Curran v. Mount Diablo Council of the Boy Scouts of America

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S039738

IN THE SUPREME COURT OF CALIFORNIA

TIMOTHY CURRAN,
Plaintiff and Appellant,
v. Ct. App. 2/7 B061869

MOUNT DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Los Angeles County
Defendant and Respondent.
Super. Ct. No. C365529

Plaintiff is a former Eagle Scout whose application to become an assistant scoutmaster was rejected by defendant, a regional council of the Boy Scouts of America, after plaintiff publicly stated that he is a homosexual and publicly expressed his commitment to communicating to others his view as to the acceptability and morality of homosexuality, a view defendant maintains conflicts with its official position that homosexuality is immoral. Plaintiff unsuccessfully sought an injunction prohibiting defendant from rejecting his application.

We emphasize at the outset that the resolution of this matter does not turn on our personal views of the wisdom or morality of the actions or policies that are challenged in this case. Instead, this case presents two legal issues: First, does defendant, in acting to admit or exclude members, come within the definition of those entities -- i.e., "all business establishments of every kind whatsoever" -- covered by California's public accommodation statute (Civ. Code, § 51, commonly known as the Unruh Civil Rights Act)?[(1)] Second, if defendant's membership decisions are subject to the Unruh Civil Rights Act, would enforcement of the statute, so as to prohibit defendant from rejecting plaintiff's application for the position of assistant scoutmaster, violate defendant's (or its members') right of association under the First and Fourteenth Amendments of the federal Constitution?

After conducting a bifurcated trial on these two issues, the trial court concluded that (1) under the applicable judicial precedents interpreting the Unruh Civil Rights Act, defendant is a type of organization whose membership decisions are covered by the Act, but (2) application of the Act to prohibit defendant from rejecting plaintiff for the position of assistant scoutmaster would violate defendant's members' federal constitutional right of expressive association. Accordingly, the trial court entered judgment in favor of defendant.

On appeal, the Court of Appeal, in a 2-1 decision, affirmed the judgment rendered by the trial court, agreeing with that court's determination that application of the Unruh Civil Rights Act to preclude defendant from rejecting plaintiff's application would violate the members' federal constitutional right of association. Contrary to the conclusion reached by the trial court, however, the Court of Appeal majority also determined that defendant does not fall within the category of "business establishments" subject to the Act, and held that judgment in favor of defendant was sustainable on this ground as well. The dissenting Court of Appeal justice disagreed with the majority's conclusion on both issues and concluded that the trial court's judgment in favor of defendant should be reversed.

In a second decision -- *Randall* v. *Orange County Council* -- filed almost contemporaneously with the appellate court's decision in the present case, the Court of Appeal in another district, ruling in a case arising out of the exclusion of two 9-year-old Cub Scouts from scouting because of their refusal to affirm a belief in God, held that a regional council of the Boy Scouts is an organization whose membership decisions come within the Unruh Civil Rights Act, and affirmed a trial court judgment rendered against the council based upon a violation of the Act.

In light of the conflict in the Court of Appeal decisions on the question whether the membership decisions of local affiliates of the Boy Scouts generally are subject to the provisions of the Unruh Civil Rights Act, as well as the potential importance of the issues relating to the constitutional right of association, we granted review in both matters.

For the reasons discussed below, we conclude that, with regard to its membership policies and decisions, defendant does not fall within the category of "business establishments" as that language is used in the Unruh Civil Rights Act. As we shall explain, the Boys Scouts differs in a number of significant respects from each of the entities that previously has been found to be subject to the Act, and we conclude that neither the language of the Act, its legislative history, nor the reasoning of past California decisions applying the Act supports plaintiff's argument that the Boy Scouts properly should be considered a business establishment whose membership decisions are subject to the statute. Because our conclusion on this statutory issue is sufficient to resolve the matter, we have no occasion to address defendant's further claim that enforcement of the Act to require it to accept plaintiff's application would violate its constitutional right of association under the First and Fourteenth Amendments.

Accordingly, we conclude that the judgment of the Court of Appeal in favor of defendant should be affirmed.

I

From 1975 to 1979, when he was 14 to 18 years of age, plaintiff Timothy Curran was a member of a Boy Scout troop (Troop 37) within the jurisdiction of defendant Mt. Diablo Council of the Boy Scouts of America. During that period, plaintiff attained the rank of Eagle Scout, the highest rank a Boy Scout can reach. In addition to becoming an Eagle Scout, plaintiff received numerous other scouting honors, being selected to participate in

a troop leadership development program run by defendant, elected by his troop to two honor camping organizations, and chosen as one of only thirty-five scouts from defendant's district (which included more than thirteen thousand five hundred scouts) to attend the Boy Scouts of America National Jamboree in 1977. At that jamboree, plaintiff received practical training in journalism through work on scouting publications, and was encouraged by one of the adult leaders in the journalism program to participate again at a subsequent jamboree. Under the applicable policies of the Boy Scouts, plaintiff remained a member of Troop 37 until his 18th birthday, October 29, 1979. After that date, although plaintiff no longer was an official member of the Boy Scouts, he apparently continued to have contact with, and to participate in some of the activities of, Troop 37.

During the summer of 1980, between June 29, 1980, and July 1, 1980, the Oakland Tribune published a three-part article on gay teenagers in the San Francisco Bay Area, based upon interviews with more than twenty teenagers who openly identified themselves as gay. Plaintiff was one of the teenagers who agreed to be interviewed for the article.

The first installment of the Oakland Tribune article began with a description of how, several years earlier, when plaintiff was 16 years of age, he first had told his parents that he was gay, and reported his parents' supportive reaction to his disclosure. The article commented that "Curran was better equipped for the confrontation [with his parents] than a lot of gay teenagers. He had a gay social life apart from life at school, and he was starting to get involved with the active gay youth underground in the Bay Area. In a little more than a year, he'd be calling himself a gay youth activist. And his parents were trying hard to understand."

The third installment of the article reported that in May 1980 plaintiff had attended his high school senior prom with a male date, and quoted plaintiff's own description and explanation of the event. The article stated: "Several months earlier, Curran had decided that the prom was the place to come out to the people at school: 'The way I saw it,' Curran says, 'I wanted to go to my prom. I wanted to go with someone I liked. I didn't want to go with a girl, and I wasn't about to listen to the tyranny of the majority saying, "You're ruining our prom." It was just as much my prom as it was theirs.' [¶] 'But I had another, nobler reason. I thought it was about time some of these people opened their eyes. If you look at [Dr. Alfred] Kinsey's statistics, it would follow that there'd be a lot of other gay young men and women there who were going with dates of the opposite sex. It would be doing *them* good to see someone at the prom who was proud of being gay -- someone who didn't just say it, but who acted on it.' " (Bracketed material in quoted article.) The article also explained that "Curran had agreed beforehand, at the request of the school principal, that he and [his date] wouldn't dance slow dances, and that they wouldn't 'openly display affection.' " Finally, the article noted that Curran said that when he returned to school on the Monday following the prom, " 'it was business -- believe it or not -- as usual.' " Nothing in the article mentioned Curran's former membership in or relationship to the Boy Scouts.

Quentin Alexander, the Executive Director of defendant Mt. Diablo Council, testified that a number of persons brought the Oakland Tribune article to his attention. He stated that

after reading the article and "knowing that Tim had been active at one time in scouting," he asked another council executive to determine whether plaintiff was still active in the program. Alexander stated that when he was informed that plaintiff no longer was active, "we took no further action."

Shortly thereafter, plaintiff submitted an application to defendant council seeking authorization to attend the 1981 Boy Scouts of America National Jamboree. Alexander testified that when the council's jamboree committee initially received plaintiff's application, the council attempted to ascertain in what troop within the district plaintiff currently was registered as an active member, but could not find plaintiff's name on the membership list of either of the two troops plaintiff had listed. Alexander testified that shortly after the district sent a letter to plaintiff indicating that his application could not be approved, he (Alexander) received a telephone call from plaintiff -- who then was attending college in Los Angeles -- inquiring about the status of the application.

In that conversation, Alexander told plaintiff that he was ineligible to attend the jamboree because he no longer was a registered member of the scouts; only those adults who had been admitted as "scouters" -- adult scoutmasters or assistant scoutmasters -- were eligible to attend the national jamboree. When plaintiff responded that "in that case, I will file an application," Alexander told him: "Tim, I think we need to set an appointment to discuss this, but we can't accept that application." When plaintiff asked "is it because of my homosexuality?", Alexander responded, "Yes, it is. But we need to set an appointment when you're back here and we'll discuss it at that time." Plaintiff agreed to meet with Alexander.

The meeting was held on November 28, 1980.[(2)] At trial, both plaintiff and Alexander agreed in substance as to what had occurred at the meeting. Plaintiff testified that Alexander gave plaintiff a copy of the Oakland Tribune article and asked "if [plaintiff] espoused that lifestyle still." When plaintiff told Alexander that he did, Alexander indicated that he could not accept plaintiff's application and explained the procedure for appealing the decision. Alexander also testified that plaintiff stated at the meeting that "he specifically wanted to [be in the scouts] -- because he so firmly believed personally in a homosexual lifestyle that there was, quote, not anything wrong with it and he wanted to make sure that other kids understood that."

Thereafter, plaintiff sought review of defendant's decision by the Western Region of the Boy Scouts of America, the next higher level in the Boy Scouts hierarchy. In response, counsel for the Boy Scouts informed plaintiff of the Boy Scouts's willingness to conduct a hearing on his appeal, but that such a hearing would be pointless unless plaintiff "believes there is some misunderstanding of underlying facts." The letter stated that "[o]nly if [plaintiff] now contends, and hopes to prove, that the facts previously provided by him are untrue could a hearing be productive."

Following receipt of this letter, plaintiff filed the present action against defendant, alleging, among other matters, that defendant's rejection of his application to become an assistant scoutmaster violated the Unruh Civil Rights Act. The trial court sustained

defendant's demurrer without leave to amend and dismissed the action. In the initial appeal in this matter, the Court of Appeal reversed the judgment and concluded that, on the basis of the allegations contained in the amended complaint, plaintiff had stated a cause of action under the Unruh Civil Rights Act. (*Curran* v. *Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712 (*Curran I*).) The Court of Appeal remanded the matter for further proceedings before the trial court.

Upon remand, plaintiff filed a motion for summary judgment and, in the alternative, for summary adjudication of issues under the then-applicable provisions of Code of Civil Procedure section 437c, subdivision (f). The superior court denied summary judgment but ruled that a number of issues were without substantial controversy, including that "[p]laintiff was refused admission by [d]efendant as Adult Member or 'Scouter,' because he was a homosexual," that "[t]he policy and practice of [d]efendant is that no homosexual may be an adult member of the Boy Scouts of America," that "[p]laintiff's homosexuality was the only reason for [d]efendant's refusal to admit him as an Adult Member," and that "[d]efendant will not admit any homosexual into membership regardless of such person's qualifications and will dismiss homosexuals from membership if it becomes aware of the member's homosexuality."

Due to a series of events, including a stay of the action pending the United States Supreme Court's consideration and determination of related issues in *Bd. of Dirs. of Rotary Int'l* v. *Rotary Club* (1987) 481 U.S. 547 (*Rotary Club*), the trial in this matter did not begin until September 1990.[(3)] At that time, pursuant to a stipulation of the parties and court order, the trial was bifurcated and the trial court conducted the first phase of the trial, which was limited to the issue whether defendant is a type of organization -- "all business establishments of every kind whatsoever" -- covered by the Unruh Civil Rights Act.

At the outset of the first phase of the trial, the trial court rejected plaintiff's contention that under the law of the case doctrine, the Court of Appeal's prior decision in *Curran I*, *supra*, 147 Cal.App.3d 712, conclusively established that defendant was a business establishment for purposes of the Act; the trial court permitted both parties to introduce evidence and present argument with regard to that issue. On the basis of the evidence presented, and the existing case law interpreting the term "business establishment" as used in the Unruh Civil Rights Act, however, the trial court nonetheless concluded that defendant is a business establishment for purposes of the Act and thus falls within the "regulatory ambit" of the Act.

In reaching this conclusion, the court relied upon a variety of circumstances relating both to the Boy Scouts in general and to the specific attributes and operations of defendant Mt. Diablo Council. The evidence established that the activities and objectives of the Boy Scouts are primarily educational (in the broadest sense) and recreational. In this regard, the Official Scoutmaster Handbook states that "[e]very Boy Scout activity and design strives toward the three aims of Boy Scouting: (1) building character, (2) fostering citizenship, and (3) developing mental, moral, and physical fitness." Further, the evidence established that membership in the Boy Scouts is governed by the policies of the national

Boy Scouts of America, and by design is inclusive rather than exclusive. Any boy between the ages of 11 and 18 years who expresses his willingness to abide by the Boy Scout Oath can become a Boy Scout upon making application and paying a nominal fee and annual dues. Scouts and scouters are actively recruited, and membership is open to all regardless of race or ethnic background. A Boy Scouts of America publication explicitly states that "[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy. The National Council and Executive Board [of the Boy Scouts of America] have always taken the position that Scouting should be made available for all boys who meet entrance age requirements."

With respect to defendant Mt. Diablo Council, the trial court found that the council is a California nonprofit corporation chartered by the National Council of the Boy Scouts of America to oversee, facilitate, and administer the provision of an effective scouting program within the council's geographic area. There are approximately 13,500 scouts (in approximately 145 troops and packs) and 5,000 adult members within the jurisdiction of the council. Defendant owns and maintains a large physical plant, which includes a central administrative building and four camps, and also maintains and operates a summer camp facility leased from the National Forest Service.[(4)] It has a paid staff of 22 full-time, year-round employees (11 professional and 11 clerical and other nonprofessional) and 30 summer employees, and an annual budget in excess of $1.7 million. It operates a small retail Boy Scout shop, sells T-shirts and patches bearing its name, and participates in the selection and sale of Boy Scouts of America uniforms, equipment, publications, and other official scouting paraphernalia.

The trial court also found that the council "engages in regular fund-raising activities, such as the annual Scout-A-Rama, the annual Sports Breakfast, and special events such as golf tournaments and auctions, to which the general public is invited," and that it publicizes these events in the local media. Further, the council interacts extensively with the local community, recruiting and chartering the organizations that sponsor local troops from local churches, labor unions, and civic organizations such as the Rotary Club, and recruiting members for its executive board from among the officers or management of prominent local businesses. Finally, the court noted that scouts themselves also are highly visible in the community, because the organization encourages scouts to wear their scout uniforms when they are participating in various public service projects and fund-raising activities within the community.

In the course of its decision in the first phase of the trial, the trial court explicitly acknowledged that "Mt. Diablo Council differs in significant respects from the other nonprofit organizations that have been held to constitute 'business establishments' under the Unruh [Civil Rights] Act," noting that defendant "has no substantial, or even significant, business purpose" and that '[t]he goals of the scouting program are predominantly expressive." Further, the trial court recognized that "[t]he benefits which the scouts and scouters receive from participation in the program are overwhelmingly personal and non-economic" and that "scouting activities take place principally in small, intimate, primary groups where the relationships among the members can be characterized as continuous, close and personal." Finally, the court observed that

"[u]nlike the [Boys'] Club in *Isbister* [v. *Boys' Club of Santa Cruz, Inc.*, *supra*, 40 Cal.3d 72], Mt. Diablo Council is not a single purpose organization operating a traditional 'public accommodation," explaining that although the Council does own recreational facilities, "their operation is not the Council's 'principal activity and reason for existence' as the [Boys'] Club's provision of gym and pool facilities was" and the facilities "are not used on a casual, drop-in basis as . . . the facilities in *Isbister* . . . were."

Although the trial court thus recognized that "[t]he circumstances of this case do not fall squarely within the fact patterns of the cases that have been decided to date," the court nonetheless concluded that "[d]efendant's public orientation and prominence in the community rightfully place it within the regulatory ambit of the Unruh [Civil Rights] Act. The public nature of the context in which discrimination occurs is a factor of overriding importance in assessing the interests served by regulation under the Act. The psychological injury to the individual is greater the more public the place or the circumstances of the discrimination. And Society's interest in preventing discrimination increases as the context in which it is practiced carries with it a greater suggestion of social tolerance or even acceptance. [Citation.] As plaintiff eloquently points out here:

> 'Finding that [d]efendant is not a business establishment under Unruh would endorse a 'right' to discriminate on the part of an organization serving a unique position in our society. The Boy Scouts stands for what is best in American values. . . . To rule that no legal principle requires that it not discriminate on the basis of race, religion, ancestry, national origin, sex, physical disability, sexual orientation, or any other arbitrary basis would send a stark message about what the ideals of this country really mean, a message that is not true.' "

Finally, although acknowledging that "Mt. Diablo Council unquestionably has legitimate interests, as an expressive association, in being able to define its own mission and to adopt membership policies which enable it to achieve that mission," the court noted that "[d]efendant's position [in the first phase of the trial], that it should not be subject to regulation under the Unruh [Civil Rights] Act because it is an expressive association, would mean that it could discriminate on any grounds and for any reason. A boy who was excluded from participating in the Scouts because of his race or religion, or because he was a homosexual, would have no opportunity to challenge the basis for his exclusion. Given the state's interest in eradicating invidious discrimination, the court concludes that it is appropriate that an organization of the size, non-selectivity, and visibility of Mt. Diablo Council be put to the burden of establishing the required nexus between its exclusionary policies and its expressive purpose."

Having concluded in the first phase of the trial that defendant properly could and should be considered a business establishment for purposes of the Unruh Civil Rights Act, the court went forward with the second phase of the bifurcated trial, which, by stipulation of the parties, was directed to an issue raised by defendant as an "affirmative defense," namely whether application of the Unruh Civil Rights Act -- so as to preclude defendant from rejecting plaintiff as a scout leader -- would violate its members' constitutional

rights of intimate or expressive association. After setting forth the basic facts surrounding defendant's rejection of plaintiff's application (which we have summarized above), and observing that "*t is undisputed that Mr. Curran's request to become a Scouter was rejected on the basis of the written policy which Mt. Diablo Council follows of excluding 'avowed' or 'known' homosexuals from adult leadership positions,*"[(5)] *the court proceeded to determine whether an order prohibiting defendant from rejecting plaintiff's application would violate the members' constitutional right of either intimate or expressive association.*

With respect to the right of intimate association, the trial court concluded that in light of the findings it had made in the first phase with regard to "the organization's size, the non-selectivity of its membership, and its public orientation and prominence within the community," defendant had failed to establish a violation of its members' right to intimate association. With respect to the right of expressive association, however, the court concluded that defendant had made the required showing to establish that application of the Unruh Civil Rights Act to prohibit defendant from excluding plaintiff as an adult leader would violate the members' right to expressive association.

In reaching its conclusion with regard to the right of expressive association, the trial court first determined that the activities in which the Boy Scouts is engaged, "and upon which application of the Unruh [Civil Rights] Act would impact," are "overwhelmingly expressive." The court noted that "[a]lthough Scouting focuses on camping and outdoor skills, this is the means to an end." Quoting from Boy Scout publications, the court found that the organization's mission is "to serve others by helping to instill values in young people and in other ways prepare them to make ethical choices over their lifetime in achieving their full potential." Although recognizing that "[t]he fact . . . an organization is engaged in expressive activities does not . . . necessarily mean that any exclusionary policy it might adopt is protected by the first amendment right to expressive association" and that "[a] nexus must be shown between the basis for the exclusion and the belief system which defines the organization," the trial court went on to conclude that the required nexus was present here.

The court found in this regard that the values the Boy Scouts seeks to instill are grounded in the Boy Scout Oath and Law, that sexual morality is addressed in the Boy Scout Oath and Law under the rubric of "morally straight" and "clean,"[(6)] and, finally, that although "[n]ot a great deal is explicitly spelled out in the Scout literature . . . regarding sexuality in general or homosexuality in particular," the evidence introduced at trial demonstrated "that the Boy Scouts of America as an organization has taken a consistent position that homosexuality is immoral and incompatible with the Boy Scout Oath and Law" and that "this is the view that is communicated whenever the issue comes up." In reaching this latter determination, the court relied on various policy statements that had been issued on the subject by the national organization,[(7)] and on the testimony of numerous national and local Boy Scout leaders who testified to the orgbid.) Furthermore, our decision in *Isbister* v. *Boys' Club of Santa Cruz, Inc., supra,* 40 Cal.3d 72, suggested the act would apply to "broad-based nonprofit community service organizations" (*id.*, at p. 79) similar

to the Boy Scouts, even though the court expressly reserved judgment on the scouts, themselves (*id.*, at p. 84, fn. 14).

It was these decisions that led the trial court to conclude the Boy Scouts is a "business establishment[]" subject to the act. While the court today rejects that conclusion, it was not irrational or irreconcilable with precedent: Our prior decisions pointed to such a result. Nevertheless, our task in the first instance is, as always, to construe the statute and, if possible, to implement the intent of the Legislature. Because it seems highly unlikely the Legislature intended the act to apply to the scouts, I concur in the judgment. I write separately to point out that the court's rationale for excluding the scouts from the act introduces three new elements into our Unruh Civil Rights Act jurisprudence.

First, the court suggests an organization can be broken down into its constituent functions for the purpose of deciding whether the act applies. Thus, the majority concludes that "*with regard to its membership policies and decisions*," defendant is not a business establishment within the meaning of the act (maj. opn., *ante*, at p. 3, italics added; see also *id.*, at pp. 20-22, 36, 39-40), while strongly disavowing any implication the act might permit discrimination in the Boy Scout's retail stores (*id.*, at p. 43). This piecemeal mode of analysis, however, seems at odds with the language of the act, which refers simply to "business establishments" (Civ. Code, § 51), not to the "business *functions* of establishments." This approach also promises further controversy. By implying the act will now be applied on a function-by-function basis, rather than to whole establishments" (*ibid.*), the court multiplies the number of abstract objects to which the act in theory might or might not apply and, thus, the occasions for litigation. Under this state of affairs, few organizations will have an incentive *not* to litigate their status under the act.

Second, the court reasons that an organization may sell goods to the general public without becoming a "business establishment[]," so long as it does not sell the "primary incidents and benefits of membership in the organization." (Maj. opn., *ante*, at p. 44.) In support, the court cites *Warfield* v. *Peninsula Golf & Country Club*, *supra*, 10 Cal.4th 594, but in *Warfield* we employed no such distinction. Indeed, to have drawn such a distinction would not have supported the outcome in that case. In *Warfield*, the principal "incident of membership" in the country club was the right to participate freely in its social activities -- something the club did not sell to the general public.

Third, the court seems to imply that an organization may not qualify as a "business establishment[]" in part because it is not a public accommodation. (See maj. opn., *ante*, at pp. 38-39.) The implication arises from the manner in which the court distinguishes *Isbister* v. *Boys' Club of Santa Cruz, Inc.*, *supra*, 40 Cal.3d 72. In *Isbister*, the court essentially held that all public accommodations were "business establishments" under the act. The court based this conclusion on the assumption the act was intended to apply more broadly than its statutory predecessor, which had expressly applied to " 'places of public accommodation.' " (40 Cal.3d at p. 83.) *Isbister*'s conclusion can fairly be criticized on the ground that the term used in the present act -- "business establishment[]" -- neither refers to nor obviously includes all public accommodations. But assuming for the sake of argument *Isbister* correctly held all public accommodations are business

establishments, it still does not follow that *the failure* of an organization to be "the functional equivalent of a traditional place of public accommodation" (maj. opn., p. 38) has a negative bearing on the act's applicability. To quote *Isbister*, the act "was intended *at a minimum* to continue the coverage of 'public accommodations.' " (40 Cal.3d at p. 83, italics added.)

After three decades of decisions, including today's, addressing the question whether particular entities are "business establishments" subject to the act,[(33)] a competent attorney in many foreseeable cases still would not be able to advise a client with a reasonable degree of certainty whether the act applies. In large part this is a result of the 1959 Legislature's failure to define the term. When legislative consensus fails on such a fundamental question as the reach of an antidiscrimination law, however, to look to courts for a clear solution to the underlying problem may be unrealistic. The exercise of supplying definitions for undefined statutory terms is not a comfortable one for judges, who generally would rather apply law than make it. Forced to supply definitions, cautious judges tend to prefer definitions more vague than precise, because the former tend to be more difficult to refute. The more precise a definition, the more vulnerable it is to the argument that, "if the Legislature had meant *that*, it could easily have said so." The most cautious way of all for courts to proceed in supplying meaning to a statutory term is to offer, in place of a definition, an "approach," consisting of a universe of considerations to be weighed and balanced. So long as the outcomes of cases decided in this manner do not seem inherently implausible, the Legislature has little incentive to take on the politically difficult task of clarifying an important but controversial statute. This way of proceeding, however, is also the most productive of litigation and the least helpful to those who must attempt to comply with the law. Regrettably, this is the path our decisions seem likely to follow in the absence of clearer statutory guidance.

WERDEGAR, J.

CONCURRING OPINION BY brown, j.

I concur in the judgment.

In my view, however, the majority's analysis cannot sustain the result. Like Justice Werdegar, I find that our Unruh Civil Rights Act jurisprudence, including today's decision, fails to provide useful guidance in determining the act's coverage and that predictability in its application remains elusive. To put it bluntly, the law is a mess. In a state as marvelously diverse as California, the rules regarding discrimination should not develop ad hoc. Nevertheless, our prior decisions have almost universally failed to formulate a coherent and comprehensive interpretation of "business establishment." This vice did not become pernicious until recently because the results appeared consistent with legislative intent to prohibit discrimination by those engaged in commercial activity

regardless of its form. (See, e.g., *Burks* v. *Poppy Construction Co.* (1962) 57 Cal.2d 463 [Unruh Civil Rights Act applies to sale of real property and notwithstanding lack of fixed place of business].) Beginning at least with *Isbister* v. *Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, however, the lack of analytical substance began to take its toll, and the law is now desperately in need of critical reexamination.

In his concurrence, Justice Mosk has successfully undertaken this task, and I fully endorse his statutory analysis and the conclusions which flow from it. In discussing the likely scope of "business establishment," Professor Horowitz noted the Legislature had failed to define this pivotal phrase. Nevertheless, considering the language contained in predecessor public accommodations statutes replaced by the Unruh Civil Rights Act, the choice to declare the principle of nondiscrimination "in terms of 'business' relationships seems to indicate . . . that the principle should be restricted to a broad category of relationships in which the 'establishment' offers its facilities for compensation, and in which the relationship with the patron is relatively noncontinuous, and in which personal and social aspects of the relationships are relatively insignificant." (Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute -- A Problem in Statutory Application* (1960) 33 So.Cal.L.Rev. 260, 288-289.)

Given the Legislature's clear focus on discrimination arising in the context of commercial activities, Horowitz concluded "[m]embership clubs or organizations, *e.g.*, country clubs owned by and operated for the benefit of the members, [which] should be held not to fall within the scope of the statutory principle, because the relationship between discriminator and discriminatee is essentially continuous, personal, and social." (33 So.Cal.L.Rev. at pp. 289-290, fn. omitted.) Likewise, coverage of nonprofit organizations would turn on whether the relationship between the establishment and other persons were "of a gratuitous, continuous, personal, and social sort . . . ." (*Id*. at p. 290.)

Justice Mosk's definition of business establishment faithfully distills the valuable insights of Professor Horowitz on which this court has frequently relied and provides a comprehensive, and comprehensible, standard. Doubtless, his conclusions require the overruling of *Isbister* v. *Boys' Club of Santa Cruz, Inc.*, *supra*, 40 Cal.3d 72, and *Warfield* v. *Peninsula Golf & Country Club* (1995) 10 Cal.4th 594. That necessity should not call into question the soundness of the standard; it simply reflects how far our jurisprudence has strayed from the plain meaning of the statute and apparent legislative intent.

This explication of the Unruh Act also properly recognizes a distinction between an organization's formulation and implementation of membership policies and its commercial activities. Such recognition is not only consistent with the statutory language and legislative intent but, for the reasons cogently expressed by Justice Kennard in her concurrence, imperative when those policies implicate expressive association and free speech. Any definition of business establishment that failed to make such an accommodation would raise serious constitutional questions as to application of the act.

BROWN, J.

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Endnotes

1. [1] For convenience and to minimize repetition, we hereafter refer to this statute as either the Unruh Civil Rights Act or simply the Act.

2. In addition to Alexander and plaintiff, the meeting was attended by plaintiff's parents, plaintiff's former scoutmaster, and the president of the Mt. Diablo Council.

3. After the stay pending the decision in *Rotary Club, supra*, 481 U.S. 547, was lifted, the initial judge to whom the case was assigned retired, and thereafter the second judge to whom it was assigned was elevated to the Court of Appeal. The case then was reassigned to the judge before whom the case ultimately was tried.

4. Although the national Boy Scouts of America is a federal nonprofit corporation established by Congress (see 36 U.S.C. §§ 21-29) and the records in the cases before us indicate that local affiliates frequently lease or are otherwise permitted to use publicly owned property for scouting activities, there is no claim before us that defendant's relationship with governmental entities is such as to render its action -- in rejecting plaintiff's application for the position of assistant scoutmaster -- "state action" for constitutional purposes. Accordingly, we have no occasion to address that issue. Similarly, there is no claim that the federal charter of the Boy Scouts of America exempts that organization, or its local affiliates, from the requirements imposed by state law upon organizations that operate within a state. (Cf. *Isbister* v. *Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 90, fn. 21.)

5. Although the trial court referred to the policy of excluding "avowed" or "known" homosexuals from adult leadership positions, the court explained that "[w]hile the court and counsel have loosely referred to the validity of this policy, such is an imprecise formulation of the issue before the court. Plaintiff is not suing for injunctive or declaratory relief with respect to this policy. Rather, he is now alleging only a violation of the Unruh [Civil Rights] Act, and the issue in Phase II is whether application of the Unruh [Civil Rights] Act to preclude the defendant from excluding the plaintiff as a Scoutmaster, under the circumstances of this case, violates its members' constitutional rights."

The "written policy" to which the trial court referred was apparently a 1983 statement by the Legal Counsel of the Boy Scouts of America that declared: "Avowed or known homosexuals are not permitted to register in the Boy Scouts of America. Membership in the organization is a privilege, not a right, and the Boy Scouts of America has determined that homosexuality and Scouting are not compatible. No units will be chartered to known homosexual groups or individuals."

6. The Boy Scout Oath states: "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight." The Boy Scout Law provides that a scout is "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent."

7. In addition to the 1983 statement of the legal counsel quoted above (*ante*, pp. 13-14, fn. 5), defendant introduced a memorandum written in 1978 by the national Boy Scouts of America setting forth -- in question and answer form -- the official position of the Boy Scouts relating to homosexuality and scouting. The document states in relevant part: "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader? A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership. [¶] Q. May an individual who openly declares himself to be a homosexual be a registered unit member? A. No. As the Boy Scouts of America is a private, membership organization, participation in the program is a privilege and not a right. We do not feel that membership of such individuals is in the best interests of Scouting."

8. At trial, the national Director of Public Relations for the Boy Scouts of America testified that it has been understood clearly since the incorporation of the Boy Scouts early in this century that homosexual conduct is immoral and inconsistent with the scout oath. He and other witnesses testified that the terms "morally straight" and "clean" have been in use in the Scout Oath and Law from the early 1900's when it would have been clearly understood that homosexual conduct was considered immoral (and illegal), and that the words continue to be interpreted by the Boy Scouts of America as rendering homosexual conduct unacceptable today. In addition, several witnesses testified that adult leaders routinely are trained to inform boys that homosexuality is not "morally straight."

9. A number of witnesses called by plaintiff testified that they had spent years in plaintiff's Boy Scout troop as members or as scoutmasters and never had been informed that homosexual conduct was not "morally straight" or "clean," and that they were unaware this was part of the Boy Scouts' message. Plaintiff also elicited evidence acknowledging that although scouting literature is replete with moral and ethical pronouncements, none of the written material that is distributed to the Boy Scouts themselves (as contrasted with the training handbook provided to scout leaders) speaks specifically to the issue of homosexuality or homosexual conduct. Finally, plaintiff presented written materials, published by the Boy Scouts, indicating that scoutmasters are not expected to instruct scouts in a formal manner on sexual matters or family life -- although the same text noted that scoutmasters should answer questions or provide advice on these topics if requested.

10. Preliminarily, we note that although neither of the parties has raised the point, the court has received a letter expressing concern that the court may have a potential conflict of interest or at least the appearance of such a conflict in this case and in *Randall* v. *Orange County Council* (____, 1998, S039161) ___ Cal.4th ___, as a result of the court's adoption of the Code of Judicial Ethics, effective January 15, 1996, which contains a provision barring a judge from holding membership in any organization that practices invidious discrimination on the basis of "race, sex, religion, national origin, or sexual orientation," and also contains an exception for membership in a "nonprofit youth organization." (See Cal. Code Jud. Ethics, canon 2C.) For several reasons, we believe it is

clear that no conflict of interest or reasonable appearance of such a conflict exists. First, the issue to which canon 2C is directed (whether a judge should be precluded as an ethical matter from participating in a given organization) is totally distinct from the issues presented in these cases (whether a specific statute [the Unruh Civil Rights Act] applies to the membership decisions of the Boy Scouts, and, if applicable, whether the Act constitutionally may be applied to prohibit the organization from excluding a would-be adult or youth member under particular circumstances). Second, even if the court's action in adopting the code were to have reflected a legal conclusion on an issue relevant to these proceedings, the adoption of the code still would not give rise to a conflict of interest that would affect the justices' participation in these cases. Courts routinely are called upon to apply, modify, or reconsider prior legal determinations in subsequent litigation, and a judge's participation in a prior decision involving a related legal issue has not been viewed as creating a conflict of interest or providing a basis for recusal in the later proceeding. (See *Liteky* v. *United States* (1994) 510 U.S. 540, 551, 555-556; see generally Shaman et al., Judicial Conduct and Ethics (2d ed. 1995) § 4.04, pp. 101-102.) Accordingly, the court's adoption of the Code of Judicial Ethics provides no basis for questioning the propriety of the justices' participation in these cases.

11. Thus, for example, although *Curran I* noted that the complaint alleged that "membership in the Boy Scouts of America is of considerable financial value to its members in admission to institutions of higher learning, in employment, and in advancement in the business world" (147 Cal.App.3d at p. 718), from the evidence presented at trial the trial court found that participation in scouting does not enhance "a Boy Scout's chances of getting into the college of his choice or of advancing in his chosen career to a greater extent than participation in any activity that can be included in a resume would. The evidence does not establish that boys join the scouts for any kind of financial reward."

12. In a related argument, plaintiff, relying upon the Legislature's failure to enact a number of bills that were introduced to overrule the Court of Appeal's decision in *Curran I*, *supra*, 147 Cal.App.3d 712, contends that such legislative inaction should be interpreted as demonstrating the Legislature's acquiesence in the conclusion that the Unruh Civil Rights Act applies to the membership decisions of the Boy Scouts. We cannot agree. As we have seen, the decision in *Curran I* was simply a ruling on a pleading issue and did not constitute a holding that the membership decisions of the Boy Scouts are subject to the Unruh Civil Rights Act. Further, this court's decision in *Isbister*, *supra*, 40 Cal.3d 72, made it clear that this court had reserved judgment on the question of the applicability of the Act to the membership decisions of the Boy Scouts. Under these circumstances, the Legislature's failure to enact the proposed bills cited by plaintiff cannot properly be viewed as a legislative resolution of the issue now before us.

13. The footnote in *Warfield* appearing at this point states: "The complete progression of the bill through the Legislature is set forth in detail in Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute -- A Problem in Statutory Application* (1960) 33 So.Cal.L.Rev. 260, 265-270.)"

Although in *Warfield* we did not describe in detail all of the numerous amendments that were proposed and later deleted as part of the legislative drafting process, we note that at one point the bill was amended specifically to apply to "the charitable benefits administered or offered by any organization or institution receiving any tax advantage or exemption . . ." but that this language was deleted in a later stage of the drafting process. (See Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute -- A Problem in Statutory Application* (1960) 33 So.Cal.L.Rev. 260, 265-270 & fns. 33, 34, 35, & 36.)

14. The court in *O'Connor* stated in this regard: "Contrary to the association's attempt to characterize itself as but an organization that 'mows lawns' for owners, the association in reality has a far broader and more businesslike purpose. The association, through a board of directors, is charged with employing a professional property management firm, with obtaining insurance for the benefit of all owners and with maintaining and repairing all common areas and facilities of the 629-unit project. It is also charged with establishing and collecting assessments from all owners to pay for its undertakings and with adopting and enforcing rules and regulations for the common good. In brief, the association performs all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders. A theme running throughout the description of the association's powers and duties is that its overall function is to protect and enhance the project's economic value." (33 Cal.3d at p. 796.)

15. A question has been raised as to which level of the organizational hierarchy of the Boy Scouts -- the troop, the regional council, or the national Boy Scouts of America -- is the appropriate focus in determining whether defendant is a business establishment whose membership decisions are subject to the Unruh Civil Rights Act. There is no need to resolve that question in this case, because even if we assume that the level most favorable to plaintiff's position -- the national Boy Scouts of America -- is the appropriate point of reference, we conclude, for the reasons discussed below, that the organization's membership decisions do not fall within the reach of the Act.

16. See, e.g., *Rotary Club of Duarte* v. *Board of Directors* (1986) 178 Cal.App.3d 1035 nonprofit civic association of business and professional men held to be a business establishment, where one of the primary purposes for which the organization was founded was to promote the business interests of its members and where the evidence disclosed that business concerns remain a principal motivation for joining the organization); *Pines* v. *Tomson* (1964) 160 Cal.App.3d 370 (nonprofit religious corporation that publishes a business telephone directory held to be a business establishment).

17. Although we have found no case in which a plaintiff claimed that an organization with the attributes of the Boy Scouts fell within the reach of California's earlier public accommodation statute, in light of the rather restrictive interpretation of the prior statute in the series of Court of Appeal decisions that led to the enactment of the Unruh Civil Rights Act in 1959 (see *Warfield*, *supra*, 10 Cal.4th 594, 608 [citing cases]) we believe it

is reasonable to conclude that the earlier statute would not have been interpreted to apply to the Boy Scouts.

18. See *Welch* v. *Boy Scouts of America* (7th Cir. 1993) 993 F.2d 1267 [Boy Scouts is not a "place of public accommodation or amusement" under title II of the federal Civil Rights Act of 1964]; *Seabourn v. Coronado Area Council* (1995) 257 Kan. 178 [891 P.2d 385] [Boy Scouts not subject to state public accommodation law]; *Schwenk* v. *Boy Scouts of America* (Or. 1976) 551 P.3d 465 [same]; but cf. *Quinnipiac Coun.* v. *Com'n on Human Rights* (Conn. 1987) 528 A.2d 352 [Boy Scouts falls within scope of state public accommodation law, but denial of opportunity to serve as scoutmaster did not deprive plaintiff of an "accommodation" as that term is used in the applicable statute]; *Dale* v. *Boy Scouts of America etc.* (N.J.Super.Ct.App.Div., Mar. 2, 1998, A-2427-95T3) 1998 WL 84577 [Boy Scouts is a place of public accommodation under state public accommodation statute].

19. A number of cases decided under the public accommodation statutes of other states support this conclusion. (See, e.g., *Batavia Lodge No. 196* v. *N.Y. State Div. of Human Rights* (1974) 35 N.Y.2d 143 [316 N.E.2d 318, 359 N.Y.S.2d 25] [private lodge, not otherwise subject to the public accommodation statute, violated public accommodation statute by discriminatorily refusing bar service to African-American guests who were attending a fashion show at the lodge]; *Commonwealth, Hum. R. Com'n* v. *Local Ord. of Moose* (1972) 448 Pa. 451 [294 A.2d 594] [public accommodation law's prohibition on racial discrimination applies to private club's policy with regard to the service of guests in its dining room].)

20. Although defendant has not suggested in the briefs filed in this court that the decisions in either *Isbister* or *Warfield* should be reconsidered, Justice Mosk's and Justice Brown's concurring opinions argue that both of these decisions were wrongly decided and should be overruled. As we have explained in text, the present case is clearly distinguishable from the circumstances presented in either *Isbister* or *Warfield*, and thus there is no need to revisit those cases in order to conclude that the membership decisions of the Boy Scouts are not subject to the Unruh Civil Rights Act.

21. The purpose of section 51 in its original form cannot be deemed to have been merely to codify the "common-law doctrine," annunciated in decisions such as *Willis v. McMahon* (1891) 89 Cal. 156, and *Turner v. N.B. & M.R.R.* (1868) 34 Cal. 594, that "innkeepers and common carriers had a duty to extend their facilities to all members of the public in the absence of some reasonable justification for not doing so." (Horowitz, *supra*, 33 So.Cal.L.Rev. at p. 276, fns. omitted.) Such doctrine found its reason, as to innkeepers, in the "need for protection of travelers against brigands and for shelter," and, as to common carriers, in the "need of the public for the facilities of a carrier, analogizing the carrier to an innkeeper, and, in some situations, [in] the monopoly status of a common carrier . . . ." (*Ibid*.) The provision reached beyond innkeepers and common carriers to "places of public accommodation," such as skating rinks, that were not within the scope of the doctrine and did not implicate its reasons. (*Id*. at p. 277.) Moreover, it did not list common carriers until 1919, and then only under the rubric of "public conveyances."

22. See Klein, *The California Equal Rights Statutes in Practice* (1958) 10 Stan.L.Rev. 253, 255 (stating that section 51 in its original form was "concerned . . . with the protection of equal rights with respect to facilities and services offered to the public by *private* persons" (italics added)).

23. See Colley, *Civil Actions For Damages Arising out of Violations of Civil Rights* (1965) 17 Hastings L.J. 189, 197 (implying that the phrase "business establishments" in section 51 means "commercial activit[ies]").

24. Notwithstanding the "eliminat[ion]" from section 51 in its present form of "reference[] to prohibition of discrimination . . . with respect to the purchase of real property" that appeared in certain unenacted versions of Assembly Bill No. 594. (Horowitz, *supra*, 33 So.Cal.L.Rev. at pp. 266267.)

25. But see *O'Connor* v. *Village Green Owners Assn.*, *supra*, 33 Cal.3d at pages 800804 (dis. opn. of Mosk, J.).

26. See footnote 5, *ante*.

27. So I believe now. (But see *Warfield* v. *Peninsula Golf & Country Club*, *supra*, 10 Cal.4th at pp. 630632 (conc. opn. of Mosk, J.).)

28. See footnote 7, *ante*.

29. In order to prevent subterfuge, we would doubtless have to hold that the Boy Scouts perated as a "business establishment" in the formulating and implementing of membership policies as to members or potential members if its sole purpose or effect was to limit the class of persons to whom it would provide goods or services, nongratuitously, for a price or fee, in the course of relatively noncontinuous, nonpersonal, and nonsocial dealings. (Cf. *Daniel* v. *Paul* (1969) 395 U.S. 298, 301302 [holding to such effect as to a "club" under the provisions for "place[s] of public accommodation" subject to title II of the Civil Rights Act of 1964 (78 Stat. 243, 42 U.S.C. § 2000a et seq.)].) We could make no such holding here: the condition is not satisfied.

30. And state broadly, and erroneously, in dictum that section 51 "clearly applies to any type of for-profit commercial enterprise, and to nonprofit entities . . . whose purpose is to serve the business or economic interests of its owners or members . . . ." (Maj. opn., *ante*, at p. 37.) As explained, the provision applies only to the extent that any such "enterprise" or "entity" occupies an area of activity encompassing proprietor-patron relationships.

31. Appearing in *Isbister* as amicus curiae, the Boy Scouts evidently did not consider itself different from the Boys' Club of Santa Cruz. Neither did the majority therein, notwithstanding their assertion that they "reserve[d] judgment" on the issue. (*Isbister* v. *Boys' Club of Santa Cruz, Inc.*, *supra*, 40 Cal.3d at p. 81, fn. 8.)

32. I am not persuaded otherwise by a recent decision of the Appellate Division of the New Jersey Superior Court. In that case, a two-judge majority held that the First Amendment poses no impediment to enforcement of New Jersey's public accommodation statute to preclude the Boy Scouts from excluding a 20-year-old university student who had publicly avowed his homosexuality and served as co-president of the Lesbian/Gay Alliance on his college campus. (*Dale* v. *Boy Scouts of America* (N.J.Super.Ct.App.Div., Mar. 2, 1998, A-2427-95T3) ___ A.2d ___ [1998 WL 84577].)

Among the *Dale* majority's reasons for its holding was its rejection of the proposition "that the [Boy Scouts of America] has a constitutional privilege of excluding a gay person when the sole basis for the exclusion is the gay's exercise of his own First Amendment right to speak honestly about himself." (*Dale* v. *Boy Scouts of America*, *supra*, ___ A.2d ___, ___.) But when an individual seeks to use state power to force a private organization to accept that individual as a member, and the individual's views are diametrically opposed to those of the organization, the First Amendment rights at issue are those of the organization and its members, not those of the applicant. Accordingly, the critical issue, which the *Dale* majority never considered, was this: Whether granting the plaintiff the relief he sought would violate the First Amendment right of the Boy Scouts, by means of its policy and membership decisions, to choose the content of the organization's own message. (See *id*. at p. ___, conc. and dis. opn. of Landau, J.A.D. [concluding that requiring the Boy Scouts to grant the plaintiff a leadership position violated the organization's right of expressive association: "If their perception of the immorality of homosexuality is in fact an important part of the Boy Scouts' institutional message to young Scouts, what Jim Dale openly professes and exemplifies clearly flies in the face of that view. When we force the Boy Scouts to permit him to serve as a volunteer leader, we force them equally to endorse his symbolic, if not openly articulated, message."].)

33. See *Warfield* v. *Peninsula Golf & Country Club*, *supra*, 10 Cal.4th 594 (country club a "business establishment"); *Isbister* v. *Boys' Club of Santa Cruz, Inc.*, *supra*, 40 Cal.3d 72 (nonprofit recreational facility a "business establishment"); *O'Connor* v. *Village Green Owners Assn.*, *supra*, 33 Cal.3d 790 (homeowners' association a "business establishment"); *Burks* v. *Poppy Construction Co.*, *supra*, 57 Cal.2d 463 (real estate seller a "business establishment"). See also *Harris* v. *Mothers Against Drunk Driving* (1995) 46 Cal.App.4th 833 (reversing summary judgment for expressive organization and finding a question of fact as to whether it is a "business establishment"); *Rotary Club of Duarte* v. *Board of Directors* (1986) 178 Cal.App.3d 1035 (civic organization a "business establishment"); *Curran* v. *Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712 (rejecting on demurrer the argument that the Boy Scouts are not a "business establishment"); *Pines* v. *Tomson* (1984) 160 Cal.App.3d 370 (nonprofit religious publisher of Christian Yellow Pages a business establishment).