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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S112621

EUGENE EVANS, et al.,
Petitioners,

v.

CITY OF BERKELEY,
Respondent.

After an Opinion by the Court of Appeal,
First Appellate District, Division Five
(Case No. A017987)

On Appeal from the Superior Court of Alameda County
(Case No. 8091980-4, Honorable James A. Richman, Judge)

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Northern California, the American Civil Liberties Union of San Diego and Imperial Counties, and the American Civil Liberties Union of Southern California are the regional California affiliates of the American Civil Liberties Union ("ACLU"), a nationwide, nonprofit, nonpartisan membership organization dedicated to the defense and promotion of the guarantees of individual liberty secured by the state and federal Constitutions. Since its inception, the ACLU has worked to eradicate every vestige of invidious discrimination directed against all persons within the jurisdiction of the United States. The ACLU has worked as well to defend the expressive and associational rights of all persons irrespective of their viewpoint or the content of their speech. While unwavering in its opposition to discrimination, the ACLU has been equally diligent in seeking to insure that government efforts to combat harmful prejudice do not infringe upon expressive or associational rights protected by the state and Federal constitutions. The ACLU believes that the nondiscrimination policy at issue in this case is an important and appropriate measure to combat invidious

discrimination, offends no countervailing constitutional interest, and accordingly should be upheld.

INTRODUCTION

The City of Berkeley ("Berkeley") has the right – indeed, it has the compelling duty – to protect all its residents from the harms of invidious discrimination in the provision of public benefits and services. To help accomplish this goal, Berkeley has enacted laws and regulations that seek to eradicate many forms of discrimination in activities that it supports or funds. Among these laws is Berkeley Municipal Code (BMC) Chapter 13.28, which in part forbids discrimination on the basis of sexual orientation in the provision of publicly-subsidized services.

The publicly-subsidized service at issue here is the provision by Berkeley of free berths at the Berkeley Marina to certain community organizations that, on a regular basis, provide valuable and beneficial public services not duplicated by the City itself. (Berkeley City Council Resolution No. 58,859 Adopting A Policy For The Use Of Berths At The Berkeley Marina By Non Profit Organizations Providing Community Services) The City Council policy waiving the usual berthing fees prohibits discrimination in the use of the Marina

facility on the basis of, inter alia, sexual orientation and religion. (Id.) All community organizations applying for fee waivers must submit specific written assurances in order to demonstrate their compliance with the city's nondiscrimination policies. Among those organizations, only the Berkeley Sea Scouts ("Sea Scouts") refuse to provide the required assurances. For this reason alone, their request for a waiver of berthing fees was denied by the Berkeley City Council.

Remarkably, Petitioners' Opening Brief ignores this dispositive fact and instead constructs an elaborate scenario under which the Sea Scouts are the innocent, nondiscriminating victims of Berkeley's nefarious plot to attack a third party – the Boy Scouts of America (BSA). As the Sea Scouts tell it, their organization "is affiliated with the BSA but is semi-autonomous" (Petitioners' Opening Brief On The Merits, at p. 5) and shares none of the BSA's discriminatory policies: "Although BSA maintains certain belief-based restrictions on membership and leadership positions . . . Petitioners do not have comparable policies." (Id. at p. 6) The Sea Scouts proceed to argue that they engage in no discriminatory practices, are in full compliance

with Berkeley's nondiscrimination requirements, and thus have been punished for their mere association with a discriminatory third-party.

The record tells a different story, both with regard to the Sea Scouts' relationship with the BSA and their purported compliance with Berkeley's nondiscrimination policy. Indeed, the record demonstrates that the Sea Scouts could not fully comply with Berkeley's policy precisely because of their subordinate relationship to the BSA. As the Sea Scouts' counsel admitted in the court below, other non-profit organizations receiving fee waivers "were able to say that they would not discriminate on the basis of sexual orientation" (Reporter's Transcript "RT" April 30, 2001, p. 29:4-7) while "the Sea Scouts, because of their association with the Boy Scouts, could not say the precise words that the City [of Berkeley] asked for which was 'we do not discriminate on the basis of sexual orientation.'" (*Id.* at p. 20:26-28)

Rather than address their refusal to provide Berkeley with the unambiguous promise of nondiscrimination required by the policy at issue, the Sea Scouts assert that they complied with Berkeley's requirements by submitting a letter in April 1998 in which they offer their own special version of a nondiscrimination pledge. The Sea

Scouts' letter alters Berkeley's policy in two critical respects: first, they substitute the phrase "religious preference" for the word "religion" (thus narrowing Berkeley's prohibition against all religious discrimination to a ban on sectarian preference), and second, they promise to abide by a "don't ask, don't tell" policy in place of Berkeley's explicit prohibition of discrimination on the basis of sexual orientation. (Petitioners' Opening Brief On The Merits, at p. 7) Based on this unilateral and substantive alteration of Berkeley's policy, the Sea Scouts assert that they have submitted all the documentation that Berkeley may require of them and that, accordingly, the denial of their fee-waiver application constitutes impermissible punishment for protected associational activities.

Even assuming that the Sea Scouts do not discriminate against religious nonbelievers or on the basis of sexual orientation – notwithstanding the contrary inference reasonably drawn from their modification of Berkeley's nondiscrimination policy – the import of their argument is extraordinary. Under the Sea Scouts' reasoning, Berkeley may not condition receipt of a public subsidy upon the execution of a simple, straightforward assurance of nondiscrimination, but instead must bear the burden of proving actual discrimination on

the part of any applicant who – for whatever reason – is unwilling to execute the city's unambiguous nondiscrimination pledge. To impose such an onerous administrative requirement upon municipalities seeking to enforce nondiscrimination policies would render the undertaking a practical impossibility.

In the interest of protecting its residents from invidious discrimination, Berkeley, like myriad other governmental entities across the nation, has enacted a nondiscrimination policy that requires applicants to provide proper assurances of their compliance. The Sea Scouts' unwillingness to give those specific assurances is the sole and appropriate reason for their exclusion from the Marina fee-waiver program. As the discussion below will demonstrate, state and federal courts have consistently held that governments are well within their rights to condition public subsidies upon compliance with such requirements. In enforcing the policy at issue,

> Berkeley has not attempted to muzzle anyone's speech, and Berkeley has not ordered appellants to cease discriminating or associating as they please. Berkeley has only prevented appellants from enjoying a certain city subsidy, free rent, unless appellants' program is open to all residents without regard to the barriers created by the types of invidious discrimination Berkeley seeks to discourage.

Evans v. City of Berkeley, 104 Cal. App. 4th 1, 10 (2002).

ARGUMENT

I. BERKELEY'S REFUSAL TO WAIVE THE MARINA BERTHING FEE BASED ON THE SEA SCOUTS' REFUSAL TO PROVIDE PROPER ASSURANCES OF NONDISCRIMINATION DOES NOT INFRINGE ON PETITIONERS' EXPRESSIVE OR ASSOCIATIONAL RIGHTS

The Sea Scouts claim that Berkeley has violated "their rights of association and speech, Equal Protection rights, and civil rights protection[] under state statutes" solely "because Petitioners are affiliated with BSA [Boy Scouts of America]." (Petitioners' Opening Brief On The Merits, at p. 13) As set forth above, the assertion is fiction: the Sea Scouts were denied a subsidy because they refused to sign Berkeley's non-discrimination pledge. The execution of such a pledge nevertheless is expressive in character, and Berkeley's requirement that it be done to obtain free berthing at the city's Marina thus implicates interests within the scope of the First Amendment. While implicating the First Amendment, however, Berkeley's policy plainly does not offend it.

A. The Constitutional Test.

The Second Circuit recently considered whether the State of Connecticut could deny the BSA's participation in a state workplace charitable campaign based on the organization's discriminatory

membership and employment policies. *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003). Writing for the court, Judge Calabresi contrasted the challenged regulation with the law struck down in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), which sought to compel the BSA to accept particular individuals as members. Noting that the exclusion of the BSA from the state campaign did not, in the language of *Dale*, "directly and immediately affect[] . . . associational rights that enjoy *First Amendment* protection" nor impose a "serious burden" on the BSA, since "its conditioned exclusion does not rise to the level of compulsion," the court concluded that the case was governed not by *Dale* but by two other lines of First Amendment authority:

> The first deals with nonpublic forums and is exemplified by *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), which considered the federal government's attempt to exclude legal defense and advocacy groups from a federal workplace charitable campaign. *Cornelius* held that the federal charitable campaign was a nonpublic forum and concluded that access to the campaign "can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view."

Wyman, 335 F.3d at 91. (citations omitted)

The second relevant line of authority concerns the doctrine of unconstitutional conditions, "which holds that the government may

not condition certain government benefits on the relinquishment of constitutional rights." *Id.* With respect to this doctrine, Judge Calabresi cited *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548, 550 (1983), for the proposition that so long as the government "did not discriminate invidiously in such a way as to 'aim[] at the suppression of dangerous ideas,' all that was required . . . was that the exemption be rational." *Wyman,* 335 F.3d. (citations omitted) Observing that the issue before it "lies at the intersection of these two lines of authority," the *Wyman* court concluded that the distinction ultimately made no analytic difference: "Whether viewed as denial of access to a nonpublic forum or as the denial of a government benefit, the BSA's exclusion is constitutional if and only if it was (1) viewpoint neutral and (2) reasonable." *Id.*

The same analysis applies to Berkeley's denial of the fee waiver sought by the Sea Scouts. Because the impairment at issue is significantly less onerous than the one considered in *Wyman*,[1] and even more remote from the compulsion at issue in *Dale*, the requirements of viewpoint neutrality and reasonableness govern Berkeley's regulation of access to the nonpublic forum at issue.[2]

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[1]In contrast to *Wyman*, where the BSA faced complete exclusion from the charitable campaign, the Sea Scouts' access to the Marina is unimpaired – the only question is whether Petitioners may be required to pay for the privilege of using it.

[2]The Sea Scouts seek access to the non-physical forum of Berkeley's fee-waiver program rather than the physical Marina itself, to which they continue to have access upon payment of the required fee. As the Supreme Court noted in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995), such a grant or subsidy program "is a forum more in a metaphysical than in a spatial or geographic sense, but the same [forum] principles are applicable."

Under those *principles*, the Berkeley Marina fee-waiver program is a nonpublic forum to which access may be regulated on a reasonable, viewpoint-neutral basis: unlike a traditional or designated public forum, it is not devoted by long tradition to assembly and debate nor has it been intentionally opened for public discourse. *Cornelius,* 473 U.S. at 800-06 (articulating standard for traditional, designated, and nonpublic forums); *Clark v. Burleigh*, 4 Cal. 4th 474, 482-83 (1992) (same). Its purpose instead is to advance the City's specified objectives regarding use of the Marina facility, and is open only to certain non-profit community organizations that meet the criteria set forth in Berkeley City Council Resolution No. 58,859.

B. Berkeley's Nondiscrimination Policy Is Viewpoint Neutral.

Under the policy of the Berkeley City Council, embodied in Resolution No. 58,859, discrimination in the subsidized use of Marina facilities is prohibited on the basis of "race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition." (Respondent's Answer Brief On The Merits, at p. 4) The Sea Scouts themselves admit that this 1997 resolution is "neutral on its face." (Petitioners' Opening Brief On The Merits, at p. 9) As in *Regan*, there is no indication that the resolution "was intended to suppress any ideas or any demonstration that it has had that effect." 461 U.S. at 548.

As the court in *Wyman* explained, "[a]s a general matter, all anti-discrimination laws that govern organizations' membership or employment policies have a differential and adverse impact on those groups that desire to express through their membership or employment policies viewpoints that favor discrimination against protected groups." 335 F.3d at 93. "Where a law is on its face viewpoint neutral . . . but has a differential impact among viewpoints, the inquiry into whether the law is in fact viewpoint discriminatory turns on the law's purpose. Such a law is viewpoint discriminatory

only if its purpose is to impose a differential adverse impact upon a viewpoint." *Id.* at 94; *R.A.V v. City of St. Paul*, 505 U.S. 377, 390 (1992); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 762-63 (1994).

Berkeley's purpose in passing the resolution was "to fund recreational opportunities for the public at the Berkeley Marina by waiving substantial berthing fees for organizations providing these opportunities. The City sought to ensure that the services subsidized by Berkeley taxpayers would be available *to all Berkeley citizens* free of invidious discrimination." (Respondent's Answer Brief On The Merits, at p. 9) (emphasis added) Through its nondiscrimination policy, Berkeley sought to discourage the harmful conduct associated with discrimination; it did not seek to suppress constitutionally protected expression or association.

Far from supporting the Sea Scouts' allegation that Berkeley was motivated by the desire to penalize them for associating with the BSA, the record demonstrates that their subsidy was denied because they failed to comply with the neutral and appropriate administrative requirements of the nondiscrimination program itself – *i.e.*, that all applicants provide Berkeley with an unqualified and explicit

assurance of their nondiscriminatory policies and practices. This the Sea Scouts could not do – evidently because of their relationship with the BSA – and they were appropriately denied the subsidy as a result.[3] It makes no difference, as the Sea Scouts allege, that they are the only applicant for a berthing subsidy that has been denied the benefit. Petitioners have neither alleged nor demonstrated that any other applicant either discriminates in ways forbidden by Berkeley's policy or has refused to give Berkeley the required written assurances of nondiscrimination.

C. Berkeley's Nondiscrimination Policy Is Reasonable.

So long as a restriction on a nonpublic forum such as Berkeley's fee-waiver program is viewpoint neutral, the government's

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[3] As the court in *Wyman* noted:

> We recognize that the legislature's viewpoint-neutral purpose in passing a law that has a predictably adverse impact on certain viewpoints may be cold comfort to those whose expression the law, in practice, limits. But that is precisely the result that follows from the Supreme Court's treating more restrictive measures, like those considered in *Dale*, differently from the lesser harm of removal from a nonpublic forum, like that at stake in the instant case. Connecticut has not prevented the BSA from exercising its *First Amendment* rights; it has instead set up a regulatory scheme to achieve constitutionally valid ends under which, as it happens, the BSA pays a price for doing so.

335 F.3d at 95 n.8.

decision to restrict access to it "need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." *Cornelius,* 473 U.S. at 808. As the Court of Appeal in this case concluded,

> the requirement that appellants explicitly agree to comply with Berkeley city policy, by specifically agreeing not to discriminate against those persons of whose sexual orientation appellants become aware, did not violate appellants' First Amendment rights, since it was merely a *permissible and reasonable condition* placed upon receipt of a public subsidy.

104 Cal. App. 4th at 13, *citing Grove City College v. Bell,* 465 U.S. 555, 575-76 (1984) (emphasis added). The clear connection between the purpose of the City Council resolution establishing the Marina fee-waiver program – to increase the recreational facilities available to all Berkeley residents – and the requirement that every applicant submit explicit assurances that they will not discriminate demonstrates the reasonableness of the condition at issue.

1. Case Law Confirms As Reasonable and Constitutional The Exclusion Of Discriminatory Organizations From Public Subsidy Programs.

It is axiomatic that governmental entities have the power to require compliance with nondiscrimination provisions when private organizations apply for governmental subsidies. The United States Supreme Court has held that the use of criteria which exclude discriminatory organizations from the receipt of public subsidies does

not violate the free speech rights of excluded organizations. *Grove City College,* 465 U.S. at 575-76 (subsidy conditioned on compliance with antidiscrimination goals did not violate the First Amendment rights of noncomplying college); *accord, Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983) (government may impose nondiscrimination condition upon subsidy offered to nonprofit organizations); *Regan*, 461 U.S. at 549 (tax subsidies for nonprofit organizations may be conditioned upon recipients' restricted exercise of First Amendment rights). This Court has recognized the same principle. *See, e.g., Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 17 Cal. 4th 670, 701 (1998) (tax-exempt status may be rescinded if nonprofit entity engages in forbidden discrimination).

In *Grove City College*, the public subsidy provided to certain colleges to defray or supplement the tuition paid by students was conditioned on compliance by the school with a nondiscrimination policy. That policy required colleges to agree not to discriminate against students based on various grounds, including gender. Grove City College argued that this condition violated the First Amendment. Ruling unanimously, the Supreme Court rejected the college's argument and held that "[r]equiring Grove City to comply with Title

IX's prohibition of discrimination as a condition for its continued eligibility to participate in the [subsidy] program infringes no First Amendment rights of the College or its students." *Grove City College*, 465 U.S. at 575-76.

In *Bob Jones*, the university contended its First Amendment right to freedom of religion had been violated by a nondiscrimination condition imposed upon applicants seeking charitable status for purposes of federal tax law. The Supreme Court rejected the university's argument, holding that the denial of a tax subsidy did not violate any First Amendment interest because the university remained free to observe its own religious principles and to discriminate, albeit without a subsidy. As the Court stated, "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets." *Bob Jones*, 461 U.S. at 603-04. Similarly, in *Regan*, a subsidy under federal tax law was offered to nonprofit organizations on condition that they refrain from exercising their First Amendment rights in certain ways. The Court ruled that the public subsidy could properly be conditioned upon such an agreement

because the "decision not to subsidize the exercise of a fundamental right does not infringe the right. . . ." *Regan*, 461 U.S. at 549.

Likewise, enforcement of Berkeley's nondiscrimination policy does not impair in any noteworthy manner the Sea Scouts' rights of expression and association. In *Dale*, the United States Supreme Court found that the forced inclusion of an unwanted person in a membership organization would infringe upon the group's freedom of expressive association if the presence of that person "affect[ed] in a significant way the group's ability to advocate public or private viewpoints." *Dale,* 530 U.S. at 648; *citing New York State Club Ass'n., Inc. v. City of New York*, 487 U.S. 1, 13 (1988). Here, the condition at issue does not prevent the Sea Scouts from associating in any manner they please or from advancing any public or private viewpoint they may wish to promote. It simply prevents them from obtaining a public subsidy for those unrestricted activities unless they provide express assurances of their commitment to nondiscrimination.

2. Berkeley Has A Compelling Interest In Enforcing Its Nondiscrimination Policies.

The Sea Scouts' interest in this case, an alleged burden on their right to associational freedom, is slight in comparison to Berkeley's stake in effectively fulfilling its duty to protect its residents against

invidious discrimination. As the Supreme Court said in *Roberts v. United States Jaycees*,

> acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent – wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

468 U.S. 609, 628 (1984) (emphasis added); *see also Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 134 (1999) (citing *Roberts* for the proposition that the state's interest in eradicating race discrimination in employment "is compelling" and holding that an injunction restraining the defendants' speech in the workplace did not violate their First Amendment rights).[4]

The Supreme Court has explicitly extended the reasoning of *Roberts* to governmental attempts to ensure that public funds and resources do not subsidize private prejudice: "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all

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[4]For an extended discussion of Berkeley's compelling interest in protecting its residents from discrimination, see Brief Amicus Curiae In Support Of City Of Berkeley, submitted in this case by Lawyers' Committee for Civil Rights of the San Francisco Bay Area and Anti-Defamation League, pp. 8-15.

citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 492 (1989) (plurality). In the present case, Berkeley has a compelling interest in ensuring that it does not support the evil of private prejudice through its funds and resources, including the provision of free berthing at its Marina.

Race discrimination, as in *Aguilar* or *Bob Jones*, and gender discrimination, as in *Roberts* or *Grove City College*, are not the only forms of discrimination that government entities have a compelling interest in preventing. Berkeley's nondiscrimination policy also addresses discrimination based on religion or sexual orientation; its interest in preventing these forms of discrimination is equally compelling. In *Koire v. Metro Car Wash*, this Court cited with approval the court of appeal's determination that the government has a "compelling interest in eradicating discrimination in all forms, including discrimination based on religious creed." 40 Cal. 3d 24, 31 n.8 (1985) (internal quotations omitted), *citing Pines v. Tomson*, 160 Cal. App. 3d 370, 391 (1984); *see also Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344, 351 (5th Cir. 1975) ("We believe, in this context, religious discrimination against the Jewish applicant carries the same stigma of inferiority and badge of opprobrium that is characteristic of

racial discrimination"), *rev'd on other grounds*, 530 F.2d 16 (5th Cir. 1976) (en banc); *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) (en banc) ("eradication of sexual orientation discrimination is a compelling government interest").

In the context of First Amendment challenges to anti-discrimination laws, the Supreme Court and other courts have recognized a compelling government interest in the enforcement of anti-discrimination laws generally, regardless of the precise form of private discrimination targeted by the law at issue. This approach differs from the analysis of discrimination for purposes of equal protection, which classifies various forms of discrimination within a three-tiered hierarchy based on the magnitude of interest required of government to permissibly discriminate on each basis. The distinction is illustrated by the Supreme Court's analysis in *Roberts,* where the Court noted that the "stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." 468 U.S at 625. The Court thus characterized the government's interest in preventing private sex and

race discrimination as equally compelling when weighed against plaintiffs' First Amendment interests – in contrast to equal protection analysis, where government need only demonstrate a "substantial" interest to engage in gender-based discrimination but must demonstrate a "compelling" interest to discriminate based on race. *See also Wyman*, 335 F.3d at 92 n.5 (Calabresi, J.) ("a *state* that has adopted a policy of equal protection with respect to a specific group may have a compelling interest in the enforcement of that policy, even if the *federal* government has not recognized that same group's claim to heightened scrutiny for the purpose of equal protection"); *Gay Rights Coalition*, 536 A.2d at 46 (Newman, J., concurring) ("[P]lainly, an interest need not be national in scope to be compelling.... Moreover, an interest need not be identical in weight to some other compelling interest to be compelling itself").

Thus, in considering the Sea Scouts' First Amendment claim, this Court must balance the slight burden allegedly imposed on the Sea Scouts' exercise of associational freedom against Berkeley's

compelling interest in ensuring that its public funds and resources do not subsidize private discrimination.[5]

II. BERKELEY'S NONDISCRIMINATION POLICY DOES NOT VIOLATE CALIFORNIA'S UNCONSTITUTIONAL CONDITION DOCTRINE.

This Court has articulated a clear standard by which to determine whether government has conditioned receipt of benefits upon the arbitrary deprivation of constitutional rights. (Petitioners' Opening Brief On The Merits, at pp. 33-34) Under the Court's formulation,

> The governmental entity seeking to impose such a condition must establish that: (1) the condition reasonably relates to the purposes of the legislation which confers the benefit; (2) the value accruing to the public from imposition of the condition manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no available alternative means that could maintain the integrity of the benefits program without severely restricting a constitutional right.

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[5] *Dale* does not cast any doubt on the compelling nature of Berkeley's interest in enforcing the anti-discrimination rule at issue in this case. *Dale* held that New Jersey's interest in enforcing its public accommodations law was not sufficient to outweigh the severe infringement of the Boy Scouts' associational freedom imposed by an outright prohibition on organizations with discriminatory membership policies. As Judge Calabresi pointed out in *Wyman*, the result in *Dale* "does not mean that, as to other state actions that are significantly less restrictive of associational freedoms, there might not be a state interest compelling enough to justify the restrictions." *Wyman*, 335 F.3d at 92 n.5.

Robbins v. Superior Court, 38 Cal. 3d 199, 213-14 (1985), *citing Comm. To Defend Reprod. Rights v. Myers,* 29 Cal. 3d 252, 265-66 (1981); *see also Parrish* v. *Civil Serv. Comm'n,* 66 Cal. 2d 260, 271 (1967); *Bagley v. Wash. Township Hosp. Dist.,* 65 Cal. 2d 499, 501-02, 505-07 (1966).

Berkeley clearly meets each of the three criteria. First, its requirement that fee-waiver applicants conform to the city's nondiscrimination policy reasonably relates to the purpose of the fee-waiver program. As discussed above, Berkeley's purpose in passing the resolution was to provide increased recreational opportunities at the Marina for all its residents without risk or fear of invidious discrimination. The nondiscrimination policy is obviously and demonstrably intended to promote these legitimate and rational legislative objectives, and in no way is intended to suppress protected expressive or associational activities.

Second, the value accruing to the public of enjoying the benefits of publicly supported recreational activities without fear of invidious discrimination manifestly outweighs any impairment of the Sea Scouts' rights of expression or association. As this Court has explained:

> [A] court in undertaking this "weighing" or "balancing" process must realistically assess the importance of the state interest served by the restrictions and the degree to which the restrictions actually serve such interest; further the court must carefully evaluate the importance of the constitutional right at stake and gauge the extent to which the individual's ability to exercise that right is threatened or impaired, as a practical matter, by the specific statutory restrictions or conditions at issue. . . . We must canvass the various factors on each side of the scale in order to determine whether the utility of the restrictions "manifestly outweighs" the resulting impairment of constitutional rights.

Myers, 29 Cal. 3d at 273-74.

In this case the "restriction" – the requirement that the Sea Scouts provide an explicit and unqualified assurance of their nondiscriminatory policies and practices – represents at most a minimal impairment of Petitioners' rights of expression and association. If, as the Sea Scouts' counsel admitted in the court below, the Sea Scouts' "association with the Boy Scouts" prevents them from saying "the precise words that the City [of Berkeley] asked for which was 'we do not discriminate on the basis of sexual orientation'" (RT April 30, 2001, p. 20:26-28), resulting in their exclusion from the fee-waiver program, Petitioners can simply continue to pay the Marina berthing fee and associate with whomever they please in their ongoing use of the public facility. Alternatively, the Sea Scouts can seek berthing elsewhere, or arrange to use boats

owned by sympathetic supporters. Enjoying a *free* berth at the Berkeley Marina is hardly a fundamental or essential part of the Sea Scouts' expressive or associational activities. This minimal impairment is "manifestly outweighed" by Berkeley's compelling interest in providing recreational activities for all its residents and in assuring that its limited public funds – contributed by all its taxpayers – are not used to finance private bias.

Third, no available alternative means exists by which Berkeley can maintain the integrity of its Marina fee-waiver program without imposing the minimal restriction at issue. The only way Berkeley can possibly ensure the achievement of its legislative objective is by requiring applicants to specifically pledge, as a binding condition upon their receipt of the fee waiver, that they will not discriminate in their use and enjoyment of the Marina facility. Berkeley's requirement that applicants provide these assurances, like the prohibition against gender discrimination in *Roberts*, "abridges no more speech or associational freedom than is necessary to accomplish [its compelling public purpose]". 468 U.S. at 629.

III. BERKELEY'S NONDISCRIMINATION POLICY DOES NOT VIOLATE EQUAL PROTECTION

Petitioners' equal protection argument is also meritless. First, Petitioners cannot establish the most basic requirement of an equal protection claim – a showing that they have been treated differently than other organizations seeking berthing space at the Berkeley Marina. Second, even if this Court were to find that Petitioners have been treated unequally, Petitioners cannot show that the City acted with an intent to discriminate. Finally, even assuming that Petitioners could establish these basic elements of an equal protection violation, their claim would still fail because Berkeley has a compelling interest in ensuring that its public funds and resources are not used to subsidize private discrimination.

A. Berkeley Has Not Treated Petitioners Differently Than Other Users of the Marina

To state a claim for violation of equal protection under the state and federal Constitutions, Petitioners must show that (1) they were treated differently from others similarly situated, (2) based on their membership in a protected class or exercise of a fundamental right, and (3) that the City acted with an intent to discriminate against them. *See, e.g., Barren v. Harrington,* 152 F.3d 1193, 1194 (9th Cir. 1998);

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). Petitioners cannot establish these basic elements.

First, Berkeley has treated Petitioners the same as all other persons and organizations seeking berthing space at the Berkeley Marina. The Sea Scouts are free to berth their boats at the Marina by paying the same fee applicable to all other persons or groups. If the Sea Scouts wish to obtain a waiver of the normal berthing fee, then they – like all other applicants for fee waivers – must provide explicit written assurances of their compliance with Berkeley's anti-discrimination policy. The Sea Scouts have refused to submit such assurances and have been denied a fee waiver as a result. Petitioners have not been treated differently than any other similarly situated person or organization, and thus fail to make the threshold showing required to state a viable equal protection claim.

B. Petitioners Cannot Show that Berkeley Acted With Discriminatory Intent

Even if this Court were to find that the Sea Scouts were treated differently from other organizations, Petitioners cannot show that Berkeley acted with the requisite intent to discriminate against them in the provision of free berthing spaces at the Marina. "The absence of proof of discriminatory intent forecloses any claim that the official

action challenged . . . violates the Equal Protection Clause of the Fourteenth Amendment." *Hispanic Taco Vendors v. City of Pasco*, 994 F.2d 676, 680-81 (9th Cir. 1993), quoting *City of Memphis v. Greene*, 451 U.S. 100, 119 (1981); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 686-87 (9th Cir. 2001) (policies that allegedly had discriminatory impact on disabled persons did not violate plaintiffs' rights to equal protection, absent a showing that the city was motivated by intent to treat disabled persons unequally).

Here, Petitioners cannot meet their burden of showing that the enactment of Berkeley City Resolution No. 58,859 evinces an intent on the part of Berkeley to discriminate against Petitioners. The purpose of the Resolution is to ensure that Berkeley's funds and resources are not used to subsidize private discrimination and to protect Berkeley's residents from discrimination by organizations enjoying subsidized use of public facilities. The Resolution, both by its terms and as enforced by the City, applies equally to all organizations seeking free berthing space at the Marina.

C. Berkeley's Non-Discrimination Policy Withstands Strict Scrutiny

As set forth above, Berkeley has a compelling interest in enforcing antidiscrimination laws to protect its residents from

invidious discrimination. Therefore, even if Petitioners could establish that they were treated differently than other similarly situated organizations and that Berkeley acted with discriminatory intent – which they cannot – Berkeley's decision to deny Petitioner's fee waiver would still withstand strict scrutiny analysis.

As discussed above, pp. 17-22, this Court, the United States Supreme Court, and numerous other courts have recognized that government entities have a compelling interest in preventing invidious discrimination, and particularly in preventing the use of public funds and resources to subsidize private discrimination. Thus, Berkeley's nondiscrimination policy governing fee waivers for use of its Marina advances a compelling government interest.

Berkeley's Resolution No. 58,859 is also the least restrictive means to advance that compelling interest. The Resolution itself, and its application to Petitioners, does not seek to force organizations to admit members with whom they do not wish to associate. The Resolution requires only that any organization wishing to receive subsidized berthing space from the City agree to comply with the City's nondiscrimination rules. Thus, the Resolution is narrowly tailored to serve Berkeley's compelling interest in ensuring that it

does not subsidize private discrimination, and burdens the associational rights of private organizations no more than minimally necessary to achieve that purpose. As the Court of Appeal pointed out, this case "does not involve an order to cease discrimination; nor does it involve a denial of access to a public forum, or public employment, public benefits provided to all citizens by law, or public property." 104 Cal. App. 4th at 9.

Because the Resolution is the least restrictive means to serve a compelling government interest, it withstands even strict scrutiny. Thus, even if the facts of this case could support a claim that Petitioners were treated unequally (which they were not), and that the City acted with intent to discriminate against Petitioners (which it did not), this Court should still reject Petitioners' equal protection claim.

CONCLUSION

For the reasons set forth above, *amici curiae* the American Civil Liberties Union of Northern California, the American Civil

Liberties Union of San Diego and Imperial Counties, and the American Civil Liberties Union of Southern California respectfully request that this Court affirm the judgment of the Court of Appeal.

Dated: September 2, 2003

Respectfully submitted

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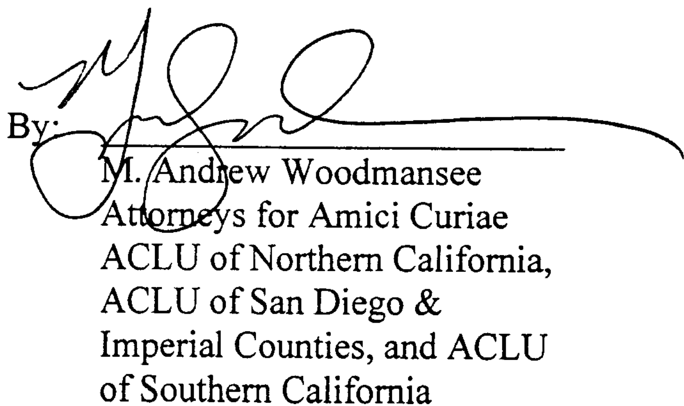
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionally double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 6020 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 2, 2003.

Respectfully submitted,



By: ______________________

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sd-162712

PROOF OF SERVICE

I, the undersigned, am employed in the City and County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 3811 Valley Centre Drive, Suite 500, San Diego, California, 92130.

On September 2, 2003, I caused to be served the following documents:

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT

by placing a true copy thereof in a sealed envelope(s), addressed as follows:

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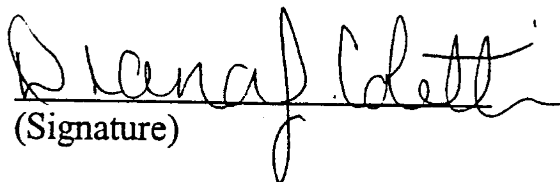
X (BY MAIL) I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at San Diego, California. I am readily familiar with the practice of Morrison & Foerster LLP for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on September 2, 2003 at San Diego, California.

Diana J. Coletti
(Printed)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