



Summary of Alliance Defending Freedom's Letter to the Boy Scouts of America

The Boy Scouts of America (BSA) faces an important decision over whether to stand firmly for the fundamental American principle of free association and the right to maintain moral values that form the basis of Western civilization. The decision implicates the freedom of BSA to instill these good and noble values into the young men and boys under its care. It is the same freedom that allows those who disagree with BSA to separate and form their own association.

We at Alliance Defending Freedom have stood with BSA for years helping to defend the right of BSA to maintain values-based policies consistent with BSA's mission. And Alliance Defending Freedom will continue to stand with BSA to defend its right to free association against attacks from those who disagree with BSA's values.

We write to alert BSA to the legal consequences of giving in to the demands of those who oppose or wish to change BSA's values. Giving in will not alleviate their demands nor will it avoid legal liability for BSA or its many local councils, charters, and troops. It is not legally necessary for BSA to sacrifice its history or its principles in the face of growing threats.

The Boy Scouts' Affirmation of Traditional Values and Its Membership Policy

For years, BSA has consistently affirmed its values—values embodied in the Scout Oath and Law, which require members of BSA to be, among other things, “morally straight” and “clean.” BSA believes and teaches the young men in its charge that certain conduct is inconsistent with these two values, and requires its members and leaders to affirm, and conform their conduct to, these core BSA values. Accordingly, BSA's membership policy states that the organization “do[es] not grant membership to individuals who are open or avowed homosexuals or who engage in behavior that would become a distraction to the mission of the BSA.”¹ BSA's consistent adherence to its values as embodied in the Scout Oath and Law were important factors that led to the U.S. Supreme Court ruling in BSA's favor when its membership policy was challenged as a violation of a state public accommodations law. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

The Existence of Non-Compliant Councils and/or Troops That Defy BSA's Policy Does Not Require BSA to Abandon Its Policy to Avoid Litigation

In recent years, BSA's values have come under a renewed attack. A small handful of councils and/or troops have defied BSA's policy and have admitted members who are in defiance of these values. But BSA should not let these isolated councils and troops dictate BSA's national policy on any matter, especially those policies defining the morals and values that BSA seeks to instill in the boys and young men under its charge.

¹ <http://www.scouting.org/sitecore/content/MembershipStandards/KnowTheFacts/CurrentPolicy.aspx>.

Additionally, the existence of these non-compliant groups does not undermine the continued legal defensibility of BSA's policy. In several cases, courts have upheld organizations' First Amendment free association rights to require members and leaders to adhere to the organization's values. In *Dale*, the Supreme Court expressly rejected the argument that the existence of dissenting members undermined BSA's policy. "[T]he First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'" 530 U.S. at 655 (emphasis added). In other words, the mere existence of some councils and/or troops that defy BSA's values-based membership policy does not deprive BSA's policy of constitutional protection. However, to ensure ongoing protection for its national policy under the First Amendment, BSA should take steps to regulate or disassociate itself from these groups. In sum, consistency is key. Organizations that strive to maintain a consistency of their message by selecting members and participants based on a shared set of defined values typically have their First Amendment free association rights affirmed.

**BSA Should Take Immediate Steps to Reaffirm Its Values-Based Policy and
to Disassociate Any Councils and/or Troops That Violate BSA's Policy**

To ensure constitutional protection for its policy, it is our strong recommendation that BSA take the following steps:

1. BSA should immediately issue a public statement reaffirming its long-held values-based membership policy. Because of the recent internal organizational discussions about changing this policy, it is necessary for BSA to publicly affirm the policy so that no question can be raised challenging its consistent adherence to this position.
2. BSA should take immediate steps to disassociate or revoke the charters of any councils and/or troops that disobey BSA's policy. The presence of these groups within the organization does not automatically mean that BSA may no longer maintain its policy. But if BSA is aware of these groups and intentionally continues to associate with them, a court could conclude that their presence does not interfere with BSA's First Amendment rights.

This does not mean that BSA must kick-out any individuals or councils who merely disagree with BSA's policy but rather those who disobey it. It is only when the organization continues to associate itself with members, councils, and troops who disobey the policy—showing an inconsistency between its words and its deeds—that a court may be inclined to find that the BSA's policy is no longer necessary to BSA's mission and is therefore afforded no constitutional protection.

**Any Change to BSA's National Membership Policy Is Likely to Open the
Floodgates of Litigation Against the National Organization and Those Local
Councils and Troops that Adhere to the Policy.**

There has been discussion within BSA of abandoning its values-based membership policy and instead allowing each council and/or troop to make its own decision regarding membership. Rather than alleviating concerns of legal liability, this change would exacerbate those concerns for the national organization and for local councils and troops.

The Supreme Court's landmark holding in *Dale* was premised upon the existence of a unified national values-based policy and the centrality of those values to BSA's mission. 530 U.S. at 652. In a case at the D.C. Court of Appeals shortly after *Dale*, the court affirmed that because BSA had maintained a consistent values-based policy that was central to the organization, it should prevail. *Boy Scouts of America v. District of Columbia Com'n on Human Rights*, 809 A.2d 1192 (D.C. Ct. App. 2002). "Absent 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...." *Id.* at 1201 (emphasis added). A change in BSA's policy would be the exact type of "demonstrated change" that may have led to BSA being held in violation of D.C.'s public accommodations law. This ruling is a stark warning that some courts may stand ready to rule against BSA and its members if there is any change in BSA's "official position." Therefore, such a change, as BSA is contemplating, will not strengthen or protect BSA, but rather could be its undoing. Instead, maintaining the current policy is the best way for BSA to ensure that state and local public accommodation laws do not interfere with the organization's policies and operations.

The risk is even greater for those local councils and troops who choose to maintain BSA's values-based policy. As discussed above, *Dale* was premised upon a unified national policy that was integral to BSA's message and that applied to every troop. If that policy is removed allowing each council or troop to set its own membership guidelines, any council or troop that argues that the values-based membership policy is fundamental to the group will be undermined by other troops within the same organization who have abandoned it. The lack of a common, central message among the troops would undermine the protection afforded by *Dale*. A court could conclude that a values-based membership policy is no longer central to the organization, and therefore, no individual troop can legally maintain that policy.

It is insufficient for BSA to adopt a "neutral" policy and leave the decision to local councils and troops. It will expose both BSA and local troops that choose to adhere to the old policy to substantial litigation—litigation that they cannot afford and that they risk losing.

Conclusion

BSA is in a unique position. Its brave stand for the right of private associations to adhere to moral values set a national precedent that has protected not only BSA and its members, but countless other organizations that also require members to affirm and abide by their morals and values. We are well aware of the growing tide of voices calling for BSA to abandon its principles. But now is not the time to walk away from these long-held moral principles. Standing firm requires bravery—the type of courage that has epitomized BSA and its members for over a hundred years. It is a bravery noted by the Court in *Dale*, which said that "the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." 530 U.S. at 660.