the Boy Scouts' 'official position'…nothing in *Dale* suggests that a different tribunal may consider other evidence and define the Boy Scouts' viewpoint differently." *Boy Scouts of Am. v. D.C.Com'n on Human Rights*, 809 A.2d 1192, 1201 (D.C. Ct. App. 2002).

By changing its membership policy, BSA has opened itself and the religious groups that charter troops to great risk of being sued if they refuse to accept any sexual orientation or preference. The new policy is the type of "demonstrated change" that undermines the protection afforded by *Dale* to define certain behaviors and beliefs as incompatible with the mission and message of BSA and the church. Under threat of litigation directed at both BSA and its chartered organizations, they could be required to accept all sexual preferences of potential members. The church-chartered troop will likely be sued when it tries to revoke the membership of the homosexual member who wears his uniform to the Gay Pride Parade or to deny membership to the girl who believes she is male. Under threat of litigation, a church that chooses to maintain ties with BSA could face forfeiting the ability to teach biblical principles of sexual morality to its Scouts and to require them to adhere to those principles.

BSA's Policy Change Increases the Risk of Litigation Against Other Membership Requirements, Including the "Duty to God."

By abandoning one of its core values, BSA has invited legal challenges to its other values—namely its requirement that all members do their "duty to God." If a youth who rejects the traditional definition of "morally straight" can now become a member, then some will argue that rejecting a belief in God should not preclude membership. Indeed, if, as BSA claims, its main reason for the policy change was to make sure that it did not deny membership to any youth, then it is logical that the "duty to God", which also has the effect of limiting membership, would also be challenged. Because BSA has already shown willingness to abandon what it previously claimed was a core belief, will it also abandon its "duty to God" requirement when the inevitable lawsuits come? And these challenges are already beginning to rise. *See* http://ffrf.org/news/news-releases/item/17786-boy-scouts-still-practices-discrimination (atheist group calling on BSA to abandon its "declaration of religious principles").

The Policy Change Opens BSA and its Chartered Organizations to Legal Challenges by Homosexual Adults Who Are Denied Membership.

Some will argue that the new membership policy creates an arbitrary distinction between youth and adult members. Under the policy, a 17 year old Scout or a 20 year old Venturer could be a homosexual (or any other sexual preference or orientation), remain in good standing with BSA, and exert influence over younger, more impressionable members. In many troops, older Scouts are elected as Patrol Leaders responsible for organization and leading meetings, trips, etc. While the Patrol Leader is subject to the adult Scout Master, the student still exerts substantial leadership and influence over the younger students—greater influence than many adult volunteers in a troop. Yet the moment that same member turns a year older, he would be prevented from any further participation in BSA unless he becomes an adult volunteer. Adult volunteers are still subject to the restriction against "open or avowed homosexuals." By allowing a 20 year old homosexual to be a member and leader, but not a 21 year old, BSA creates an arbitrary position that could undermine BSA's victory in *Dale*. A homosexual Scout who is denied the opportunity to be an adult volunteer with a church-based troop simply because he turns a year older is likely to file a lawsuit alleging that such age-based classifications are arbitrary. In sum, by intentionally admitting youth of any sexual orientation or preference as Scouts, it will be argued that there is no principled basis to limit the restriction to adult volunteers.

Churches Or Other Religious Organizations That Accept BSA's New Youth Membership Policy Will Open Themselves Up to Litigation Under State Public Accommodation Laws.

Chartering a troop—which requires a church or other religious organization to affirm youth members of any "sexual orientation or preference" and accept the new membership policy as if it were its own policy—could have a detrimental impact on the church's or religious organization's ability to operate on the basis of its religious beliefs in other contexts. Importantly, such a compromise on this issue could have the undesirable side effect of weakening a church's First Amendment rights to freedom of expression and freedom of association. Churches may be censored from teaching Bible-based standards for sexual morality to the youth in its chartered troop because it would directly conflict with BSA's position that any "sexual orientation or preference" is compatible with being morally straight.

Sponsoring a Scout troop that includes youth members of any "sexual orientation or preference" could also have a detrimental impact on a church's freedom of association. Many states and localities have "non-discrimination" laws that prohibit certain organizations from taking protected factors—including "sexual orientation"—into account in making rental, employment, and other decisions. One of the key factors a court would look to in determining whether the First Amendment freedom of expressive association or free exercise of religion preempts the application of such laws is the consistency of a private organization's message. For example, if a church refuses to rent its facilities to a same-sex couple that wishes to use them for a civil union or "marriage" ceremony, or if a church denies a job to such individuals, a court is likely to examine the consistency of the church's message opposing the morality of homosexuality in determining whether they may lawfully be excluded. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 707-08 (2012) (examining the consistency of a church's treatment of an employee as a "minister" for the purposes of determining whether it is exempt from labor laws). Affirming the "good conduct" and "moral straightness" of youth of any sexual orientation or preference—which is the effect of a church chartering a BSA troop—could limit a church's ability to make a convincing showing that its beliefs opposing homosexuality should be constitutionally protected because of the internal inconsistency created by the charter.

Recommendations

BSA has abandoned over 100 years of traditional morality and mandated that all troops, including those chartered by churches and religious organizations, adhere to the new membership policy. Maintaining the relationship with BSA will only impair the ability of such organizations to continue in their mission, will undermine First Amendment protection of free exercise and free association, and will significantly increase the risk of litigation directed at these organizations. Churches and religious organizations should also take this opportunity to review their own membership and leadership policies to ensure that they comply with all legal requirements as well as preserving the right of these groups to limit leadership and membership to individuals who adhere to the beliefs and teachings of the organization.

Conclusion

Separation from BSA may not be easy, but it may be necessary for churches who want to best protect their right to freely preach the Gospel, to be a witness to our nation's youth, and to avoid undermining their ability to make decisions based on their religious convictions in other, critical contexts. Alliance Defending Freedom stands ready to assist and advise any church or religious organization facing this issue. Please contact us at 1-800-TELL-ADF for more information or assistance.

Cordially,

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