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“I Love a Parade”: Can a Group's Participation in a Privately Organized Parade be Compelled?

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Case at a Glance

An Irish-American gay, lesbian, and bisexual group wanted to march in Boston's St. Patrick's Day-Evacuation Day Parade. The organizer refused to grant permission. Holding that the organizer violated Massachusetts public accommodations law that prohibits discrimination on the basis of sexual orientation in public places, the Massachusetts courts, including its high court, ordered the organizer to permit the group to participate. Now the Supreme Court decides if the state courts' decisions violate the Parade organizer's right of expressive association.

"I Love a Parade": Can a Group's Participation in a Privately Organized Parade be Compelled?

by Jay E. Grenig

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ISSUE

Is a parade organizer's First Amendment right of expressive association violated when a state court, enforcing the state's nondiscrimination law, orders the organizer to allow a group to participate in the parade despite the organizer's prior refusal to permit the group's participation?

FACTS

During the first half of the twentieth century, the South Boston Citizens Association and the City of Boston, Massachusetts, organized various Evacuation Day activities. (Evacuation Day commemorates George Washington's initial military victory over the British in 1776 and the British departure from South Boston.)

Boston celebrated the 125th anniversary of Evacuation Day in 1901 with a parade, artillery salute, fireworks display, and concerts. In 1947 then-Mayor James Michael Curley granted the South Boston Allied War Veterans Council (the "Veterans Council" or the "Council") the authority to organize and conduct the Parade. The event, now known as the St. Patrick's Day-

Evacuation Day Parade (the "Parade"), also commemorates St. Patrick's Day, which, like Evacuation Day, falls on March 17.

Over the years, the Parade has involved as many as 20,000 participants and as many as 1,000,000 spectators. In 1992 the parade featured about 10,000 participants and some 750,000 spectators. It is one of the six largest parades held in Boston annually and the largest New England event for Irish-Americans.

Until recently, the Veterans Council had no written guidelines or procedures for selecting sponsors and participants. The Parade appeared open to virtually any group. Between 1947 and 1992, the only groups excluded from the parade have been the Ku Klux Klan and an antibusing group.

JOHN J. HURLEY, INDIVIDUALLY, AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL V. IRISH-AMERICAN GAY, LESBIAN, AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH TIMOTHY DALEY, BARBRA KAY, AND CATHLEEN FINN
Docket No. 94-749

ARGUMENT DATE:
APRIL 25, 1995
FROM: THE SUPREME JUDICIAL
COURT OF MASSACHUSETTS

In 1992 several individuals formed the Irish-American Gay, Lesbian, and Bisexual Group of Boston ("GLIB"). GLIB is a social organization of persons who are homosexual or bisexual and their supporters. GLIB's purpose is to express its members' pride in their dual identities as Irish or Irish-Americans who are also homosexual or bisexual; to demonstrate to the Irish-American community and to the gay, lesbian, and bisexual community the diversity within both communities; and to show support for Irish-American homosexual and bisexual men and women in New York City who were seeking to participate in that city's St. Patrick's Day Parade.

GLIB was formed in part to march in South Boston's annual St. Patrick's Day-Evacuation Day Parade. When GLIB submitted an application to participate, the Council denied it, citing safety reasons and insufficient information regarding GLIB. GLIB ultimately marched in the Parade pursuant to a state court order.

In 1993 GLIB again filed an application with the Veterans Council to march in that year's Parade and, again, the Council refused to admit the group, asserting that its decision to exclude groups with sexual themes merely formalized the Parade's express traditional religious and social values.

GLIB responded by securing another state court order mandating their participation in the 1993 Parade. In issuing the order, the state trial court, noting the absence of procedures and criteria for selecting Parade sponsors and participants, found that

applications for participation in the next year's Parade are sent to all previous participants. Those who call to inquire about participating in the Parade are sent applications, and depending

upon the monies available they are reimbursed for their travel expenses or costs of performance. Applications from new groups are voted on in batches, and the Veterans Council does not generally inquire into the specific messages or views of each participant.

In addition, some groups participate in the Parade without submitting an application to the Veterans Council. For instance, in 1993, the Boston Bruins did not apply to the Veterans Council, but simply showed up at the Parade and marched. Other groups gained entrance by making a contribution to the Parade rather than filling out an application form. Thus, the procedures for admittance into the Parade are not uniformly applied.

The state trial court concluded that the Parade did not have an expressive purpose because of the Council's nonselectivity in choosing sponsors and participants. According to the court, the Council's nonselective organization of the Parade meant that it was not an expressive associational activity entitled to First Amendment protection.

The court went on to conclude that the Parade was a place of public accommodation under Massachusetts law and that excluding GLIB from the Parade violated the State's public accommodations law which prohibits discrimination on the basis of sexual orientation in places of public accommodation. See MASS. GEN. L. ch. 272 §§ 92A and 98. (A *place of public accommodation* is "any place . . . which is open to and accepts or solicits the patronage of the general public" and includes "a boardwalk or other public highway" and "a place of public amusement, recreation, sport, exercise, or entertainment." MASS. GEN. L. ch. 272, § 92.)

The Council canceled the 1994 Parade to avoid GLIB's participation. However, a motorcade traveled the Parade route on the scheduled day displaying black flags to protest the state court's orders.

The Council also appealed to the Supreme Judicial Court of Massachusetts, the State's highest court, which affirmed. 636 N.E.2d 1293 (Ma. 1994). The Massachusetts high court held that the Council had violated GLIB's rights under the State's public accommodations law. According to the court, the 1993 Parade had no discernible expressive purpose and, therefore, was a public accommodation subject to Massachusetts' prohibition against sexual-orientation discrimination in public accommodations within the State. The court explained that the Parade fell within the scope of the State's public accommodations law because it occurred on public streets and provided entertainment, recreation, and amusement to participants and spectators. However, the high court acknowledged that the relevant facts could change materially and a future Parade might constitute expressive associational activity within the meaning of the First Amendment and, thus, would be entitled to First Amendment protection, including the right to exclude GLIB and other groups.

The Veterans Council filed a petition for a writ of certiorari with the Supreme Court seeking review of the decision of the Supreme Judicial Court which was granted. 115 S. Ct. 714 (1995). Shortly after the Court accepted the case, GLIB filed a suggestion of mootness. (A case is moot when, for whatever reason, there is no dispute for a court to resolve.)

(Continued on Page 338)

GLIB pointed out that on April 19, 1994, the Veterans Council adopted written standards to govern future Parades and that, under the newly adopted standards, participation would be by invitation only, and the Parade would commemorate the role of traditional families in Irish history and the Council's decision to cancel the 1994 parade to protest the judicial imposition of messages. Based on these changes, GLIB agrees that the Parade is expressive associational activity protected by the First Amendment and, accordingly, agrees that the Council has the right to exclude it from participation. GLIB's concession is not surprising, however, because, after adopting its parade-participation standards, the Veterans Council went to federal district court and obtained a judgment that the 1995 Parade is protected by the First Amendment.

CASE ANALYSIS

The First Amendment protects the right of persons to associate for expressive purposes. *New York State Club Ass'n, Inc. v. State of New York*, 487 U.S. 1 (1988). The Constitution also guarantees freedom of association for purposes of engaging in activities protected by the First Amendment. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

A parade may constitute expressive conduct under the First Amendment. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). In determining whether or not particular conduct, including a parade, possesses sufficient communicative elements to bring the First Amendment into play, a court looks to see if there is an intent to convey a particularized message and also assesses the likelihood that the message will be understood by those who view it. *Texas v. Johnson*, 491 U.S. 397 (1989).

Parades sponsored by private organizations and containing a variety of participants and themes have been accorded constitutional protection. See, e.g., *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 17 Cal. Rptr. 861 (Cal. App. 1993) (holding that a festive parade with cars, floats, and pedestrians designed to commemorate the gay and lesbian civil rights movement and to commemorate the price participants pay for their sexual orientation is protected by the First Amendment); *New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993) (celebratory parade designed to honor St. Patrick and to proclaim allegiance to Roman Catholic Church protected by the First Amendment).

GLIB's concession that the 1995 Parade and all future Parades organized under the Council's 1994 guidelines are protected by the First Amendment means that the issue in this case has become whether or not the earlier parades were entitled to First Amendment protection as well. The Veterans Council argues that its the earlier parades were entitled to such protection, insisting that it has always been selective in choosing sponsors and participants and that it has always presented unmistakable political, cultural, religious, and military messages.

GLIB, for its part, maintains that the state trial court correctly found that the Veterans Council was nonselective in its organization of pre-1995 Parades and that its nonselectivity took the 1993 Parade out of the ambit of First Amendment protection and into the ambit of Massachusetts public accommodations law. GLIB stresses that the state trial court was painstaking in its fact finding in this case and that

its factual findings are amply supported by the record. On the record facts, GLIB contends that the Massachusetts courts were correct in holding that the 1993 Parade was not expressive but, instead, was an open recreational activity held in the public streets and, as such, was subject to the State's law prohibiting sexual-orientation discrimination in public accommodations.

SIGNIFICANCE

The central debate in this case is a factual one. The Veterans Council insists that the Massachusetts courts are wrong on the facts and that a correct finding of the facts would make it clear that the Parade has always expressed a defined set of values and beliefs. GLIB, on the other hand, maintains that the state courts correctly found the facts and that those facts clearly distinguish the pre-1995 Parades from expressive conduct protected by the First Amendment and, equally clearly, bring those Parades within the scope of Massachusetts public accommodations law.

The Supreme Court generally accepts the fact finding of lower courts. Thus, unless the Court can say, after reviewing a record that includes the testimony of 12 witnesses before the state trial court and that court's review of 113 exhibits, that the findings of fact in this case are clearly erroneous, it is not likely to take up the Veterans Council's invitation to resolve the factual debate between the parties. Instead, the Court will take the facts as found by the Massachusetts courts and consider their legal significance.

The Court's decision in this case could result in an articulation of clear guidelines for determining what constitutes expressive associational activity for purposes of the First Amendment. Is any public congregation of persons engaged in expressive associational activity simply by showing up in one place, at one time, and doing something? Or must there be some unifying purpose before the same congregation of persons can be said to be engaging in expressive associational activity? The Court's answer to these questions can go a long way toward obviating the kind of dispute presented by this case.

The Court also may address the issue of whether or not a state has a compelling interest in prohibiting discrimination that deprives a person of his or her personal dignity. One commentator has expressed the view that "unlike the concern for equality . . . the state's interest in eliminating the insult, hate, and divisiveness that accompany invidious discrimination is not properly considered 'compelling.'" W.P. Marshall, *Discrimination and the Right of Association*, Nw. U. L. Rev. 68, 97 (1986). On the other hand, a state may not need a compelling interest to prohibit discrimination against a group protected by its antidiscrimination laws if those who discriminate in violation of state law are not entitled to protection of the First Amendment. Thus, on this issue, the Court could give substantial guidance on exactly how far state and local governments can go to protect persons and groups from the animus of others.

ARGUMENTS

For John J. Hurley, individually, and the South Boston Allied War Veterans Council (Counsel of Record: Chester Darling; 306 Dartmouth Street, Boston, MA 02116; (617) 536-2050):

1. The Veterans' Parade is their expression, the content of which is protected by the First Amendment against government control.
2. The Massachusetts public accommodations law is constitutionally overbroad.

For the Irish-American Gay, Lesbian, and Bisexual Group of Boston, an unincorporated association, by and through Timothy Daley, Barbra Kay, and Cathleen Finn, acting on their own behalf and on behalf of the members of the association (Counsel of Record: John Ward; Zalkind, Rodriguez, Lunt & Duncan; 65A Atlantic Avenue, Boston, MA 02110; (617) 742-6020):

The decision of the Supreme Judicial Court of Massachusetts adheres to this Court's precedent and is fully supported by the facts as found by the trial judge, which are not clearly erroneous.

AMICUS BRIEFS

In support of John J. Hurley, individually, and the South Boston Allied Veterans Council

Boy Scouts of America (Counsel of Record: George A. Davidson; Hughes Hubbard & Reed; One Battery Park Plaza, New York, NY 10004; (212) 837-6000);

Catholic War Veterans (Counsel of Record: Thomas Bolan; 36 West 44th Street, New York, NY 10036; (212) 302-1777);

Joint brief of the Center of Individual Rights and the New York County Board of the Ancient Order of Hibernians (Counsel of Record: Gary B. Born; Wilmer, Cutler & Pickering; 2445 M Street, NW, Washington, DC 20037; (202) 663-6000)

In support of neither party

American Civil Liberties Union (Counsel of Record: Burt Neuborne; 40 Washington Square South, New York, NY 10012; (212) 998-6172).