02-9000

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Plaintiffs-Appellants,

v.

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, CAROL CARNEY, in her capacity as Chair of the Connecticut State Employee Campaign Committee, MARGARET DIACHENKO, RIGHARD EMONDS, PALUEL FLAGG, CHRISTINE FORTUNATO, BURTON GOLD, CAROL GUILIANO, CAROL HAMILTON, MARILYN KAIKA, JOAN KELLY-COYLE, D'ANN MAZZOCCA, BERNARD MCLOUGHLIN, MICHAEL NICHOLS, WILLIAM PHILLIE, CHERYL SWAIN, NOEL THOMAS, in their capacities as members of the Connecticut State Employee Campaign Committee,

Defendants-Appellees,

COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES,

Intervenor-Defendant-Appellee,

CONNECTICUT COALITION FOR LESBIAN, GAY, BISEXUAL & TRANSGENDER CIVIL RIGHTS, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC. AND GAY & LESBIAN ADVOCATES & DEFENDERS,

Movants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONSENTED TO AMICUS BRIEF OF GLAD, CCLGBTCR, AND CWEALF IN SUPPORT OF DEFENDANTS-APPELLEES WYMAN ET AL. AND DEFENDANT-INTERVENOR CHRO IN FAVOR OF AFFIRMANCE

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STATEMENTS OF INTEREST OF AMICI

Amici submit this brief pursuant to Fed. R. App. P. 29(a), with the consent of all parties, in support of Defendants Wyman et al. and Defendant-Intervenor Connecticut Commission on Human Rights and Opportunities in favor of affirmance of the decision below, BSA v. Wyman, 213 F.Supp.2d 159 (D. Conn. 2002). Amici were intervenors at the Connecticut Commission on Human Rights and Opportunities for the declaratory ruling issued on May 12, 2000, (A. 581-82), which is implicated by this case.[1]

Gay & Lesbian Advocates & Defenders

Founded in 1978, Gay & Lesbian Advocates & Defenders ("GLAD") is New England's leading public interest organization representing lesbians, gay men, bisexuals, transgendered people and people with HIV and AIDS. GLAD has litigated widely in New England on discrimination issues in employment, services and public accommodations under state non-discrimination laws. In addition, GLAD has litigated in the area of the First Amendment, representing both plaintiffs seeking to assert First Amendment and free speech and associational rights and, on the other hand, defending against overly broad speech-related defenses to the application of anti-discrimination laws. GLAD was counsel for the

[1] (Record cites are to the joint record appendix, A. ___)

band of gay marchers in Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) and Irish-American Gay, Lesbian & Bisexual Group v. City of Boston, 1994 WL 878945 (Mass. Super. 1994).

Connecticut Coalition For Lesbian, Gay, Bisexual & Transgender Civil Rights

The Connecticut Coalition for Lesbian, Gay, Bisexual and Transgender Civil Rights ("the Coalition" or "CCLGBTCR") is a statewide organization with approximately five hundred members. The mission of the Coalition is to educate the public and advocate on behalf of lesbian, gay, bisexual and transgender people in order to protect our civil rights, health and safety. For example, the Coalition was active in supporting passage of Connecticut's statute prohibiting discrimination on the basis of sexual orientation, and in passage of the statute protecting students against discrimination in Connecticut's schools. The Coalition has also taken an active role in responding to hate crimes and in supporting equal access to health services.

Connecticut Women's Education And Legal Fund

The Connecticut Women's Education and Legal Fund ("CWEALF") is a statewide, non-profit women's rights organization dedicated to ending discrimination and empowering women, girls and their families to achieve equal

opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1400 individuals and organizations. CWEALF seeks to intervene in this important matter because of its long history of work to eliminate discrimination based on sexual orientation.

ARGUMENT

This case addresses the question of whether the exclusion of the Boy Scouts of America ("BSA") from the State Employee Campaign for charitable giving ("Campaign") based on an interpretation by the Connecticut Commission on Human Rights and Opportunities ("CHRO") of state law violates the BSA's First Amendment right to free expression. As a preliminary matter, BSA's exclusion based on state laws prohibiting the use of state facilities in the furtherance of discrimination does not implicate any speech rights because it does not require it to adopt or espouse any belief or viewpoint different from its own. Contrary to the BSA's position, Boy Scouts of America v. Dale, 530 U.S. 640 (2000), has no relevance here. While Dale was about whether the BSA could exclude gay adult volunteer leaders, this case is simply about whether the Campaign must allow BSA to be part of a charitable giving campaign despite its discrimination against gay youth members and adult professional and volunteer leaders. Despite BSA's assertions otherwise, it was excluded because its discriminatory conduct violates state statutes prohibiting the use of state facilities in furtherance of discrimination, not because of its speech.

Further, BSA's argument that its exclusion from the Campaign violates its First Amendment rights fails for at least two additional reasons. In creating participation requirements for a state charitable campaign, as long as they are

reasonable, their neutral application to any particular group does not violate the First Amendment unless they are viewpoint-based. The non-discrimination law upon which the CHRO relied in issuing its ruling that including BSA in the Campaign violates state law is viewpoint neutral. Under the CHRO's interpretation of the Connecticut non-discrimination law, organizations whether anti-gay or anti-heterosexual would be excluded. Connecticut's non-discrimination law does not carve out one idea or view for disfavor. It therefore satisfies the viewpoint neutrality required of any governmental forum. In addition, BSA overstates the breadth of the unconstitutional conditions doctrine and neglects to note its inapplicability in the context of the forum analysis set forth in Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788 (1985), the controlling precedent for this case. None of the cases BSA cites to the contrary are relevant.

I. THE UNITED STATES SUPREME COURT DECISION IN DALE DOES NOT SPEAK TO THIS CASE.

The United States Supreme Court ruling in Dale, 530 U.S. 640, is inapposite to the question of whether the Boy Scouts First Amendment rights are implicated by its exclusion from the Campaign based on the CHRO's interpretation of state law. In Dale, the Supreme Court found that the "forced inclusion of an unwanted person" in BSA infringed the organization's expressive association right. See Dale, 530 U.S. at 648. The matter before this Court involves no threat of forced

inclusion whatsoever. It involves access to a state charitable campaign. The Campaign's exclusion of BSA does not require it to change its membership or hiring policies in any way, or accept an "unwanted person."

In addition, limiting BSA's access to soliciting state employees for charitable donations has no effect whatsoever on the BSA's right to either expressive association or speech.[2] The exclusion of BSA from the Campaign does not compel the organization to send an undesirable or unwanted message. Indeed, exclusion only reinforces the message BSA seems determined to convey as forcefully as it can, i.e., that it is fundamental to BSA's associational identity to discriminate on the basis of sexual orientation. Therefore, if BSA is excluded from the Campaign, it will not be obliged to express any message contrary to its stated viewpoint. Nor will BSA's exclusion "significantly burden the Boy Scouts' desire to not promote homosexual conduct as a legitimate form of behavior." Dale, 530 U.S. at 653 (internal quotation marks omitted).[3]

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[2] To the extent it is even relevant, the Campaign is far from BSA's only means of contact with Connecticut state employees. BSA has "access to alternative channels, including direct mail and inperson solicitation outside the workplace, to solicit contributions from [state] employees." See, e.g., Cornelius, 473 U.S. at 809.

[3] As the CHRO noted, BSA has admitted as much. (A. 589, CHRO Declaratory Ruling) ("Even the BSA in its Reply Brief in the BSA v. Dale Supreme Court case acknowledged the right of the government to withdraw any support or benefits.").

Further, the BSA's exclusion was based on a state agency's interpretation of state law relying on a Connecticut Supreme Court decision, not on its anti-gay message. Specifically, in its ruling dated May 12, 2000, the CHRO determined that the inclusion of the BSA in the Campaign would be in violation of three statutes and one regulation that prohibit the use of state facilities in furtherance of discrimination. (A. 581–92, CHRO Declaratory Ruling, citing Conn. Gen. Stat. §§ 46a-81i, 46a-81l, 46a-81n and Conn. Agencies Reg. § 5-262-4(a)(4)(A)(vii)). Relying on Gay & Lesbian Law Students Ass'n v. Bd. of Trus., Univ. of Conn., 236 Conn. 453 (1996), the CHRO concluded that because the Campaign requires significant use of state resources (including employees, see Conn. Agencies Reg. § 5-262(d), inter alia, see Conn. Agencies Reg. §§ 5-262-6, 7(c), 8, 9(a)), the inclusion of a discriminatory organization would violate state law regardless of whether or not the state public accommodations or employment law, Conn. Agencies Reg. §§ 5-262-6, 7(c), 8, 9(a), would prohibit the group from engaging in discrimination. (A. 588, CHRO Declaratory Ruling citing Gay & Lesbian Law Students Ass'n, 236 Conn. at 467 (state law triggered merely "by allowing the military to use the services of the placement office")). By analogy, the CHRO explained that although the military may lawfully discriminate against gay applicants,[4] the Connecticut Supreme Court held that the military's recruitment at

[4] Oddly, BSA below sought to distinguish Gay & Lesbian Law Students

the state university violated the same non-discrimination laws at issue in this matter. Id. at 591, citing Gay & Lesbian Law Students Ass'n, 236 Conn. at 470 n.13. Similarly, whether or not the First Amendment shields BSA from Connecticut's enforcement of its public accommodations (or employment) law, does not affect whether the Campaign may (or must) exclude the organization from the charitable campaign based on state law.

In short, that New Jersey's public accommodations law (or Connecticut's, for that matter) may not require BSA to permit openly gay individuals to serve as leaders, see Dale, 530 U.S. 640, does not mean that the Campaign must include an organization when doing so would otherwise violate state law.

Moreover, contrary to the contention of the BSA, the reason for its exclusion is BSA's discriminatory practices and the implications they have in the context of using state facilities, not its discriminatory purpose or message. In its declaratory ruling, the CHRO focused on BSA's discriminatory practices and its use of state facilities in the Campaign as triggering state law, not its anti-gay message or purpose. (A. 586–90, CHRO Declaratory Ruling). The use of state facilities by an organization that engages in acts of discrimination -- here the BSA's denial of

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Ass'n by arguing that it is unconstitutional for the military to exclude openly gay people. Boy Scouts' Memorandum of Law in Opposition to the Motions of Defendants and Defendant-Intervenors for Summary Judgment at 10. The established case law is to the contrary. See Able v. United States, 155 F.3d 628 (2d Cir. 1998).

membership for gay youth and prohibition against gay adult volunteers or professional leaders -- are not protected by the First Amendment, even if BSA's anti-gay message is. See, e.g., R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 385 (1992) ("nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses"). This Court's appropriate focus should be on the underlying state non-discrimination law and its permissibility, not the effect of its specific application to a discriminatory group. Cf. Madsen v. Women's Health Center, Inc., 512 U.S. 753, 762 (1994) (Although "[a]n injunction [like the application of a law in a particular case], by its very nature, applies only to a particular group," it is not therefore either content or viewpoint-based). Because the non-discrimination law itself survives scrutiny, so does its application to a particular group.[5]

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[5] As the district court said, this is case in which a federal court should defer to a state agency interpretation of law based on existing high court precedent. The question of whether the specific sections of the Gay Rights Law at issue in this case, §§ 46a-81i, 46a-81l, and 46a-81n, apply to a group that discriminates on the basis of sexual orientation is one that has already been addressed by the Connecticut Supreme Court. See Gay & Lesbian Law Students Ass'n, 236 Conn. 453. "[T]he CHRO was required to follow that case precedent in its declaratory ruling." Boy Scouts of America v. Wyman, 213 F.Supp.2d 159, 166 (D.Conn. 2002). Moreover, even if BSA disagrees with the agency's interpretation of state law, it cannot now be heard to challenge the substance of that ruling. BSA submitted a position statement in that matter, filed an appearance and was represented at the public hearing. Any party could have sought judicial review of the final agency decision issued on May 12, 2000, upon which the Campaign relied in deciding to exclude BSA. See Conn. Gen. Stat. § 4-183. Having failed to do so, BSA cannot now attack the substance of that decision.

II. EXCLUDING A DISCRIMINATORY ORGANIZATION FROM A STATE EMPLOYEE CAMPAIGN IS CONSISTENT WITH CORNELIUS V. NAACP LDEF.

The question of what rules a government employer may apply in determining which organizations have access to the workplace for purposes of soliciting employee contributions has already been comprehensively addressed by the United State Supreme Court in the case of Cornelius, 473 U.S. 788. In determining whether Connecticut law may exclude the Boy Scouts, this Court is not charting any new territory.

Cornelius was brought by the NAACP Legal Defense and Educational Fund ("NAACP LDEF") after it was excluded from participation in the Combined Federal Campaign ("CFC"), a charity drive aimed at federal employees. Cornelius, 473 U.S. at 790. The basis for the CFC's exclusion of the NAACP LDEF was an Executive Order issued by President Ronald Reagan limiting participation in the campaign to "voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families." Id. at 795. Specifically, the Executive Order excluded those "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." Id.

The issue then before the Supreme Court was whether the denial of the right to seek designated funds violated the NAACP LDEF's First Amendment right to solicit charitable contributions. Although the organization's solicitation was protected speech, the Court explained that an organization may be excluded from a government workplace charitable campaign as long as the reasons for the exclusion satisfy a test for reasonableness. In other words, according to the Supreme Court, as long as the rule, law or regulation upon which the exclusion is based is not a "façade for viewpoint-based discrimination," it need only be reasonable to support the decision to exclude. Id. at 811 (justifications behind the Executive Order -- avoiding the appearance of political favoritism and avoiding controversy that might disrupt the workplace campaign -- found to meet the test of reasonableness). In this case, determining whether the Connecticut non-discrimination law satisfies the Cornelius test is easy.

A. Enforcing Connecticut's Non-discrimination Law Is Reasonable.

The justifications for the restriction in Cornelius were that the regulation excluded some groups from participating in the campaign to avoid workplace disruption and to ensure the success of the Campaign (by eliminating groups perceived as political). Id. at 812. The Court agreed with the Government that "these are facially neutral and valid justifications for exclusion from the nonpublic forum" created by the campaign. Id. As the Court explained, "[a]lthough the

avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas." Id. at 811.

The post-Cornelius case law reveals that the threshold showing for "reasonableness" in the context of determining when organizations have been properly excluded from government charitable campaigns is easily satisfied. See, e.g., Pilsen Neighbors Community Council v. Netsch, 960 F.2d 676 (7th Cir. 1992) (legislative purpose to include only "popular" charities found reasonable); Earth Share v. Office of Admin., 660 A.2d 138 (Pa. Commw. Ct. 1995) (excluding environmental groups through "direct services to persons" requirement found reasonable). See also General Media Communications, Inc. v. Cohen, 131 F.3d 273, 276 (2d Cir. 1997) (desire to uphold "image and core values of honor, professionalism, and discipline" reasonable justification for banning sale of sexually explicit materials at military stores). Surely if "the avoidance of controversy" is reasonable under Cornelius, so too is the enforcement of Connecticut's long-established non-discrimination law.

B. Enforcing Non-Discrimination Law Is Not A Façade For Viewpoint-Based Discrimination

What the Cornelius Court found would not be permissible is "a regulation that is in reality a facade for viewpoint-based discrimination." Cornelius, 473 U.S. at 811 (emphasis added). The relevant inquiry on remand, therefore, was whether

the regulation itself -- not its specific application to a particular party -- is a facade for viewpoint-based discrimination. Id. at 811-813. See also id. at 833 (Blackmun, J., dissenting) (emphasis added) (". . . I see no reason to remand for a determination of whether the eligibility criteria are a 'facade' for viewpoint-based discrimination"); id. at 835 n.3 (Stevens, J., dissenting) (emphasis added) (an inference of bias is supported albeit without "suggest[ing] that the author of the regulation was motivated by a conscious prejudice against advocacy groups").

It should be beyond cavil that the Connecticut non-discrimination statutes applied by the CHRO are viewpoint-neutral and certainly were not adopted by the Connecticut legislature as a "facade" for viewpoint discrimination. This is true, in no small part because the United States Supreme Court has consistently held, in cases affirming the constitutionality of state non-discrimination laws subjected to First Amendment challenges, that a state's interest in eradicating discrimination is a compelling interest. See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 572 (1995) (non-discrimination laws "do not, as a general matter, violate the First or Fourteenth Amendment . . . Nor is this [Massachusetts] statute unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of its content…"); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (application of public accommodation law to compel group

to accept women as members not violative of First Amendment); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-262 (1964). See also Hishon v. Spalding, 467 U.S. 69 (1984) (Title VII non-discrimination prohibitions do not violate First Amendment); Runyon v. McCrary, 427 U.S. 160 (1976) (no First Amendment right to discriminate in selection of private school attendees). As a result, even where a plaintiff's First Amendment rights have been violated in a context requiring strict scrutiny of a state non-discrimination statute, the statute has survived. Roberts, 468 U.S. 609. In this case where the applicable inquiry involves a much more relaxed "reasonableness" test and where the impact on the BSA is simply lack of access to solicitation, not any incursion on its message or association rights, the state's ability to enforce its non-discrimination law is even clearer.

C. Discrimination Is Not A Viewpoint.

BSA cannot be heard to argue that the underlying state non-discrimination laws, upon which the CHRO based its ruling that BSA may not lawfully participate in the campaign, are viewpoint-based. As even the author of an article upon which BSA relies to make its case agrees, "the regulation requiring participating groups to comply with state nondiscrimination law is viewpoint-neutral because it excludes all groups that discriminate, regardless of their viewpoints." Carolyn Fast, Scouting Out Discrimination Against The Discriminating Boy Scouts: Does

Connecticut's Exclusion Of The Boy Scouts From Its State Employee Charitable Campaign Violate First Amendment Rights?, 35 Colum. J.L. & Soc. Probs. 255, 266 (2002)

This basic principle is underscored by the Supreme Court's determination that a District of Columbia code provision prohibiting signs within 500 feet of embassies "tending to bring a foreign government into public odium or public disrepute" was not viewpoint-based. Boos v. Barry, 485 U.S. 312, 316 (1988). Although the Court ultimately found the proscription violative of the First Amendment rights of protestors, it did so because it was content-based, not because it was viewpoint-based. Id. at 319. In other words, the code provision was impermissible because it precluded "an entire category of speech -- signs or displays critical of foreign governments," not because is singled out a particular view. Id.

Since the Campaign, unlike an area outside a foreign embassy, is a non-public forum, content-based prohibitions are permissible though viewpoint-based ones are not. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). While arguably content-based, the Connecticut non-discrimination law, like the regulation at issue in Boos, is not viewpoint-based. All organizations that discriminate would be precluded from the Campaign, regardless of what viewpoint it does so from. For example, the BSA discriminates in its exclusion of gay youth

as well as adult professional and volunteer leaders. If another organization in the campaign such as the Hispanic Health Council, to whom BSA points as an organization that "discriminates," Brief for Plaintiffs-Appellants at 40, similarly excluded individuals who were not racial minorities from membership or volunteer or professional positions, it too would be excluded from the Campaign. Or to give an example drawing from an organization whose mission relates to sexual orientation, if an organization such as the Parents and Friends of Lesbians and Gays excluded heterosexual people from membership, it too would be excluded. However, the basis of the exclusion would be the discriminatory practice and consequent violation of state law not the organization's point of view. As a corollary, BSA could espouse any view it wishes however anti-gay; it simply cannot engage in the discriminatory practices to which it admits. So, for example, it could participate in the Campaign and would not be in violation of state law, despite its avowedly anti-gay purpose and mission, as long as it does not exclude gay people from membership and volunteer and professional leadership positions. Thus, BSA's exclusion is due to its violation of state law, not its viewpoint.

Rather than supporting its case, the religious discrimination cases to which BSA point highlight the neutrality of a non-discrimination law. In Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995), Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), and most recently Good

News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) ("the Rosenberger line"), the United States Supreme Court explained that religion is a viewpoint. Therefore, explained the Court, programs including those held in public grade schools and universities may not be excluded from using facilities based on their having a religious perspective. The problem with excluding religious views, explained the Court, is that religion "provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Rosenberger, 515 U.S. at 831. In the Rosenberger line,[6] the challenged restrictions allowed many views about issues such as family or childrearing and singled out only the

[6] BSA misstates the law in positing that the scrutiny applicable to restrictions "on access to a limited public forum is identical to the [] standard applicable to a non-public forum." (emphasis added). Brief for Plaintiffs-Appellants at 33. In fact, as the Third Circuit has acknowledged, "there has been some uncertainty among the circuits" as to whether a limited public forum is properly considered a designated public forum or a non-public forum. Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 842 n.5 (6th Cir. 2000). This uncertainty stemmed from the fact that in Perry, 460 U.S. 37, the case that sets forth the appropriate scrutiny in forum analysis cases, the text of the decision describes three fora and includes a footnote identifying a fourth, the limited public forum. Although Good News Club requires a restriction in a limited public forum to be "reasonable in light of the purposes served by the forum" and not viewpoint-based, Good News Club, 533 U.S. at 107, the case does not alter the statement in Perry that forum analysis sets forth a "spectrum of review" based on the nature of the forum. Perry, 460 U.S. at 45. This Court has also acknowledged as much. See Hotel Employees & Rest. Employees Union v. City of N.Y., 311 F.3d 534, 546 (2d Cir. 2002) ("we do not view the tripartite approach as a straightjacket"). In any case, this Court need not resolve the question of whether there is a difference between the scrutiny applicable to a restriction for use of a limited public forum as opposed to a restriction for use of a non-public forum because, as argued above, the Rosenberger line is inapplicable because a restriction on religious topics, unlike a non-discrimination law is viewpoint-based.

religious views for exclusion. By contrast, non-discrimination laws serve quite a different function with different effect.

Discrimination, unlike religion, is not a viewpoint. Because non-discrimination statutes exclude groups that discriminate, and do so from any side of a given issue (e.g. whether anti-gay or anti-straight, anti-black or anti-white), they are, as the lower court said, neutral and not viewpoint-based. Therefore, although BSA has what may fairly be characterized as an anti-gay viewpoint, its exclusion because it engages in discriminatory practices in furtherance of this "viewpoint," does not thereby render the state non-discrimination law viewpoint-based. A discriminator with the opposite viewpoint would be similarly excluded.

Neither Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000) nor Boy Scouts of America, S. Fla. Council v. Till, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) advance BSA's case. In neither Cuffley nor Till did the courts address the question at issue here. In Cuffley, the court addressed whether the Ku Klux Klan was properly excluded from a state adopt-a-highway program. The state adopt-a-highway program based its exclusion on the Klan's discrimination in membership on the basis of race, religion, color and national origin. However, as the Eighth Circuit Court of Appeals explained, the State could not, unlike the Campaign here, point to any non-discrimination law that applied to the Klan nor any way that inclusion in the program could trigger state action. Cuffley, 208 F.3d at 709. Even more,

however, the Eighth Circuit focused its decision on the specific way in which the Klan's application was treated differently than others and, in the end, having rejected all of the state's reason for exclusion as pretextual, concluded, "we are left only with the admitted reason the State was motivated to so carefully scrutinize the Klan's application as an explanation for the denial: that the State disagrees with the Klan's beliefs and advocacy." Id. at 711.

There is no question raised in this appeal, as there was in Cuffley, of whether there is an underlying violation of the state non-discrimination law. Cuffley, 208 F.3d at 708 (although there was no question that the Klan discriminates in membership on the basis of race, religion, color, and national origin, the state could point to no federal or state law that applies to the Klan). The CHRO, the state agency responsible for interpreting the non-discrimination law explained that even a minimal use of state facilities triggers the relevant provisions, (A. 585–89, CHRO Declaratory Ruling). As the CHRO explained, "Clearly, [the BSA's use of State facilities] far exceed[s] the amount of time and resources expended by the State in Gay & Lesbian Law Students Association v. Board of Trustees, 236 Conn. 453 (1996). (A. 588, CHRO Declaratory Ruling). Moreover, BSA did not, and cannot, argue either below or before this Court that there is any question that, based on its anti-gay membership and leadership policies, its inclusion in the Campaign violates Connecticut law.

In addition, unlike in Cuffley, the State acted in the most measured ways possible to determine whether it was appropriate to include BSA. Having once learned of BSA's discriminatory practices, the Campaign did not unilaterally take any action. To the contrary, it sought an opinion from the state agency responsible for administering the state non-discrimination laws. It waited for a formal opinion to issue from the CHRO and only once it did, did the Campaign exclude BSA. It is unsurprising that BSA can point to facts before the Campaign made its request for the ruling to demonstrate that it was the BSA's discrimination that gave rise to the request. After all, it was the Campaign's concern about its compliance with the state non-discrimination law that triggered its request.

Nor is the case of Till dispositive or even particularly instructive. 136 F. Supp. 2d 1295. In Till, the district court assumed that the exclusion of BSA from the limited public forum created by the Broward County schools, despite the existence of a district-wide non-discrimination policy, was viewpoint-based[7] and focused its analysis, as a result, on whether the infringement on BSA's speech could therefore meet the heightened scrutiny to which it must then be subjected. The district court never even considered the reasonableness of the school district non-discrimination policy in light of the forum created by the school. This Court

[7] Arguably, the district judge may have drawn that conclusion because of the absence of a Florida statewide non-discrimination law that includes sexual orientation. Such is not the case here. See Conn. Gen. Stat. §§ 46a-81c, 46a-81d.

need not determine the correctness of Till's analysis because whether or not correct, in failing to address the legally relevant question before this Court, Till's analysis sheds no light on the analogous question at issue here -- whether a state non-discrimination law is, as Cornelius instructs it must be, a reasonable participation criterion for organizations in a state charitable campaign. Because here BSA cannot demonstrate that the exclusion was viewpoint-based, the analysis in Till has no bearing on the matter before this Court.

D. That BSA Could Participate If It Did Not Discriminate Does Not Violate The Unconstitutional Conditions Doctrine.

The BSA cannot rely on the Unconstitutional Conditions doctrine argument for three reasons.

1. BSA failed to raise this issue below.

First, this Court should not consider the argument where Appellants failed to raise the issue below. This issue was "neither presented to nor expressly ruled on by the district court. '[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.'" Mattel, Inc. v. Barbie-Club.com, 310 F.3d 293, 306 (2d Cir. 2002) citing Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994).

No mention is made of the doctrine in either of the legal memoranda submitted to the district court relating to its motion for summary judgment. See BSA's Memorandum of Law in Support of their Motion for Summary Judgment;

Memorandum of Law in Opposition to the Motions of Defendants and Defendant-Intervenors for Summary Judgment. Moreover, the first mention by BSA of cases including Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001), Rutan v. Republican Party of Ill., 497 U.S. 62 (1990), Perry v. Sindermann, 408 U.S. 593 (1972), and Speiser v. Randall, 357 U.S. 513 (1958), all essential to its unconstitutional conditions argument, is on appeal. Accordingly, because the court below did not pass on the doctrine, this Court should not either.

2. The unconstitutional conditions doctrine is inapplicable in a forum analysis case.

In any case, the doctrine is inapplicable to this case for the simple reason that forum analysis cases are not amenable to an unconstitutional conditions objection. The doctrine has no independent utility in a case such as this one because the forum analysis set forth in Cornelius subsumes any unconstitutional conditions concerns. Courts have appropriately distinguished between "subsidy" cases, which are amenable to unconstitutional conditions objections, and "forum cases," which are not. See, e.g., American Library Ass'n, Inc. v. United States, 201 F. Supp.2d 401, 458 (E.D. Pa. 2002), (probable jurisdiction noted, 123 S.Ct. 551 (2002)), (forum analysis determines the constitutionality of a requirement that libraries place internet filters on their computers; in this context, "the Supreme Court's unconstitutional conditions cases, such as Rust and Velazquez" are not controlling) (citations omitted) citing Velazquez, 531 U.S. at 544 ("As this suit

involves a subsidy, limited forum cases . . . may not be controlling").[8] See also Nation Magazine v. U.S. Dept. of Def., 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991) (Plaintiffs argued that criteria for exclusion in press pools was an unconstitutional condition; court's analysis reflects limited public forum analysis).

These doctrines cannot be applied simultaneously for a sensible reason. The unconstitutional conditions lens becomes unworkable in a forum analysis case because any excluded speaker could argue that its inclusion in a restricted forum is conditioned on it changing its speech. Allowing unconstitutional conditions objections to be considered in a forum case would gut the Cornelius test of reasonableness. For example, a case recently decided by this Court demonstrates the point. In Hotel Employees & Rest. Employees Union, 311 F.3d 534, the Plaintiff unions challenged a restriction that limited the use of Lincoln Center Plaza only to arts-related events. As a result, unions were unable to engage in organizing on the Plaza. Because the restriction was reasonable in light of the nature of the forum, this Court upheld it. Hotel Employees & Rest. Employees Union, 311 F.3d at 539. The union could have argued that the arts-related restriction unconstitutionally conditioned the union's use of the forum on adopting

[8] Although the American Library Ass'n, Inc. court acknowledged the instructiveness of the unconstitutional conditions doctrine, even in that forum analysis case, it did so because the question before the court was novel both as to the nature of the forum and as to the appropriate scrutiny to which the speech restrictions should be subjected. The case before this Court, pursuant to Cornelius, presents an obvious non-public forum and a clear test of reasonableness.

an arts-related mission. However, crediting that argument would have gutted the well-established forum analysis. Just as this Court did not entertain such an objection in Hotel Employees & Rest. Employees Union, neither should it entertain one here.

It is worth noting that the unconstitutional conditions doctrine was well-established at the time Cornelius was decided by the Supreme Court. Despite its vibrancy and the possibility that NAACP LDEF could have made the analogous argument to that which BSA makes here, the Supreme Court did not even allude to unconstitutional conditions as a concern in acknowledging that state charitable campaigns can, of course, create eligibility requirements for participation. Despite that some eligibility requirements "conditioned" a group's inclusion in the program on the type of organization they were (implicating, at a minimum their First Amendment associational rights), the Court concluded the requirements were nevertheless reasonable. This Court should not place any additional burden on the Campaign in establishing participation requirements apart from the test set forth in Cornelius.

3. BSA cannot demonstrate that it was excluded based on its viewpoint.

Finally, the doctrine does not help Appellants because, even if applicable, it requires a demonstration that BSA was excluded because of its discriminatory beliefs. It was not. As the district judge explained, "the issue before this Court is

not a matter of the BSA's viewpoint on homosexuality, but of the BSA's compliance with the laws of the State of Connecticut." Wyman, 213 F.Supp.2d at 168. In other words, BSA may retain its discriminatory purpose and message and, in the future, be included in the Campaign. What it cannot do is retain its discriminatory practices of excluding certain members, volunteers, and professionals based on their sexual orientation. Therefore, its participation is not conditioned on its relinquishment of a First Amendment right. Rather, its participation is conditioned on compliance with state law, as the district judge explained.

E. No Set Of Facts Supports BSA's Assertion That The Campaign's Decision To Exclude BSA Based On The CHRO Decision Is A Façade For Viewpoint Discrimination.

Even if, however, the relevant inquiry were to be the application of the particular statute or regulation and not the statute itself, the CHRO's decision cannot possibly be construed as a façade for viewpoint-based discrimination. Any repercussions BSA faces in the form of exclusion from the Campaign are not a façade for viewpoint-based discrimination, but simply fallout from the organization's choice not to comply with a neutral non-discrimination requirement of the Campaign. The Campaign's initial request to the CHRO was far from a targeted attack on BSA. To the contrary, the request for a declaratory ruling was initiated by actions taken by BSA itself.

As Robert King, then-Chair of the Campaign Committee explained in his request to the CHRO for a declaratory ruling, Conn. Agencies Reg., § 5-262-4(a)(4)(A)(vii) requires every participating charitable federation to maintain on file for each member agency, of which the BSA is one, "a written policy of non-discrimination." As Mr. King explained, "the Committee received a written statement from the Connecticut Rivers Council of the BSA whose Scout Executive has explained with reference to sexual orientation issues that 'the national BSA position is that homosexuals do not provide a role model for Scouts that is consistent with the traditional family values emphasized by our program.'" (A. 580, Letter from Robert King). Regardless of any facts BSA can point to of non-compliance by other groups with the requirement of submitting a statement of compliance with non-discrimination laws, only BSA notified the Campaign of its discriminatory policy. Moreover, BSA has made its anti-gay policy an issue of national importance. The Campaign could not be expected to stick its head in the sand and ignore the discriminatory position BSA has staked out so publicly. The Campaign head's request for a ruling from the state agency responsible for administering the non-discrimination laws could be neither more neutral nor measured. Moreover, the CHRO's legitimate response to a request for a declaratory ruling (and the Campaign's action in reliance upon it) can hardly be

considered evidence that either the non-discrimination law or its application is a facade for suppressing a particular viewpoint.

In addition, BSA's atmospheric argument notwithstanding, the record here is utterly devoid of any evidence whatsoever that any other organization has engaged in impermissible discrimination. Even if it were true, as BSA argues, that other organizations focus their missions or services solely on particular groups of people to the exclusion of all others,[9] there is no evidence that these organizations engage in any impermissible discriminatory conduct in membership, volunteer opportunities or hiring. While it is true, as amici and Defendant-Intervenor argued and the District Court agreed, that BSA confuses discriminatory membership and employment practices, like its, with the provision of services focused on serving a particular identity-based group, this Court need not even go so far. Simply, BSA cannot demonstrate -- because there is no evidentiary support for it -- that any other organization in the Campaign engages in any discriminatory conduct. And, because the relevant law excludes discriminators on both sides of every issue -- anti-gay as well as anti-straight, anti-black as well as anti-white -- it is decidedly viewpoint neutral.

[9] It bears mention, however, that even as to this point there is no record evidence to support even BSA's attenuated contention that some participating organizations serve only a particular sex, age group, ethnicity or sexual orientation.

CONCLUSION

For the foregoing reasons, the decision of the District Court granting summary judgment to Defendants and Defendant-Intervenor should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief contains 5, 692 words (as counted by the word processing system used to prepare the brief) and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B)(i).

Dated:

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