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LEGAL MEMORANDUM

Date: **July 22, 2015**

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

For its first 100 years "morally straight" meant to the BSA that homosexuals could not be members because they did not "possess the moral . . . and emotional qualities deemed necessary" to be role models and leaders of youth. Given the fact that being able to identify homosexual applicants for membership was (a) not feasible or possible; (b) too intrusive for BSA's tastes; and (c) could result in having to investigate "witch hunt" allegations of homosexuality made against current or prospective members; the decision was made to, in effect, go with a "don't ask, don't tell" approach. Provided that someone did not "avow" that they were homosexual, did not openly indicate that they were homosexual, and did not promote or advocate homosexuality, an individual's homosexuality was irrelevant to membership in the Boy Scouts of America. This was true whether it was a youth member or an adult member – just as a belief in God was a requirement for membership.

On May 23, 2013, the Boy Scouts of America (BSA) enacted a sweeping change to its core values by changing its long-standing membership requirements to state that "[n]o youth may be denied membership in the Boy Scouts of America on the basis of sexual orientation or preference alone." The change to its membership standards represented a complete redefinition of the requirement in the Scout Oath that all members be "morally straight." It reversed the more than 100 years of teaching that homosexuality is incompatible with being "morally straight" and began the promotion of a new radical definition that accepts all sexual orientations and preferences as moral.

One year after that decision on May 23, 2014, the President of the Boy Scouts of America, Robert Gates said he would have moved last year to allow openly gay adults in the organization but that he opposed any further attempts to address the policy and that he "believed strongly that to re-open the membership issue or try to take last year's decision to the next step would irreparably fracture and perhaps even provoke a formal, permanent split in [the Scouting] movement — with the high likelihood neither side would subsequently survive on its own."[1]

Yet in spite of those warning statements of caution, only one year later on May 21, 2015, BSA President Robert Gates announced that he wanted to end the organization's blanket ban on "open and avowed" homosexual adults serving as BSA leaders. Less than 30 days later the (Philadelphia) Cradle of Liberty Council issued a press release announcing that Council's new policy is as follows:

> *Discrimination in any form, including but not limited to* ***discrimination on the basis of sexual orientation, is contrary to the Scout Oath and Law****, and we in the Cradle of Liberty Council will vigorously oppose it* ***from whatever source****.*

[1] "Boy Scouts President Gates says he supports gay adults' inclusion, but opposes new debate," U.S. News and World Report, May 23, 2014.

On July 10, 2015, the Executive Committee of the BSA passed a resolution that has been forwarded to the National Board for approval on July 27th that would take effect immediately upon being ratified by the National Board stating that

> *No adult applicant for registration as an employee or non-unit-serving volunteer, who otherwise meets the requirements of the Boy Scouts of America, may be denied registration on the basis of sexual orientation.*

The resolution claims to preserve the religious rights of "bona fide religious organizations" by including the following statement:

> *The Boy Scouts of America affirms that sexual relations between adults should be moral, honorable, committed, and respectful. Adult Scout leaders should reflect these values in their personal and public lives so as to be proper role models for youth. The Boy Scouts of America affirms the right of each chartering organization to reach its own religious and moral conclusions about the specific meaning and application of these values. The Boy Scouts of America further affirms the right of each chartering organization to select adult leaders who support those conclusions in word and deed and who will best inculcate the organization's values through the Scouting program*

These policy changes create numerous legal ramifications for BSA and the churches and other religious organizations that charter local troops. Organizations that choose to maintain their chartered status with BSA are opening themselves to serious legal risks as outlined below.

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

BSA's own attorneys have acknowledged that "if the BSA were required to litigate today its defense in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), it would almost certainly lose."[2] By changing its membership policy, BSA has opened itself and the religious groups that charter troops to great risk of being sued if they refuse to accept any sexual orientation or preference. The new policy is the type of "demonstrated change" that may leave some courts ready to rule against BSA's chartered organizations. They have certainly lost the protection afforded by *Dale* to define certain behaviors and beliefs as incompatible with the mission and message of BSA and the church. Under threat of litigation directed at chartered organizations, they will have no choice but to accept all non-normative sexual preferences of potential members. The church-chartered troop will likely be sued the moment it tries to revoke the membership of the homosexual member who wears his uniform to the Gay Pride Parade, revokes or denies membership to an adult who publicly gets married to someone of the same-sex, or denies membership to the girl who believes she is actually a male. Despite BSA's assertions to the contrary, under threat of litigation, a church that chooses to maintain ties with BSA

[2] *Effect of Changes in Adult Leader Standard on Religious Chartered Organizations*, Hughes Hubbard & Reed LLP, http://scoutingnewsroom.org/wp-content/uploads/2015/07/Religious-Organization-Protections-Memo-062915.pdf, page 1

could very well lose the ability to teach biblical principles of sexual morality to its Scouts and to require them to adhere to those principles.

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

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

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

Despite the fact that BSA claims that:

> *The Boy Scouts of America will defend and indemnify to the fullest extent allowed by law any bona fide religious chartered organization against any claim or action contending that the chartered organization's good faith refusal to select a unit leader based upon the religious principles of the chartered organization is in violation of the law.*

Given the current legal and cultural environment, it can be anticipated that not only will individuals denied membership because of their sexual orientation file suit, but homosexual activists will search out and target churches with more conservative theology to file suit if denied admission to a unit that bars them based upon their sexual orientation (or expression thereof). Even if you believe the BSA's statement that it will bear the costs of defense, the disruption of having to deal with the litigation process, the adverse publicity and the likely intimidation of donors and church members will likely be detrimental to the overall mission of churches and religious organizations. Clearly, non-religious organizations (such as the American Legion, Lions Club, Elks Clubs, Homeschool Associations, non-religious schools and "parent associations") will have no legal defense to such claims.

The new membership policy creates an arbitrary distinction between youth and adult members. Under the BSA policy, not even "bona fide religious chartered organizations" can deny youth membership based upon them being homosexual (or any other sexual preference or orientation). Yet incoherently, the moment that same member turns a year older – or applies to be an adult member, BSA claims that he could be prevented by the chartered religious organization from any further participation in the BSA unit. By allowing a 17 year old homosexual to be a member and youth leader, but not an 18 year old Assistant Scoutmaster, the religious organization has created an arbitrary and untenable position that

undermines any claim of expressive association, or free exercise of religion that could otherwise be made. A homosexual Scout who is denied the opportunity to be an adult volunteer with a church-based troop simply because he turns a year older is likely to file a lawsuit alleging that such age-based classifications are arbitrary. In sum, by intentionally admitting youth of any sexual orientation or preference as Scouts, it will be argued that there is no principled basis to limit the restriction to adult volunteers – particularly since Scouting is extolled as a "youth-led" movement and that it is the youth who are supposed to be providing the leadership to younger youth, with the adult leadership merely overseeing to ensure safety and mentorship.

Historically, religious chartered organizations facing such litigation would have claimed protection under the First Amendment on the basis of: expressive association, the Establishment Clause, and the Free Exercise Clause.

It is quite likely that the "compelling interest" that the government has professed through the *Obergefell* decision, when added to religious chartered organizations having adopted and agreed to adhere to all other BSA policies – including the now re-defined Scout Oath and Law that interpret homosexuality as "morally straight" and "clean" – will override any claim of freedom of association. A Scout unit is not inherent to the religious beliefs of a church or religious organization, it is merely an activity or "program" being offered for fundamentally non-religious instructional reasons. As BSA's counsel indicates "the First Amendment, however, has its limits. . . . [t]he right to associate for expressive purposes is not absolute. Infringement on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[3]

While the U.S. Supreme Court has reaffirmed that the government is barred from interfering with the decision of a religious group to select its ministers[4], *Hosanna-Tabor* is of dubious protection given that Scout leaders - even in units chartered to religious organizations – are rarely involved in ministerial activities or religious instruction; rather they are teaching camping and other outdoor skills, not biblical principles. *Hosanna-Tabor* "called" certain teachers and bestowed upon them the title "Minister of Religion, Commissioned" after they had completed required training in theology. They taught religion classes, led daily prayers and devotional exercises, and took students to chapel services (not the typical functions or roles for Scout leaders).

The Supreme Court in *Hosanna-Tabor* found that the "ministerial exception" to the Americans with Disabilities Act depended upon the formal title given to an individual by the church, the substance reflected in that title, the individual's use of that title, and the important religious functions the individual performed for the church – the purpose being to ensure that the authority to select and control those engaged in matters "strictly ecclesiastical" are the church's alone.[5]

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[3] *Effect of Changes in Adult Leader Standard on Religious Chartered Organizations*, Hughes Hubbard & Reed LLP, http://scoutingnewsroom.org/wp-content/uploads/2015/07/Religious-Organization-Protections-Memo-062915.pdf, page 8, citing *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984)

[4] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012)

[5] *Hosanna-Tabor*, 132 S. Ct. at 709 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 119 (1952(

While some may believe that the *Obergefell* decision supports the rights of religious organizations to adhere to religious principles that do not condone same-sex marriage (and perhaps even homosexuality), it is important to note not only what Justice Kennedy stated in *Obergefell*,

> [I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.[6]

but also what he did **not** state;

> The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante*, at 27. The First Amendment guarantees, however, the freedom to "exercise" religion. Ominously, that is not a word the majority uses. . . . Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage [7]

It will be even more difficult to claim that Scouting is some kind of "ministry" of the church, based upon the adoption of BSA's program, including advancement. Given the current course the organization has taken it is only a matter of time until the BSA begins to logically incorporate a non-judgmental approach to homosexual "marriage", gender disorder, and other LGBT teachings into its program due to increased pressure from the LGBT community. For example, this will be most visible in the Family Life Merit Badge (an Eagle-required merit badge) with respect to requirements such as "prepare an outline on what a family is" (the family structure will no doubt be expanded to include references to same-sex parents) and "understanding the growing-up process and how the body changes, and making responsible decisions dealing with sex" (for example sections talking about "relationships with the opposite sex," dating, and "how to get along better with girls" will be rewritten to be accepting and not to offend). In all likelihood, it will start even earlier in the Webelos Family Member activity badge ("what is meant by family"), or the addition of other requirements. At this point, the Scouting program of a religious chartered organization will be teaching values and beliefs completely inconsistent with its stated beliefs.

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

BSA's own legal counsel has acknowledged that "there is no national determination of whether the BSA is a place of public accommodation[8]. Some jurisdictions have concluded that the BSA is a place of public

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[6] *Obergefell v. Hodges,* 576 U.S. (2015), No. 14-556 (U.S. June 26, 2015), slip op at 27

[7] *Obergefell,* Chief Justice Roberts dissent, page 28.

[8] However, in my eleven years as BSA's legal counsel there were numerous cases – both in state human rights' commissions and state and federal trial courts – where it was determined that BSA **was** a public accommodation and was therefore subject to state laws against discrimination.

accommodation. Other jurisdictions have concluded that the BSA is not a place of public accommodation."[9]

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

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

If the religious organization is receiving any kind of government grants or benefits (e.g., school or summer camp milk, lunches, cheese, use of facilities, etc.), then they will also likely fall subject to applicable public accommodation laws.

Furthermore, Scouting units with open homosexual Scouts and leaders will be using the same facilities as units of religious organizations that do not permit open or avowed homosexual adult members – this potentially includes openly gay Scout executives, District executives, Regional directors, and even the possibility of an openly gay Chief Scout executive. By this new membership policy BSA will have declared that an individual can be openly homosexual and still meet the BSA values of being "morally straight" and that homosexuality is "clean." This is also true for the staff and counselors for all BSA camps – whether operated by a local BSA council or by BSA National. It is difficult to see how a court will uphold a religious organization's claim that allowing homosexual adult leaders violates its religious beliefs, when that same

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[9] *Effect of Changes in Adult Leader Standard on Religious Chartered Organizations*, Hughes Hubbard & Reed LLP, http://scoutingnewsroom.org/wp-content/uploads/2015/07/Religious-Organization-Protections-Memo-062915.pdf, page 4.

religious organization is sending its unit to activities, events and facilities under the leadership of homosexuals.

Granting the use of facilities to the BSA – with its acceptance of homosexuality - by religious organizations could result in the loss of their legal protection to deny facility use to other "gay-friendly" or homosexual advocacy groups. Because BSA's Rules and Regulations state that in the event of the dissolution, revocation or lapse of a unit's charter the funds and property revert to the BSA, it could be argued that even **chartering** a BSA unit constitutes granting facility use to an organization (BSA) that opposes the religious beliefs and standards of the religious chartered organization.

Churches Or Other Religious Organizations That Accept BSA's New Youth Membership Policy Will Open Themselves Up to Claims of Hazing, Bullying, and Discrimination

As Justice Alito ominously warned in his dissent in the *Obergefell* (same-sex marriage) decision[10], the ruling of the U.S. Supreme Court that "the right to marry is a fundamental right . . . and couples of the same-sex may not be deprived of that right and that liberty" will "be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional-marriage laws to laws that denied equal treatment for African-Americans and women . . . . The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent."[11]

There will likely be increased claims of hazing, bullying, discrimination, assault and coercion. In today's environment, perception is greater than reality, and any BSA member who expresses their religious conviction that homosexuality is immoral will be chastised and told to be "kind" and accepting. There will be homosexual members who will make complaints – either validly or invalidly –that they are being discriminated against because of their sexual orientation. Just as Scouts and parents have filed complaints with state human rights commissions alleging that there has been discrimination based upon disabilities, there will be similar claims based on allegations of discrimination based on sexual orientation or gender self-identification.

Conclusion

With at least one BSA council publicly acclaiming that "***discrimination on the basis of sexual orientation, is contrary to the Scout Oath and Law***," and the national organization expressly affirming in the resolution that homosexual acts can be "*moral, honorable, committed and respectful*" it will be difficult for a church or religious organization to continue to be engaged with the BSA, when it does not share the same actively proclaimed statement of faith and values regarding marriage, gender and sexuality. Apart from the greater legal risk, this striking language in the resolution will likely be seen as wholly incompatible with most historic Christian theology and ethics, making it even more challenging for a church to integrate a BSA troop as part of a church's ministry offerings.

[10] *Obergefell v. Hodges,* 576 U.S. (2015), No. 14-556 (U.S. June 26, 2015), slip op

[11] *Obergefell,* J. Alito dissent, page 6

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For additional information and greater specific guidance on these matters, the Alliance for Defending Freedom (www.AllianceDefendingFreedom.org) has "A Legal Guide for Churches, Christian Schools, and Christian Ministries", which is an excellent resource and provides many real life cases stressing the importance of the potential legal pitfalls that can result from closely affiliating in ministry with organizations/associations that do not share the same actively proclaimed statement of faith and religious beliefs regarding marriage, gender and sexuality.