1996

Parading the First Amendment Through the Streets of South Boston

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"And that is a story that NO ONE can beat
When I say that I saw it on Mulberry Street!"[1]

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† I would like to gratefully acknowledge the help of others in putting this Article together. First, Chester Darling, the intrepid lead counsel for the South Boston Allied War Veterans Council and a 1969 graduate of the New England School of Law. Chester was a tireless defender of the First Amendment, losing repeatedly in the state courts only to be triumphantly vindicated in the end by the United States Supreme Court. He asked me to collaborate with him on the case when it was time to petition the Supreme Court for review. William M. Connolly, Paul Walkowski, and Daniel J. Sumption worked closely on the briefs with us. Paul and Bill are the co-authors of a book about the case, *From Trial Court to the United States Supreme Court* (1996). There was a small army of young lawyers and law students, some from Harvard, some from New England School of Law, some from my own law school, who helped with the research and writing of the briefs and with getting Chester ready for oral argument: particularly Sean Brady, Mark Molloy, Daniel P. Olohan, Wendy Stone, and Brian Sylvia, but also Stephen Bayer, Kelly Bowdren, Brian Darling, William Gussmann, Christopher Kuniffe, Patrick Lannon, John McCormack, Eli Mulligan, Lynne Nowak, David Pignato, Jay Prabhu, Joe Rendini, Jim Sonne, and Andrew Yung. Then there were the clients, John "Wacko" Hurley and the South Boston Allied War Veterans Council, without whom none of this would have happened.

I would also like to thank the Dean of the Southern New England School of Law, Francis J. Larkin, who was supportive throughout, and the Associate Dean, David M. Prentiss, who facilitated financial and technical support for this Article. Finally, my colleagues at the law school, Philip Cleary, Ralph Clifford, Robert Kane, Peter Lubin, and Frances Rudko, provided helpful suggestions and always fascinating conversation. The then librarian at the school, Hazel Inglis, was always helpful with locating materials. Nor can I forget the sometimes vocal contributions of Sharon Martin, my secretary, nor those of Donald Discepolo, my research assistant.

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1. DR. SEUSS, AND TO THINK THAT I SAW IT ON MULBERRY STREET (1937).

I. STATEMENT OF THE CASE

The Boston St. Patrick's Day Parade (Parade) controversy started as street theater. The Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB)[2] wanted to make a statement in the St. Patrick's Day Parade in 1992. GLIB's message was crucial to its participation.[3] There was evidence that individuals could march without a banner or as part of other groups.[4] An openly homosexual city councilor, David Scondras, had marched for years without incident.[5] If GLIB's identity became an issue, that was only because GLIB made it one. The South Boston Allied War Veterans Council (Veterans Council or Veterans), for its part, was interested in running its traditional St. Patrick's Day Parade, with its themes of honoring St. Patrick and commemorating Evacuation Day, the day the British troops left Boston.[6] The Veterans Council was not interested in making a statement of sexual liberation or in being identified with someone else's statement of "gay pride."[7]

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2. An unincorporated association.

3. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338, 2348 (1995).

4. Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston, 418 Mass. 238, 260 n.4, 636 N.E.2d 1293, 1304 n.4 (1994) (Nolan, J., dissenting) [hereinafter *GLIB II*], *cert. granted sub nom.* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 714, *rev'd*, 115 S. Ct. 2338 (1995).

5. Reply Brief for Petitioners at 14 n.8, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749) (citing Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 836 n.208 (1993)); *see also* Trial Transcript at A-33, Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston, 1 Mass. L. Rptr. No. 18 370 (1994) (CIV. No. 92-1518).

6. Evacuation Day, March 17, was established as an official holiday in Suffolk County, Massachusetts in 1938. *See* MASS. GEN. L. ch. 6, § 12k (1994). The holiday commemorates the evacuation of British troops and loyalists from the City of Boston in 1776. *See Hurley*, 115 S. Ct. at 2341. The evacuation was prompted by the action of Revolutionary troops, under General George Washington, who had placed the cannons captured at Fort Ticonderoga upon Dorchester Heights which overlooks the harbor and City of Boston. *See id.*

7. While no one would contend that the St. Patrick's Day Parade was an upper-class production, or that it had any pretensions of grandeur, it was a neighborhood and family affair in celebration of what could be styled "Rum, Romanism and Rebellion." The Rebellion, however, was political ("England out of Ireland," as on Evacuation Day), and not sexual. *See Hurley*, 115 S. Ct. at 2345. In that regard, the Irish are generally as straight-laced as the English. *See, e.g.*, Mike Barnicle, *Re the Parade: I Have an Idea*, BOSTON GLOBE, Mar. 15, 1994, at 17 (discussing the Irish-Catholic view of sex and sexuality).

The battle lasted for three and one-half years, from the beginning of 1992[8] until June 19, 1995, when the United States Supreme Court decided the case in favor of the private parade organizer's First Amendment right to choose its own marchers.[9] In the first year, Judge Hiller Zobel of the Massachusetts Superior Court ordered that GLIB march, against the wishes of the parade organizers.[10] In the second year he did likewise.[11] In the third year, once a full trial before Judge J. Harold Flannery resulted in a permanent injunction,[12] which was affirmed by the Massachusetts Supreme Judicial Court (SJC),[13] the Veterans Council which sponsored the Parade chose to cancel it rather than include the marchers with the message it found objectionable.[14] For St. Patrick's Day 1995, the Veterans added a protest theme to its Parade.[15] United States District Court Judge Mark L. Wolf, in a separate action filed by the Veterans Council, ruled that this theme sufficiently distinguished the 1995 Parade to qualify for First Amendment protection,[16]

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8. *See* Don Aucoin, *Gays May Sue Organizers Over St. Patrick's Parade Ban*, BOSTON GLOBE, Mar. 5, 1992, at 1.

9. *See* Shelly Murphy, *US Decision is Hailed in South Boston*, BOSTON GLOBE, June 20, 1995, at 1; Ana Puga, *High Court Says Veterans Can Bar Gays from Parade: Speech Rights at Issue in St. Patrick's Event*, BOSTON GLOBE, June 20, 1995, at 1.

10. Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston, CIV. No. 92-1518 (Suffolk Super. Ct. Mar. 11, 1992) (order and memorandum granting temporary restraining order, Zobel, J.).

11. Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston, CIV. No. 92-1518 (Suffolk Super. Ct. Feb. 18, 1993) (order and memorandum granting preliminary injunction, Zobel, J.).

12. Irish-American Gay, Lesbian & Bisexual Group of Boston, 1 Mass. L. Rptr. No. 18 370, 379 [hereinafter *GLIB I*]. This case can also be found at Petition for Writ of Certiorari, Appendix B, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749).

13. *GLIB II*, 418 Mass. 238, 636 N.E.2d 1293 (1994).

14. Michael Rezendes, *Would Be Marchers Rap City: Gay Group Grumbles at Mayor's Lack of Contingency Parade Plan*, BOSTON GLOBE, Mar. 14, 1994, at 13 (discussing Parade cancellation).

15. *See* South Boston Allied War Veterans Council v. City of Boston, 875 F. Supp. 891, 910-11 (D. Mass. 1995). In 1995, the Veterans added a protest theme "'to commemorate the support by the people of South Boston who supported the Veterans' rejection of judicially imposed messages on the parade of Sunday, March 20, 1994.'" *Id.* at 899-900 (quoting letter from John "Wacko" Hurley to Frank Tramontozzi, Boston Transportation Department, May 2, 1994). This provided "the 1995 Parade with the discernible expressive purpose that the courts of the Commonwealth found to be lacking with regard to the 1993 Parade." *Id.* at 910.

16. *Id.* at 910.

and thus the Veterans could exclude GLIB, notwithstanding the permanent injunction requiring GLIB's inclusion.[17] The United States Supreme Court by then had granted certiorari to decide whether the permanent injunction[18] was consistent with the First Amendment, regardless of whether there was a protest theme to the Parade.[19]

A. Why the Veterans Resisted GLIB's Suit to Enter the Parade

The Veterans group, which organized the St. Patrick's Day Parade every year since 1947,[20] was loathe to serve as a vehicle for "gay pride" messages.[21] Part of the reason was social. South Boston is a conservative, family-oriented neighborhood.[22] Part was religious. "Southie" is heavily Catholic,[23] and St. Patrick is the patron saint of Boston's Catholic Archdiocese.[24] Catholicism teaches that non-marital sex is wrong because it is not open to procreation, and homosexual acts are included within the ban.[25] Catholicism also commands loving your

17. *See id.* at 911, 920.

18. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 714 (1995) (granting certiorari Jan. 6, 1995).

19. GLIB argued that the 1995 decision by Judge Wolf rendered the controversy moot before the Supreme Court. Respondents' Suggestion of Mootness, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749). The Veterans Council responded that it "currently live[s] under a permanent injunction which acts as a prior restraint on [its] free expression," and that it "ha[s] been subjected to substantial fines because of activity protected by the [F]irst and [F]ourteenth Amendments." Petitioner's Response to Respondents' Suggestion of Mootness at 1-2, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749) (footnote omitted). In a footnote, the Veteran's Council stated that an award of attorneys' fees had been imposed upon it, and that additional fee awards were being sought. *Id.* at 2 n.1. Moreover, the Veterans Council noted that it was "potentially subject to criminal penalties arising out of the Massachusetts Court's decision." *Id.* at 2. When GLIB replied to all these points in its Respondents' Reply Concerning Mootness, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749), it represented to the Supreme Court that the "Respondent no longer has any wish to seek to collect attorneys' fees, either for the 1992 case or for the present case, and counsel represents to the Court that appropriate steps to permanently relinquish those claims will be taken forthwith." *Id.* at 10. As of June 19, 1995, the day the Supreme Court reversed the lower courts, no such steps were taken.

20. *Hurley*, 115 S. Ct. at 2341.

21. *Id.* at 2348.

22. *See generally* J. ANTHONY LUKAS, COMMON GROUND *passim* (1985); Mike Barnicle, *It's a Parade, Not a Forum*, BOSTON GLOBE, Mar. 8, 1992, at 33.

23. *See* LUKAS, *supra* note 22, at 209.

24. THE ORDER OF PRAYER IN THE LITURGY OF THE HOURS AND CELEBRATION OF THE EUCHARIST 1996, ARCHDIOCESE OF BOSTON 74 (1996).

25. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2351-2359 (1994) [hereinafter

enemies and sinners, though deploring the sin.[26] In doing so, the Catholic Church distinguishes carefully between "homosexual acts," which are "intrinsically disordered,"[27] and persons with "homosexual tendencies," who deserve respect, compassion and sensitivity, and are entitled to be protected from unjust discrimination.[28] The distinction was lost on GLIB. Indeed, one of GLIB's founders, according to press reports, had called New York's Cardinal John O'Connor a "homophobe."[29]

Given the context of the Parade, GLIB's action in seeking to march can only be called provocative. It was confrontational, in-your-face politics. GLIB thought it had an easy target. South Boston, scarred by its years of fighting forced busing,[30] was deemed a blue-collar bastion of traditional attitudes by a politically correct mindset.[31] "Homophobia," in the minds of radical activists, was akin to racism.[32]

Professor Larry W. Yackle, one of the signers of GLIB's brief for the Supreme Court, had written in a law review article that was submitted in draft form to the trial court: "In the summer of 1990, ACT-UP/Boston disrupted the ordination of several young priests at the Holy Cross Cathedral in the South End. The protestors staged a mock gay wedding, shouted vulgarities, and threw condoms at priests and their families."[33] Parade official Thomas L. Lyons testified at the trial re-

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CATECHISM]. For a detailed discussion of Catholicism and homosexuality, see generally GERALD D. COLEMAN, HOMOSEXUALITY: CATHOLIC TEACHING AND PASTORAL PRACTICE (1995).

26. CATECHISM, *supra* note 25, ¶¶ 1825, 1931-1933.

27. *Id.* ¶ 2357.

28. *Id.* ¶ 2358. *See generally* COLEMAN, *supra* note 25.

29. *See* Trial Transcript at 92, *GLIB I* (CIV. No. 92-1518); Yackle, *supra* note 5, at 840; Don Aucoin, *Queer Nation at Center of Parade Debate*, BOSTON GLOBE, Mar. 11, 1992, at 1.

30. *See* LUKAS, *supra* note 22, at 241; *City Weekly: A Q&A with Bernard O'Donnell*, BOSTON GLOBE, Mar. 26, 1995, at 1 [hereinafter *City Weekly*] (interviewing South Boston community representative discussing the nature of the neighborhood and the problems it has faced, including forced busing and its legacy).

31. LUKAS, *supra* note 22, *passim*.

32. *See* Aucoin, *supra* note 8, at 26; Don Aucoin, *Judge Lets Gays March in Parade: South Boston Group Won't Appeal*, BOSTON GLOBE, Mar. 12, 1992, at 1; Bob Hohler & Philip Bennett, *Abuse, Cheers for Gay Marchers: St. Patrick's Day Parade in Damp Draws 200,000*, BOSTON GLOBE, Mar. 29, 1993, at 13; *see also* Kevin Cullen, *Shades of Green, No Shades of Gray*, BOSTON GLOBE, Mar. 6, 1992, at 21 (quoting GLIB co-founder Barbra Kay as saying that the Veterans' refusal to admit GLIB was "'a smoke screen for bigotry'"). All of the above articles quote GLIB members as equating their attempts to march in the Parade with the civil rights struggle, and describe the Veterans' stance as bigoted discrimination.

33. Yackle, *supra* note 5, at 838.

garding his concern that people from the protest at Holy Cross Cathedral would participate in the Parade, as part of GLIB's contingent.[34]

It was no surprise that in GLIB's promotional brochure, the return address was not South Boston, but Cambridge.[35] These two communities are actually worlds apart.[36] Indeed, in 1995, Cambridge held its own St. Patrick's Day Parade, an offspring of this conflict.[37] GLIB marched, as did a number of other homosexual contingents, and even a vehicle with anti-homosexual signs was included in the Cambridge parade.[38] All of this was quite unremarkable in Cambridge. In South Boston, however, a "gay pride" message would have gotten maximum attention, because it would have been considered an affront to the values many residents hold dear.[39]

1. GLIB's Motives Revealed

The trial court found as a fact that GLIB was organized to march in the Veterans' Parade.[40] GLIB's trial testimony and its own brochure had stated why GLIB was formed. In a section headed "GOALS," the following were listed: "Celebrate our Irish heritage as openly gay, lesbian and bisexual individuals. Remind people that there are lesbians, gay men and bisexuals within all demographic groups, including people of Irish heritage. Form coalitions with other regional, national, and international gay, lesbian and bisexual organizations such as ILGO [Irish Gay and Lesbian Organization]."[41] The brochure further stated that "GLIB

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34. Trial Transcript at A-272, *GLIB I* (CIV. No. 92-1518); *see also* Aucoin, *supra* note 29, at 11 (discussing Parade officials' uncertainty regarding GLIB's sincerity and motives).

35. GLIB BROCHURE (1993), *reprinted in* Joint Appendix A55, at A59, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749) (copy on file with the *New England Law Review*).

36. *Compare City Weekly*, *supra* note 30, at 1 (describing the conservative ethnic neighborhood and values of South Boston) *with* Doreen I. Vigue & Zachary R. Dowdy, *Parade Cheered in Cambridge*, BOSTON GLOBE, Mar. 13, 1995, at 14 (describing GLIB's participation in the first St. Patrick's Day Parade in Cambridge, a city committed to diversity, and generally considered fairly liberal). In the interest of disclosure, I feel obligated to reveal that I live in Cambridge—I just do not "inhale."

37. Vigue & Dowdy, *supra* note 36, at 14.

38. Tim Cornell, *Irish Marchers Take Diverse Steps in Cambridge*, BOSTON HERALD, Mar. 13, 1995, at 1.

39. *See* Barnicle, *supra* note 22, at 33 (discussing the conservative values held by many South Boston residents and their reluctance at accepting GLIB's participation).

40. *See Hurley*, 115 S. Ct. at 2346; *GLIB I*, 1 Mass. L. Rptr. No. 18 at 371.

41. GLIB BROCHURE, *supra* note 35. ILGO was the New York City homosexual group seeking to march in New York's St. Patrick's Day Parade. *See* New York

is open to all gay men, lesbians, and bisexuals of Irish descent and others interested in Irish and Irish-American issues."[42] At trial, Barbra Susan Kay, the co-founder of GLIB, testified that GLIB had no set criteria for membership and that people "can be members of the group as long as they support our stated goals."[43] A fact sheet published by GLIB prior to the 1992 march stated, "[w]e are committed to providing approximately 50% of the marching slots to the general gay community."[44] Two important things were clear from GLIB's literature: 1) Central to GLIB's purpose was the proclamation and celebration of homosexuality (the "gay pride" theme);[45] and 2) one did not have to be homosexual to belong to GLIB or march behind its banner.[46] These facts would cripple GLIB's argument at the Supreme Court.[47]

Judge Flannery, the trial judge, found that GLIB's purposes were threefold:

> to express its members' pride in their dual identities; to demonstrate to the Irish-American and to the gay, lesbian, and bisexual communities the diversity within those respective communities; and to show support for the Irish-American gay, lesbian, and bisexual men and women in New York City ("ILGO" Members) who were seeking to participate in the New York St. Patrick's Day Parade.[48]

Any differences with GLIB's stated purposes were incidental and cosmetic.[49]

Judge Flannery found, however, that "GLIB was excluded from the Parade on account of its members' sexual orientation."[50] A footnote to his decision demonstrates how Flannery reached that conclusion: "GLIB would be excluded because of its values and its message, i.e., its members' sexual orientation."[51] Judge Flannery, in equating GLIB's message with its members' sexual orientation, however, ignored the

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County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358, 360 (S.D.N.Y. 1993).

42. GLIB BROCHURE, *supra* note 35.

43. Trial Transcript at A-98, *GLIB I* (CIV. No. 92-1518).

44. GLIB FACT SHEET (1992), *reprinted in* Joint Appendix A51, at A52, *Hurley* (No. 94-749) (copy on file with the *New England Law Review*).

45. *See GLIB I*, 1 Mass. L. Rptr. No. 18 at 371 (noting that purpose of GLIB was to express pride in dual identities as Irish/Irish-Americans and homosexuals).

46. *See supra* note 42 and accompanying text.

47. *See infra* part IV.

48. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 371.

49. *See supra* notes 41-42 and accompanying text.

50. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 372.

51. *Id.* at 379 n.5.

evidence that people who are not homosexual could belong to GLIB, or be among its supporters and march behind its banner.[52]

B. Public Accommodation Laws Versus the First Amendment

1. The First Amendment as a Sword

Ironically, GLIB's initial legal claim for inclusion in the Parade was premised on the First Amendment.[53] As its "Fact Sheet" indicated, "[t]here are two legal tacks we can take if we need to go to court: the first is to petition for our right under the [F]irst [A]mendment to march in a public parade."[54] In view of the final outcome of the case, this was a classic assertion of "Free Speech for Me, but Not for Thee."[55] In this regard, GLIB's amended complaint had alleged that the Veterans and the City had "refused to allow them to march in the 1993 Parade because of Plaintiffs' sexual orientation and because of the *content of their expression.*"[56] As counsel for GLIB said in his opening statement at trial, "We will . . . show that the thrust of the action by the Veterans and the city is not to make a determination of GLIB as an organization or to criticize GLIB. The thrust of this is to preclude GLIB's message from being heard either in Boston or elsewhere."[57]

This claim was unsuccessful because it depended upon a showing of state action.[58] The Veterans' refusal to include GLIB among the marchers had to be shown to be a result of governmental action in order to trigger the First Amendment.[59] GLIB, by suing both the Veterans and the City of Boston, attempted to show this.[60] Even Judge

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52. *See supra* note 42 and accompanying text.

53. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 371 (laying out GLIB's freedom of expression and equal protection claims under the First and Fourteenth Amendments).

54. GLIB FACT SHEET, *supra* note 44.

55. *See generally* NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE (1992).

56. Plaintiffs' Supplemental Pleading and Amended Complaint ¶ 29 (1993), *reprinted in* Joint Appendix A5 at A11, *Hurley* (No. 94-749) (emphasis added) (copy on file with the *New England Law Review*).

57. Trial Transcript at A-26 to -27, *GLIB I* (CIV. No. 92-1518).

58. For a discussion, and ultimate rejection, of the state action claim against the City, see *GLIB I*, 1 Mass. L. Rptr. No. 18 at 374-77.

59. *Id.*; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 18-3 to -7 (2d ed. 1988).

60. *GLIB II*, 418 Mass. at 245, 636 N.E.2d at 1297; *GLIB I*, 1 Mass. L. Rptr. No. 18 at 371, 374-77. Gretchen Van Ness's "Incredible True Story" claims that "[i]n the years preceding the litigation, it is undisputed that the City of Boston helped finance the Parade. Additionally, evidence offered at trial showed that City officials assisted in organizing and administering the Parade." Gretchen Van Ness,

Flannery found against GLIB on this point. The judge found the following:

> [F]or the 1993 Parade, the City's involvement consisted of the participation of city vehicles such as fire, ambulances, and police in the Parade itself. The City also supplied clean-up services for the 1993 Parade costing a total of approximately $8,000. This amount is comparable to other parades of similar size. Many of these services constitute routine functions of government.[61]

Thus, the City was off the hook, because, "[t]he most that can be said of the City's conduct is that it allowed the Veterans to hold a parade, for without a permit a parade is not lawful. But issuing a parade permit is a neutral act."[62] The finding of no state action was fatal to GLIB's First Amendment claim against the Veterans Council, which, as a pri-

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Parades and Prejudice: The Incredible True Story of Boston's St. Patrick's Day Parade and the United States Supreme Court, 30 NEW ENG. L. REV. 625, 630 (1996) (footnotes omitted). The testimony of then-Mayor Raymond Flynn regarding the City of Boston's role in the Parade from 1990 to 1993, however, flatly contradicted GLIB's assertion at trial that there was joint organization and administration of the Parade. Flynn, in response to an interrogatory questioning the City's involvement in the Parade, stated that "the Allied War Veterans Council plans, organizes, administers, coordinates, promotes, publicizes, and executes the Evacuation Day/St. Patrick's Day Parade." Trial Transcript at A-472, *GLIB I* (CIV. No. 92-1518) (Mayor Flynn's Answers to Interrogatories). The Mayor continued by clarifying that the City's function "as with all other private parades was to ensure that the event is properly permitted . . . and to engage in appropriate action to protect the public safety." *Id.*

Moreover, no one from the City of Boston, no one from the Veterans Council, no witness, and not even Judge Flannery went so far as to make the bald assertion of joint organization and administration. GLIB advocated this position on the evidence, and on the evidence Judge Flannery rejected it. *See GLIB I*, 1 Mass. L. Rptr. No. 18 at 375-77. GLIB failed to appeal this issue, and before the Supreme Court, GLIB explicitly acknowledged that state action was not even at issue. *Hurley*, 115 S. Ct. at 2344.

61. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 373 (footnote omitted) (citation omitted). These findings by the trial court went to the issue of whether the City of Boston was liable for aiding or inciting discrimination based upon sexual orientation—conduct that is also forbidden by the anti-discrimination statute. *See id.* (citing MASS. GEN. L. ch. 272, § 98 (1994)). These findings, however, were also relevant to the trial court's determination that there had been no state action. *Id.* at 375-77.

62. *Id.* at 374. In so concluding, the trial court relied upon Otway v. City of New York, 818 F. Supp. 659, 664 (S.D.N.Y. 1993) (holding that the city's providing of legitimate governmental services for parade, such as police and sanitation, does not constitute state action or establishment of religion in violation of the First Amendment).

vate actor, could now assert the First Amendment itself.[63] Indeed, when the Veterans appealed the case to the SJC, GLIB's brief did not appeal the ruling on state action.[64] Instead, it stated that the "Court should deny the Veterans Council appeal and affirm in all respects the rulings of the Trial Court below."[65]

2. GLIB's Public Accommodation Argument

"The second tack is to protect ourselves as gays and lesbians from discrimination in public accommodations under the gay rights legislation."[66] This alternative theory had the tactical advantage of not requiring state action for GLIB's claims to go forward, for places of public accommodation (e.g., restaurants and theaters), could be privately owned and operated, but nonetheless subject to anti-discrimination laws.[67] In Massachusetts, as in other states, discrimination in places of public accommodation on the basis of race, sex, and, most recently, sexual orientation, has been prohibited.[68] The argument required construing the Parade itself as a place of public accommodation because it used the public streets, and because it was generally open to the public.[69]

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63. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 377.

64. *GLIB II*, 418 Mass. at 245 n.12, 636 N.E.2d at 1297 n.12. Although GLIB's initial brief did not contest the dismissal of its claims against the City, GLIB attempted to raise the issue in its reply brief to the SJC. *Id.* The SJC, however, noted that GLIB failed to file a cross appeal. Therefore, GLIB neither had the right to file a reply brief, nor had it properly raised the issue for appeal. *Id.* (citing MASS. R. APP. P. 16(c), as amended, 399 Mass. 1217 (1987)).

65. Appellees' Brief at 35, Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston, 418 Mass. 238, 636 N.E.2d 1293 (1994) (No. SJC-06498).

66. GLIB FACT SHEET, *supra* note 44.

67. *See, e.g.*, Concord Rod & Gun Club, Inc. v. Massachusetts Comm'n Against Discrimination, 402 Mass. 716, 720, 524 N.E.2d 1364, 1367 (1988).

68. MASS. GEN. L. ch. 272, §§ 92A, 98 (1994); *see also* CONN. GEN. STAT. ANN. § 46a-81 (West 1995); MINN. STAT. ANN. § 363.03(Subd. 3)(a)(1) (West Supp. 1996); N.J. STAT. ANN. § 10:5-4 (West 1993); R.I. GEN. LAWS §§ 11-24-2 to -2.2 (Supp. 1995); VT. STAT. ANN. tit. 9, § 4502 (1993); WIS. STAT. ANN. § 101.22(9) (West Supp. 1995).

69. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 373 ("Given the lack of selectivity exerted by the Veterans over the Parade participants and sponsors, as well as the Parade's historical roots, I conclude that the Parade is a public event." (citing Concord Rod & Gun Club, Inc. v. Massachusetts Comm'n Against Discrimination, 402 Mass. 716, 721, 524 N.E.2d 1364, 1367 (1988))).

3. The First Amendment as a Shield

One problem with the public accommodation argument was that it had been rejected by the Federal District Court in New York in a similar case.[70] New York City's Human Rights Commission had attempted to apply the public accommodation ordinance to the New York St. Patrick's Day Parade,[71] but the court ruled as follows:

> The main problem with the logic of the decision of the City's Human Rights Commission is that it starts the analysis at the wrong end. The first question that should have been considered is not whether the New York St. Patrick's Day Parade is a public accommodation, but whether the Parade and its message constitutes speech protected by the First Amendment guarantee of Freedom of Speech. Insofar as a parade constitutes protected free speech, it cannot be a public accommodation.[72]

The Massachusetts trial court, however, came to a different conclusion. After a four-day bench trial, the Suffolk County Superior Court found that the Veterans Council did not generally inquire into the specific messages of the groups which applied to march, had no written standards or procedures in selecting participants, and was not selective in choosing the diverse groups which participated in the Parade.[73] Citing "the lack of genuine selectivity in choosing participants and sponsors,"[74] the court found that the Parade was a public event,[75] and had no specific expressive purpose.[76]

The trial court found that the Parade constituted a public accommodation under Massachusetts law and ruled that "the Veterans' exclusion of GLIB based on the sexual orientation of its members violates the public accommodations statute."[77] As noted earlier, the trial court also found that "GLIB would be excluded because of its values and its mes-

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70. *See* New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358, 366 (S.D.N.Y. 1993).

71. *Id.* at 362-63.

72. *Id.* at 366.

73. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 372-73.

74. *Id.* at 372.

75. *Id.*

76. *Id.* at 378.

77. *Id.* at 373.

sage, i.e., its members' sexual orientation,"[78] and, "[t]he evidence establishes that GLIB was excluded from the Parade on account of its members' sexual orientation."[79]

In his decision, Judge Flannery concluded that "[h]istory does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade."[80] Judge Flannery ordered the Veterans Council "permanently enjoined from preventing plaintiff GLIB from participating in the St. Patrick's/Evacuation Day Parade because of the group members' sexual orientation."[81] The court "further ORDERED that the defendant Veterans Council shall allow plaintiff GLIB to participate in the Parade in the same manner and under the same terms and conditions applicable to all other participants in the Parade."[82]

C. The SJC's Decision and Opinion

On February 16, 1994, the Veterans Council appealed the Superior Court's decision to the SJC and was granted direct appellate review.[83] The Veterans argued that the Parade constituted "expressive activity" protected by the First Amendment, asserting its rights to free speech, expressive association, and freedom from being compelled to communicate or foster views in which the Veterans did not believe.[84] The Veterans further argued that the public accommodation statute was constitutionally invalid as applied, as well as facially vague and overbroad.[85]

On March 11, 1994, just before the scheduled 1994 St. Patrick's Day Parade, the SJC issued an order affirming the Superior Court's decision, and noted that written opinions would follow.[86] Rather than

78. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 379 n.5.

79. *Id.* at 372.

80. *Id.* at 379.

81. *Id.*

82. *Id.*

83. In Massachusetts, appeals may be taken directly by the SJC, thus bypassing the intermediate Massachusetts Appeals Court. MASS. GEN. L. ch. 211A, § 10 (1994); *see also* John Ellement, *SJC to Rule Whether Gays Can Be Allowed in Parade*, BOSTON GLOBE, Mar. 11, 1994, at 22.

84. *GLIB II*, 418 Mass. at 240, 636 N.E.2d at 1294.

85. *Id.* at 251, 636 N.E.2d at 1300.

86. *Id.* at 239 n.5, 636 N.E.2d at 1294 n.5; *see also* John Ellement & Chris Black, *SJC Says Gays May March in Parade: Veterans Threaten to Cancel Event*, BOSTON GLOBE, Mar. 12, 1994, at 1.

submit to this court-dictated composition of its Parade, the Veterans Council canceled the 1994 Parade.[87]

On July 11, 1994, the SJC issued its opinion.[88] Applying the "clearly erroneous" standard,[89] the SJC, in a four-to-one opinion, upheld the trial court's findings of fact, and rejected the Veterans' First Amendment claims:

> [W]e need not decide whether the free speech rights or the expressive association right, or both, might be implicated by the factual situation asserted by the defendants. This is so because, as the judge found, it is "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment."[90]

The SJC also rejected the Veterans' claim that the compelled inclusion of GLIB in the Parade would force the Veterans to promote a message it did not endorse.[91] It affirmed the trial court's ruling that the Parade was a public accommodation and stated that "the burden was on the [Veterans Council's members] to demonstrate that they were exercising their First Amendment rights and as a result were entitled to exemption from the public accommodation laws."[92]

In a lone dissent, Justice Joseph Nolan wrote: "[o]ne must strain to recall or even imagine such an obvious violation of the revered right to free speech."[93] Citing *Wooley v. Maynard*,[94] Justice Nolan stated, "regardless of whether the parade has one message, ten messages, or no message at all, if GLIB's particular message is not in the parade, it cannot constitutionally be forced on the Veterans Council."[95] The dissent found that "[t]he judge's order clearly violate[d] the Veterans

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87. Rezendes, *supra* note 14, at 13.

88. Gay, Lesbian & Bisexual Group of Boston v. City of Boston, 418 Mass. 238, 636 N.E.2d 1293 (1994), *cert. granted sub nom.* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 714, *rev'd*, 115 S. Ct. 2338 (1995).

89. *Id.* at 242, 247-48, 250, 636 N.E.2d at 1295, 1298-99. Under MASS. R. CIV. P. 52(a), as under its federal rules counterpart, trial court findings of fact are not generally set aside unless "clearly erroneous."

90. *GLIB II*, 418 Mass. at 249, 636 N.E.2d at 1299 (footnote omitted) (quoting *GLIB I*, 1 Mass. L. Rptr. No. 18 at 378).

91. *See id.* at 250-51, 636 N.E.2d at 1299-1300.

92. *Id.* at 250 n.19, 636 N.E.2d at 1299 n.19. The SJC then concluded by summarily rejecting the Veterans Council's arguments regarding vagueness and the statute's overbroad application. *Id.* at 251-53, 636 N.E.2d at 1300-01.

93. *Id.* at 253, 636 N.E.2d at 1301 (Nolan, J., dissenting).

94. Wooley v. Maynard, 430 U.S. 705 (1977).

95. *GLIB II*, 418 Mass. at 257, 636 N.E.2d at 1303 (Nolan, J., dissenting) (citing *Wooley*, 430 U.S. at 717).

Council's freedom of speech"[96] and expressive association,[97] and that the trial judge's finding that the Veterans had discriminated on the basis of GLIB's members' sexual preference was clearly erroneous.[98]

The Veterans Council's Petition to the United States Supreme Court for Writ of Certiorari,[99] however, was granted on January 6, 1995.[100] The Veterans' lead counsel and legal team took it as a good omen for their prospects of reversing the Massachusetts Judiciary.

II. BRIEFING

The Questions Presented for Review in the Petition for Writ of Certiorari centered on the compelled speech issue:

> I. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts violated the First and Fourteenth Amendment rights of the Petitioners when it compelled the Petitioners to include, in their privately organized Parade, a message the Petitioners deemed unwanted and antithetical?
>
> II. Whether Petitioners' refusal to include a gay, lesbian and bisexual message within a private parade can be declared unlawful discrimination by the government without violating the Petitioners' First and Fourteenth Amendment as guaranteed by the United States Constitution?[101]

A. The Statement of the Issues

Once formulated that way, the case became easy. As the Veterans Council's Summary of Argument stated, "[t]his case involves the most straightforward of constitutional claims: that the organizers of a private parade may define and express their own messages, free of government interference, and protected from the compulsion to express messages they choose not to communicate."[102] GLIB's case depended on mud-

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96. *Id.* at 257, 636 N.E.2d at 1303 (Nolan, J., dissenting).

97. *Id.* at 259, 636 N.E.2d at 1304 (Nolan, J., dissenting). See *id.* at 257-59, 636 N.E.2d at 1303-04 (Nolan, J., dissenting), for Justice Nolan's freedom of speech and association reasoning.

98. *Id.* at 260, 636 N.E.2d at 1304-05 (Nolan, J., dissenting) (criticizing the trial judge for equating sexual message with sexual orientation).

99. The Veterans' Petition for Rehearing with the SJC was denied outright. Joint Appendix at A1, *Hurley* (No. 94-749).

100. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 714 (1995). Interestingly, when the Supreme Court granted certiorari, GLIB's lead counsel up to that point, Philip Cronin, withdrew his appearance from the case.

101. Petition for Writ of Certiorari at i, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749).

102. Brief for Petitioners at 9, Hurley v. Irish-American Gay, Lesbian & Bisexual

dying the legal waters as much as possible, by straining to insist that the St. Patrick's Day Parade in South Boston had no specific expressive purpose,[103] and thus did not qualify for First Amendment protection.[104]

Thus, the Veterans Council Brief argued that the Supreme Court should "state in clear terms that parades, like books and protest marches, are a form of speech *per se*, deserving of First Amendment protection from any abridgement, intrusion or content-based evaluation by the state, subject to the usual exceptions such as obscenity."[105]

The Veterans' argument partly rested on the thoroughness of review required in a case in which First Amendment claims were made.[106] The SJC had applied a "clearly erroneous" standard;[107] therefore, findings of fact would be reversed only if found to be "clearly erroneous."[108] Nevertheless, the United States Supreme Court required *de novo* review of First Amendment claims.[109]

Most of the Veterans' case, however, emphasized substance, not procedure. The heart of the case was the compelled speech argument: "Far worse, the Veterans have been compelled to convey through their Parade a message they opposed."[110] The Veterans' Brief quoted from *West Virginia Board of Education v. Barnette*:[111] "'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by

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Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749).

103. *See* Brief for Respondent at 45, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749) (arguing that the Parade was an "open recreational event" with no expressive themes).

104. *See generally* Brief for Respondent *passim*, *Hurley* (No. 94-749).

105. Brief for Petitioners at 9, *Hurley* (No. 94-749).

106. *See Hurley*, 115 S. Ct. at 2344 (citing Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 503 (1984); Jacobellis v. Ohio, 378 U.S. 184, 189 (1964) (opinion of Brennan, J.); New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964); Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Fiske v. Kansas, 274 U.S. 380, 385-86 (1927)).

107. MASS. R. CIV. P. 52(a); *see also supra* note 89 and accompanying text.

108. *See GLIB II*, 418 Mass. at 242, 636 N.E.2d at 1295 (citing Cox v. New England Tel. & Tel. Co., 414 Mass. 375, 384, 607 N.E.2d 1035, 1040 (1993)).

109. *See, e.g.*, Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 499 (1984); New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964).

110. Brief for Petitioners at 9, *Hurley* (No. 94-749).

111. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

word or act their faith therein.'"[112] Additionally, the Veterans Council argued that its freedom of expressive association had been violated.[113] It argued that not only is the Parade its members' speech, "it is their principal expressive activity."[114] Finally, the Veterans contended that the Massachusetts public accommodation statute,[115] as interpreted by the SJC, was unconstitutionally overbroad since it "require[d] not only inclusion of persons but inclusion of their messages as well."[116]

B. Amicus Briefs

Several groups filed amicus briefs in support of the Veterans: the Ancient Order of Hibernians, which organizes the New York St. Patrick's Day Parade,[117] the Christian Legal Society and a host of evangelical groups,[118] the Boy Scouts of America,[119] which faced legal actions around the country challenging its practice of excluding homosexuals under state public accommodation laws,[120] and the Catholic War Veterans.[121] Each of these briefs added or developed some significant argument. For example, the Christian Legal Society noted that the courts erroneously equated message discrimination with trait discrimination,[122] and the Ancient Order of Hibernians argued that "[t]he

112. Brief for Petitioners at 9-10, *Hurley* (No. 94-749) (quoting *Barnette*, 319 U.S. at 642).

113. *Id.* at 10, 28-32; *see also* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

114. Brief for Petitioners at 10, *Hurley* (No. 94-749).

115. MASS. GEN. L. ch. 272, §§ 92A, 98 (1994).

116. Brief for Petitioners at 10, *Hurley* (No. 94-749).

117. Brief of Center for Individual Rights and New York County Board of the Ancient Order of Hibernians as Amici Curiae in Support of Petitioners, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749).

118. Brief *Amici Curiae* of Christian Legal Society, Christian Life Commission of the Southern Baptist Convention, Family Research Council and National Association of Evangelicals in Support of Petitioners, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749).

119. Brief of Boy Scouts of America as Amicus Curiae in Support of Reversal, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749).

120. *Id.* at 2; *see also* Welsh v. Boy Scouts of Am., 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir.), *and cert. denied*, 114 S. Ct. 602 (1993).

121. Amicus Curiae Brief on Behalf of Petitioners, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749) (Brief of the Catholic War Veterans).

122. Brief *Amici Curiae* of Christian Legal Society, Christian Life Commission of the Southern Baptist Convention, Family Research Council, and National Association

injunction's real purpose is not ending discrimination against individuals, but rather, forcing private groups to swear allegiance to [the state's] notion of inclusiveness."[123]

In an unusual move, the American Civil Liberties Union (ACLU) filed an amicus brief "in support of neither party."[124] It was a carefully balanced production. On the one hand, the ACLU assured the Supreme Court that the First Amendment is important.[125] On the other hand, the ACLU, holding dear its Gay and Lesbian Rights project, argued that ending discrimination against gays and lesbians is important.[126] The ACLU noted that the Parade, if privately sponsored, would be protected by the First Amendment.[127] Nevertheless, the ACLU argued that the case should be remanded to the state courts to re-examine the question (already exhaustively examined) of whether the Parade is truly private.[128] The ACLU's perplexing contribution touched at least Justice Ruth Bader Ginsburg, who asked at oral argument about the state action issue: "Mr. Darling, before you finish, there was one of the friends of the court that suggested there was an open issue here about perhaps State action."[129] Chester Darling, attorney for the Veterans Council, conceded that if the Parade was sponsored by the city or the state of Massachusetts, there could be no exclusion of messages.[130]

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of Evangelicals at 4, *Hurley* (No. 94-749).

123. Brief of Center for Individual Rights and New York City Board of the Ancient Order of Hibernians as Amici Curiae in Support of Petitioners at 7, *Hurley* (No. 94-749).

124. Motion for Leave to File [hereinafter ACLU Motion] and Brief *Amicus Curiae* of the American Civil Liberties Union In Support Of Neither Party [hereinafter ACLU Brief], Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749).

125. ACLU Brief, *supra* note 124, at 2.

126. ACLU Motion, *supra* note 124, at 1-2; ACLU Brief, *supra* note 124, at 5.

127. ACLU Brief, *supra* note 124, at 13.

128. *Id.* at 22; *see also GLIB II*, 418 Mass. at 245, 636 N.E.2d at 1297; *GLIB I*, 1 Mass. L. Rptr. No. 18 at 372-77. The trial court found that the Parade was not private for purposes of anti-discrimination law based on the organizer's lack of participant selectivity. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 373. Nevertheless, the trial court, after an exhaustive review of the facts, determined that there was no state action on the part of the city. *Id.* at 377. It appears that the trial court wanted it both ways, one more example of the court's inconsistent conclusions regarding this case. For a discussion regarding the trial court's confusion of discrimination based on sexual message with that of sexual orientation, see *supra* notes 48-52 and accompanying text.

129. Transcript of Oral Argument at 18, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749).

130. *Id.* at 19.

Darling, however, made it very clear that the issue of state action had been fully litigated in the trial court, in which the judge had found that the Veterans Council was a private actor and that there was no symbiotic relationship with the City.[131]

C. The Attack on the Public Accommodation Statute

GLIB went in search of potential amici of its own. In doing so, GLIB counsel Mary Bonauto, John Ward and Gretchen Van Ness circulated a "Fact Sheet for Amici Curiae" dated January 20, 1995, under the letterhead of the Gay & Lesbian Advocates & Defenders (GLAD).[132] Among its more remarkable claims was that the Veterans Council was a Johnny-come-lately in asserting the First Amendment:

> The First Amendment did not surface as an issue until the Veterans unsuccessfully tried to exclude GLIB, first on the grounds of public safety, then because they were radical activists and then because they had a "sexual theme." When these efforts failed with the courts, the Veterans simply rewrote history and attempted to recast the St. Patrick's Day/Evacuation Day celebration as a "private parade" and raised the First Amendment.[133]

Professor Yackle, who co-signed GLIB's brief before the Supreme Court, had indicated in his article, however, that the Veterans, beginning early in 1992, had relied principally upon the First Amendment in rejecting GLIB:

> [T]he Veterans declared that the "principle" [sic] reason for excluding GLIB was that the inclusion of . . . [GLIB] was "not consistent" with the Veterans' own views, "embodied in their parades". . . . In this last [reason], of course, the Veterans asserted their own First Amendment right to use the parade to advance a private agenda, and, within that argument, effectively claimed that they need specify no particular message other than what was implicit in ad hoc decisions to include some groups and exclude others.[134]

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131. *Id.* at 19-20; *see also GLIB I*, 1 Mass. L. Rptr. No. 18 at 377 (finding by trial court, after exhaustive review of the facts, that there was no symbiotic relationship between Veterans and the City; therefore, no state action).

132. MARY BONAUTO ET AL., GLAD FACT SHEET FOR AMICI CURIAE 1 (Jan. 20, 1995) (copy on file with the *New England Law Review*).

133. *Id.*

134. Yackle, *supra* note 5, at 844 (second alteration in original) (footnote omitted) (quoting John "Wacko" Hurley Answers to Interrogatories at 7, Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston, CIV. No. 92-1518 (Suffolk Super. Ct. filed Nov. 10, 1992)). It is important to note that this was the *first* instance of litigation in this matter.

Contradicting GLIB's own literature,[135] as well as the findings of fact of the trial court,[136] GLAD went on to assert that "it is . . . misleading to say that GLIB has a message other than 'Happy St. Patrick's Day.'"[137] Of course, this is the real misleading statement, considering not only the Supreme Court's holding,[138] but also the findings of the trial court.[139] Indeed, in the October 1995 newsletter of GLAD, GLIB's counsel, Mary Bonauto, co-authored an article titled "*The Silver Lining in the GLIB Case*," in which she stated with hindsight:

> [T]he Court said that by marching behind a banner identifying themselves as lesbian, gay, or bisexual, GLIB was making a statement that there are lesbians, gay men, and bisexuals among the Irish and that they ". . . have as much claim to unqualified social acceptance as heterosexuals . . ." This is quite close to what our movement has been saying for years. Coming out of the closet is a political act, which makes the statement that we are everywhere and that we are entitled to equal treatment.[140]

If this is what the movement had been saying for years, counsel for GLIB was a recent convert. What she had been saying was that GLIB's only message was "Happy St. Patrick's Day."[141]

A number of predictions made in the "Fact Sheet" proved not only that prophecy is an elusive gift, but that GLAD was being wantonly glib. "Plainly and simply, the Veterans are using the First Amendment in this case as a pretext to justify discrimination against gay, lesbian and bisexual people."[142] In other words, the case was really about discrimination and not about the First Amendment. The second prediction was that "the United States Supreme Court trivializes litigants presenting

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135. *See supra* notes 41-44 and accompanying text.

136. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 371; *see also supra* notes 48-52 and accompanying text.

137. BONAUTO ET AL., *supra* note 132, at 2.

138. *Hurley*, 115 S. Ct. at 2346, 2348 (finding that GLIB had an expressive message to expound).

139. *See GLIB I*, 1 Mass. L. Rptr. No. 18 at 371 (finding by trial court that GLIB had three purposes for marching: to *express* pride in dual identities—as Irish-Americans and as homosexuals; to *demonstrate* to homosexual and Irish-American communities the diversity within the communities; and to *show* support for ILGO).

140. Mary Bonauto & Matt Coles, *The Silver Lining in the GLIB Case*, GLAD FALL BRIEFS, Oct. 1995, at 2 (alteration in original) (quoting *Hurley*, 115 S. Ct. at 2348).

141. *See supra* note 137 and accompanying text.

142. BONAUTO ET AL., *supra* note 132, at 2.

lesbian and gay issues. . . . We expect the same treatment."[143] These assertions were preposterous.[144]

Because the constitutionality of the Commonwealth's public accommodation statutes was put directly in issue, GLIB was hoping to get Massachusetts Attorney General, Scott Harshbarger, to file an amicus brief in defense of the statute.[145] His office not only refused to do so, but refused to allow the state's anti-discrimination agency, the Massachusetts Commission Against Discrimination, to file an amicus brief.[146] Harshbarger's refusal to get involved was a harbinger of the final outcome.[147]

D. The Respondent's Brief

The Brief for Respondent GLIB, not surprisingly, reiterated the claim that "[o]nly when the 'sexual themes' rationalization collapsed . . . did the Council develop the First Amendment argument pressed here."[148] In its summary, GLIB argued as follows:

> First, this case involves the enforcement of a generally applicable anti-discrimination statute, not a statute targeted at speech.
>
> Second, the Parade . . . is a civic celebration . . . that the Council has administered for nearly five decades as an open recreational event . . . .
>
> Third, while persons or groups in the Parade may indeed express a variety of messages, the Council itself has not used the Parade as the kind of expressive vehicle that would entitle it to an exemption from a generally applicable statute . . . .
>
> Finally, the Council has not been "compelled" to say anything.[149]

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143. *Id.* at 4.

144. *See Hurley*, 115 S. Ct. at 2348. The Court gave much credence to GLIB's message of sexual diversity, but clearly stated that regardless of the Veterans' reasons for excluding GLIB "it boils down to the choice of a speaker not to propound a particular point of view." *Id.* Moreover, the Court concluded by saying that the "holding . . . rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech." *Id.* at 2351.

145. Serine Steakley, *Harshbarger Nixes State Participation in St. Pat's Case*, BAY WINDOWS, Mar. 9-15, 1995, at 1.

146. *Id.*

147. *See infra* part IV.

148. Brief for Respondent at 13, *Hurley* (No. 94-749); *see also supra* notes 133-34 and accompanying text.

149. Brief for Respondent at 14-15, *Hurley* (No. 94-749).

E. Amici

There were two amicus briefs filed in support of GLIB: one by the Irish Lesbian and Gay Organization (ILGO), the group that had attempted to march in the New York City St. Patrick's Day Parade;[150] the other by the Anti-Defamation League and joined by many other civil rights organizations.[151]

F. The Reply Brief

The Veterans Council's Reply Brief reiterated the claim that "[w]hat the facts describe is a conflict between two sides: a longstanding private group that runs a parade, and a newly-formed group that has lately sought to use that parade to make its own statement."[152] According to the Veterans, "this [was] a case primarily about the First Amendment."[153]

The Reply Brief affirmed that "GLIB has absolutely no claim on the Veterans' Parade since it could sponsor another parade at any other time, or on any other street in the City of Boston."[154] In response to GLIB's exaltation of Evacuation Day as a public holiday and acknowledgment that "March 17, of course, also happens to be St. Patrick's Day,"[155] the Veterans made clear which holiday took priority.[156]

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150. Brief of Irish Lesbian and Gay Organization and Center for Constitutional Rights as Amici Curiae in Support of Respondents, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749).

151. Brief *Amicus Curiae* For Anti-Defamation League; Disability Rights Education and Defense Fund, Inc.; Lambda Legal Defense and Education Fund, Inc.; Gay, Lesbian & Bisexual Veterans of America; Mexican-American Legal Defense and Educational Fund; National Center for Lesbian Rights; Puerto Rican Legal Defense and Education Fund, Inc.; Woman's Bar Association of Massachusetts; and Women's Legal Defense Fund In Support of Respondents, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749) [hereinafter Brief *Amicus Curiae* for Anti-Defamation League].

152. Reply Brief for Petitioners at 1, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995) (No. 94-749).

153. *Id.* at 2.

154. *Id.*

155. Brief for Respondent at 3, *Hurley* (No. 94-749).

156. *See* Reply Brief for Petitioners at 2 n.l, *Hurley* (No. 94-749).

> Evacuation Day is a limited Public Holiday, celebrated only in Suffolk County, Massachusetts. While the Respondent's Brief characterizes it as "a civic holiday centered on a municipal parade," (Resp. Br. 4), the city does not conduct any Evacuation Day activities, with the exception of allowing a day off for municipal employees. The Respondent does concede that "March 17, of course, also happens to be St. Patrick's Day." (Resp. Br. 3). Interestingly,

The Reply Brief took issue with GLIB's attempt to minimize the communicative content of its own participation in the Parade.[157] GLIB contended that the Veterans merely had "to allow GLIB marchers to march while self-identifying as lesbians, gay men or bisexuals by means of a banner."[158] But as Nan D. Hunter, a lesbian scholar, wrote:

> The idea of identity is more complicated and unstable than either simply status or conduct. It encompasses explanation and representation of the self. Self-representation of one's sexual identity necessarily includes a message that one has not merely come out, but that one intends to *be* out—to act on and live out that identity.
>
> Notions of identity increasingly form the basis for gay and lesbian equality claims. Those claims merge not only status and conduct, but also viewpoint, into one whole. To be openly gay, when the closet is an option, is to function as an advocate as well as a symbol.[159]

From quite a different perspective, Oxford University scholar John Finnis noted that

> [t]he phrase "sexual orientation" is radically equivocal. Particularly as used by promoters of "gay rights," the phrase ambiguously assimilates two things which the standard modern position carefully distinguishes: (I) a psychological or psychosomatic disposition inwardly orienting one *towards* homosexual activity; (II) the deliberate decision so to orient one's public *behavior* as to express or *manifest* one's active interest in and endorsement of homosexual *conduct* and/or forms of life which

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> Author Thomas O'Connor, Professor of History at Boston College, quoted in a Boston Globe article by Tom Coakley, Globe Staff, March 17, 1995: *Evolution of a holiday, Boston-style*, tells a different story of how the holiday evolved. Giving workers a day off for St. Patrick's Day would have violated church-state separation and the sensibilities of the Yankee establishment, he said. Therefore, "'at a time where it would have been impossible to get a holiday to celebrate a Catholic saint, the way around it was to get a holiday for Evacuation Day. It was a political disguise.'" During the middle of the nineteenth century, an era when the Know-Nothing movement gained ascendancy in this country, Irish Catholics were openly prohibited from taking part in July 4th parades. In response, they formed their own parades, thus giving rise to thousands of annual St. Patrick's Day parades conducted throughout the nation.

Id. (citing THOMAS SOWELL, ETHNIC AMERICA, 3-42 (1981)).

157. *See* Reply Brief for Petitioners at 7-11, *Hurley* (No. 94-749) (objecting to GLIB's message, not its members' sexual orientation). Additionally, the Reply Brief further attacked the trial court's equating of sexual orientation with sexual message. *Id.*

158. Brief for Respondent at 28, *Hurley* (No. 94-749).

159. Nan D. Hunter, *Identity, Speech and Equality*, 79 VA. L. REV. 1695, 1696 (1993).

> presumptively involve such conduct.
>
> It is also widely observed that laws or proposed laws outlawing "discrimination based on sexual orientation" are always interpreted by "gay rights" movements as going far beyond discrimination based merely on A's belief that B is sexually attracted to persons of the same sex. Instead (it is observed), "gay rights" movements interpret the phrase as extending full legal protection to *public* activities intended specifically to promote . . . homosexual *conduct*.[160]

Far from being a mere matter of self-identification, then, the expression of one's sexual orientation was fairly teeming with significance. At the very least, it was a significant message. GLIB's co-counsel before the Supreme Court, Professor Yackle, acknowledged this in his law review article:[161]

> [T]here is some substance to the claim that the exclusion of gay and lesbian *groups*, as opposed to individual homosexuals marching with other units, is not discrimination on the basis of sexual orientation at all, but rather is discrimination on the basis of the point of view that ILGO and GLIB represent. Those organizations *do* have a message of their own, namely the message that forms their *raison d'être*. . . . [I]n this particular First Amendment context, where speech claims are set over against each other, it seems perfectly reasonable, even essential, that those who command the public forum be permitted to bar those with conflicting views.[162]

One of GLIB's amici argued that "a gay and lesbian pride parade may exclude those bringing a message of antipathy towards lesbians and gay men," because "their participation would conflict with the expressive purpose of the parade."[163] GLIB had argued that, "[b]y its own submissions, the Council has not had, and does not have, an 'anti-gay' message to convey,"[164] and thus could not justify GLIB's exclusion on that basis. In other words, if the Veterans' Parade were truly hateful towards homosexuals, the Parade could then exclude GLIB. That First Amendment protection should depend upon a person's being hateful rather than exercising their First Amendment right to remain silent, all under the pretext of vindicating anti-discrimination laws, was and is

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160. John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1053-54 (1994).

161. The article had been submitted in draft form to the trial court at the end of the trial in the case along with GLIB's Proposed Findings of Fact and Conclusions of Law.

162. Yackle, *supra* note 5, at 851 (footnotes omitted).

163. Brief *Amicus Curiae* for Anti-Defamation League at 11, *Hurley* (No. 94-749).

164. Brief for Respondent at 34 n.25, *Hurley* (No. 94-749).

ludicrous. The rule GLIB proposed was, for all intents and purposes, that one cannot discriminate against gay pride messages unless one is actually hateful or explicitly anti-gay.[165]

The Veterans Council concluded its Reply Brief as follows:

> In sum, GLIB's position invites continual litigation about every privately-sponsored parade. Professor Yackle has written that "extant constitutional doctrine does not generate a clear answer, but only beckons a difficult exercise in balancing—in every case and in every year." Without a reversal of the lower courts' decisions in this case, the Veterans' Council will be compelled to either 1) silence its voice, as in 1994; 2) conduct future Parades with the governmentally enforced inclusion of a message and viewpoint favored by the state, as in 1992 and 1993; or 3) submit its claim that it has reformulated the Parade into a protected expression to a judge for his or her approval, as in 1995. Based on the record in this case, the Petitioners ask for a resounding and categorical First Amendment ruling that will protect privately organized parades from governmental control of content.[166]
>
> > A parade "falls [well] within the sphere of conduct protected by the First Amendment." Indeed, one can scarcely imagine a more definitive and graphic way for a citizen to manifest himself to the world than to march down the street, arm-in-arm with friends and neighbors, displaying his allegiances for all to see. To abandon the anonymity of the crowd and take a place in the lists is to affirm as few other actions can the ideas and people one calls her own. To parade is to proclaim who, what, and of what you are—to identify yourself with a community of thought and comradeship in the most elemental sense.[167]

III. ORAL ARGUMENT BEFORE THE UNITED STATES SUPREME COURT

A. The Initial Hurdle

The oral argument took place on April 25, 1995.[168] Chester Darling, the Veterans' lead counsel, began his argument by saying that this case was about governmentally compelled speech.[169] His presentation went smoothly until he made reference to the Parade as expressive of the traditional religious and social values of the Veterans.[170] Chief Jus-

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165. Reply Brief for Petitioners at 17-18, *Hurley* (No. 94-749).

166. *Id.* at 18 (citations omitted) (quoting Yackle, *supra* note 5, at 868).

167. *Id.* (quoting Yackle, *supra* note 5, at 797 (quoting Gregory v. City of Chicago, 394 U.S. 111, 112 (1969))).

168. Ana Puga, *Boston St. Patrick's Parade is Argued Before High Court: Some Justices Seem to Favor Southie Veterans' Free-Speech Position*, BOSTON GLOBE, Apr. 26, 1995, at 3.

169. Transcript of Oral Argument at 3, *Hurley* (No. 94-749).

170. *Id.* at 4.

tice Rehnquist interrupted him with a question about whether the Parade had any such expressive purpose, according to the trial court.[171] Following this query was a barrage of questions from other Justices on this point.[172] Justice Kennedy asked if the expressive content of the Parade was critical to Darling's argument.[173] Darling, in his brief, had asked for a *per se* ruling on privately run parades being expressive and therefore protected by the First Amendment.[174] Thus, he was willing to concede that the expressive content of the Veterans' Parade was not crucial to the case.[175] Accordingly, Darling argued that the compelled speech argument did not depend on the Veterans Council's members having anything to say themselves through their Parade;[176] it depended on their right not to be forced to espouse what someone else had to say.[177] Darling recovered the rhythm of his argument by returning to the compelled speech issue, stating that "any group of people or any individual cannot be compelled to speak [on] behalf of the State or be the courier for the State's message."[178]

B. Discrimination Against Messages, Not Persons

Mr. Darling stressed that his clients "excluded messages, not the people."[179] Justice Scalia asked:

> Well, as I recall, the district court found that St. Patrick would not have excluded the homosexuals, lesbians, and bisexuals, isn't that right, something to that effect. His mission was not just to the straights, or something of that sort. Is that a finding of the district court, or the lower court here?[180]

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171. *Id.*

172. *Id.* at 4-8.

173. *Id.* at 5.

174. Brief for Petitioners at 9, 11, *Hurley* (No. 94-749).

175. Transcript of Oral Argument at 7, *Hurley* (No. 94-749).

176. *Id.* at 7-9.

177. *See id.* at 9; *see also Hurley*, 115 S. Ct. at 2347 ("[T]he fundamental rule . . . under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message."); *id.* at 2348 ("[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

178. Transcript of Oral Argument at 9, *Hurley* (No. 94-749).

179. *Id.* at 10.

180. *Id.* at 13.

Mr. Darling responded:

> I believe that was a homily that was added at the end of the judgment in the superior court decision, but clearly the fact that homosexuals and bisexuals and lesbians have marched in my client's parade for years is of no great consequence to my clients, that a gay city councillor who is openly gay who marched . . . and he was not disturbed.
>
> . . . .
>
> My clients do not care about the sexual orientation or the religious background or the ethnic composition of anyone in their parade. They select groups that are consistent with what they perceive to be their version of a celebration of St. Patrick in their neighborhood . . . .[181]

C. Ward's Fatal Initial Concession

Before GLIB's lead counsel John Ward could even say, "May it please the Court," Chief Justice Rehnquist nailed down the state action issue that had been raised by Justice Ginsburg.[182] He got Ward to concede that the issue was not properly before the Supreme Court,[183] even though the Respondent's Brief attempted to raise the issue through the back door.[184] In his decision for the Court, Justice Souter acknowledged that the state action question was not at issue.[185]

Most interesting, however, was John Ward's attempt to downplay the expressiveness of GLIB's participation in the Parade. He said, for example, that it did not help to look at the case in terms of messages.[186] Ward perhaps realized the implications of the central facts; the case was about competing messages in the St. Patrick's Day Parade, and whose message would govern—that of the Veterans, the Parade organizers, or that of GLIB.[187]

Ward implied that the notorious equation of GLIB's messages and values with its members' sexual orientation, which was effected in the trial court's opinion,[188] merely reflected the Veterans' own confusion of the two concepts.[189] Ward conceded that the Veterans could exclude

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181. *Id.* at 13-14.

182. *Id.* at 22.

183. Transcript of Oral Argument at 22, *Hurley* (No. 94-749).

184. Brief for Respondent at 21-22 n.17, *Hurley* (No. 94-749) (noting that, although the SJC had affirmed the trial court's rejection of GLIB's state action argument, the United States Supreme Court could affirm the SJC by alternatively finding that the record indicated there was state action).

185. *Hurley*, 115 S. Ct. at 2344.

186. Transcript of Oral Argument at 23, *Hurley* (No. 94-749).

187. *See Hurley*, 115 S. Ct. at 2348.

188. *See GLIB I*, 1 Mass. L. Rptr. No. 18 at 379 n.5.

189. *See* Transcript of Oral Argument at 24, *Hurley* (No. 94-749).

based on message, but relied on the trial court's mistaken confusion of GLIB's message with the members' sexual orientation.[190] As the transcript references in the trial court's opinion make clear, the Veterans Council freely admitted that it was discriminating against the messages and values of GLIB (i.e., its viewpoint).[191] But the equation of GLIB's message with its members' sexual orientation (a characteristic protected by anti-discrimination laws), was the trial court's error of law.[192] The trial judge stated that "[e]xcluding all sexual themes not only contravenes the First Amendment's prohibition on content-based restriction, but is a form of discrimination itself."[193] This collapsing of the distinction between the message and the messenger was a crucial error. For all the Veterans Council's members knew, and for all they cared, heterosexual members or sympathizers of GLIB could be marching behind GLIB's banner, since membership in GLIB depended on support for its goals.[194] Even if all the marchers behind GLIB's sign were "straight," however, the exclusion of the group would still legally be discrimination on the basis of sexual orientation, under the trial judge's reasoning.[195]

IV. DECISION

The Supreme Court issued its unanimous decision on June 19, 1995.[196] The opinion, authored by Justice Souter, held that the state

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190. *Id.*; *see also GLIB I*, 1 Mass. L. Rptr. No. 18 at 379 n.5.

191. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 379 n.5 (citing Trial Transcript at A-533, A-541 to -542, *GLIB I* (CIV. No. 92-1518), where counsel for the Veterans admitted that the Veterans excluded GLIB because of its message). The trial court, however, mistakenly equated GLIB's message with its members' sexual orientation. *Id.*

192. *See Hurley*, 115 S. Ct. at 2347.

193. *GLIB I*, 1 Mass. L. Rptr. No. 18 at 379 n.6 (citation omitted).

194. Trial Transcript at A-98, *GLIB I* (CIV. No. 92-1518).

195. *See Hurley*, 115 S. Ct. at 2347.

> Once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own.

Id.

196. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 115 S. Ct. 2338 (1995).

courts' application of the public accommodation statute to the St. Patrick's Day Parade, requiring inclusion of a message that the organizers did not wish to convey, violated the First Amendment.[197] Overcoming the lower court's factual findings, the Supreme Court ruled that it had a duty, where First Amendment interests were implicated, to conduct an independent examination of the record as a whole.[198] Defining "parades" as "marchers who are making some sort of collective point, not just to each other but to bystanders along the way,"[199] the Court forcefully ruled that parades are inherently expressive.[200] The Court held that

> the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. . . . But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.[201]

The Supreme Court was clear, then, that the case was a First Amendment case, not a discrimination case.

Although self-identification is clearly a message in and of itself,[202] the Court did not directly isolate or address "self-identification" as an issue in this case. Justice Souter, however, acknowledged that the record corroborated the expressive nature of GLIB's participation in the Veterans' Parade.[203] He further specified:

> The message [the Veterans] disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.[204]

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197. *Id.* at 2343.

198. *Id.* at 2344.

199. *Id.* at 2345.

200. *See id.* ("Not many marches . . . are beyond the realm of expressive parades, and the South Boston celebration is not one of them.").

201. *Hurley*, 115 S. Ct. at 2347.

202. *See id.* at 2348. *Cf.* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1516-17 (1995) (holding that political author's decision to remain anonymous is protected by the First Amendment).

203. *Hurley*, 115. S. Ct. at 2346.

204. *Id.* at 2348; *see also id.* at 2351 (describing GLIB "as an expressive contingent with its own message").

John Ward summed up his argument on behalf of GLIB by saying that,

> [i]n the end, this is a case about discrimination. The finding of the two courts below, well-supported in the record, was that the reason, the real reason that GLIB was kept out was its members' sexual orientation and not any message, because there was no message in that sense . . . .[205]

Whether self-identifying as homosexual was a message, then, was squarely at issue in this case.[206]

GLIB was slicing it too thin in arguing that it had no message.[207] In this regard, the Supreme Court's decision is surprising for what it did *not* say. It did not explicitly say that self-identification as homosexual is an expressive message protected from state-ordered inclusion (or, presumably, exclusion) by the First Amendment. The opinion's discussion on this point was more circumspect.[208] Perhaps this was because the Court did not want to prejudge cases that were clearly on the horizon; cases challenging, for example, the military's "Don't Ask, Don't Tell" policy.[209]

The United States Supreme Court's opinion also paid SJC Justice Joseph R. Nolan quite a compliment by summarizing and quoting from his dissent.[210] It was a nice gift for the outgoing Justice, who retired from the bench at age 70 shortly before the *Hurley* decision was announced.[211]

For someone who followed the case closely, it was remarkable that the case of *Wooley v. Maynard*[212] was cited only once in the Supreme Court's opinion, and only as part of its account of the SJC opinion of Justice Nolan.[213] While the Supreme Court did cite *West Virginia State*

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205. Transcript of Oral Argument at 46, *Hurley* (No. 94-749).

206. *See Hurley*, 115 S. Ct. at 2348.

207. Indeed, there was debate in the homosexual community as to whether Ward's argument had, in effect, sold the community down the river. *See* Richard D. Mohr, *Putting More Gay into Gay Pride*, BAY WINDOWS, June 15, 1995, at 6, 6-7.

208. *See supra* note 204 and accompanying text. *But see* Elize v. Aspin, 897 F. Supp. 1, 5 (D.D.C. 1995) (recognizing that self-identification as a homosexual may be entitled to strict scrutiny protection (citing *Hurley*, 115 S. Ct. at 2348)).

209. *See, e.g.*, Selland v. Perry, 905 F. Supp. 260 (D. Md. 1995); *Aspin*, 897 F. Supp. at 5.

210. *See Hurley*, 115 S. Ct. at 2343 (citing *GLIB II*, 418 Mass. at 256-60, 636 N.E.2d at 1302-04 (Nolan, J., dissenting)).

211. *Justice Nolan Retires from SJC*, BOSTON GLOBE, June 14, 1995, at 35.

212. Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding that state requirement to display "Live Free or Die" on license plates violates First Amendment).

213. *Hurley*, 115 S. Ct. at 2343 (citing *GLIB II*, 418 Mass. at 257, 636 N.E.2d at

Board of Education v. Barnette,[214] the leading "compelled speech" case, *Wooley* was not cited in the body of the holding. A number of possible reasons for this omission exist. One is that Justice Souter, when he was the New Hampshire Attorney General, had signed the *Wooley* brief, on the losing side.[215] It is probably not one of his favorite precedents. But Chief Justice Rehnquist had also dissented in that case,[216] and it is probably fair to conclude that it is not one of his favorites, either. Presumably the opinion had to be written as inclusively and as non-controversially as possible to preserve unanimity, and that may have precluded reliance on *Wooley*.

Perhaps more to the point, however, *Wooley* was not necessary. Because the Supreme Court had accepted the Veterans' argument that parades were inherently expressive,[217] there was no need for authority for the proposition that even if they were not, private parties would still be entitled to freedom from government-coerced expression of someone else's message.[218] Indeed, because both the Veterans and GLIB were trying to express something through the Evacuation Day/St. Patrick's Day Parade,[219] this was an exceptionally easy case culminating in a unanimous decision.

Because the Court decided the case under the free speech rationale,[220] it did not need to reach the Veterans' expressive association argument.[221] Nonetheless, the Court distinguished *New York State Club Association v. City of New York*,[222] which upheld application of a public accommodation law to a private club, on the ground that compelled access to the public benefits offered by the club did not trespass on the organization's message itself.[223] The *Hurley* Court, however, stated

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1303 (Nolan, J., dissenting)).

214. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630-32 (1943) (holding that state school's expulsion of children who refused to comply with requirement to salute flag and pledge allegiance to the flag violated First Amendment); *see also Hurley*, 115 S. Ct. at 2345 (citing *Barnette*, 319 U.S. at 632).

215. Brief for Appellants, Wooley v. Maynard, 430 U.S. 705 (1977) (No. 75-1453).

216. *See Wooley*, 430 U.S. at 717-19 (White, J., dissenting, joined by Rehnquist, J.); *id.* at 719-22 (Rehnquist, J., dissenting).

217. *See Hurley*, 115 S. Ct. at 2345.

218. *See id.* at 2347-48, 2351.

219. *Hurley*, 115 S. Ct. at 2348.

220. *See supra* notes 196-201 and accompanying text.

221. *See* Brief for Petitioners at 28-34, *Hurley* (No. 94-749).

222. New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988).

223. *Hurley*, 115 S. Ct. at 2351 (distinguishing *New York State Club Ass'n*, 487 U.S. at 13).

that,

> [i]f we were to analyze this case strictly along those lines, GLIB would lose. . . . GLIB could . . . be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.[224]

Although this is technically dictum, it is nonetheless very significant dictum, since it was joined by all the members of the Court. One must think that it was said because the concerns expressed by groups like the Boy Scouts, in its amicus brief,[225] weighed heavily with the Justices.

The Court did reject the Veterans' challenge to the public accommodation law as being overbroad, once it was interpreted by the SJC as applying to expressive activities like the Parade.[226] This was not surprising, since the application of the law in this particular case was so "peculiar" that the Court did not have to reach the facial challenge.[227] Nor is it likely that the questioning of the anti-discrimination law would have achieved anything like unanimity on the present Court.

V. CONCLUSION: A ROTUND REJECTION OF STATE-CONTROLLED EXPRESSION

The real question that presented itself about this case is why all this litigation was necessary, if the legal principle was so clear? The fact is that GLIB was interested in the confrontation, and while it takes two to make a fight, it only takes one to start one. GLIB wanted to make a statement similar to the one made by ILGO.[228] GLIB filed the original

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224. *Id.*

225. *See* Brief of Boy Scouts of America as Amicus Curiae in Support of Reversal at 8-13, 17-22, *Hurley* (No. 94-749).

226. *See Hurley,* 115 S. Ct. at 2346-47.

227. *See id.* at 2347, 2350. The Court noted the following:

> On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn . . . [that] they will not be turned away merely on the proprietor's exercise of personal preference. When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow *exactly what the general rule of speaker's autonomy forbids.*

Id. at 2350 (emphasis added).

228. *See supra* note 41 and accompanying text.

suit. The Veterans, on the defensive, simply kept appealing, all the way to the United States Supreme Court. By then, GLIB may have preferred to walk away, but the battle lines had already been drawn. Fortunately, the story has a happy ending. The First Amendment won.

The Court's unanimous rejection of the "very idea" that the state could impose a viewpoint through the control of speech and expression should resonate throughout First Amendment jurisprudence.

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.[229]

229. *Hurley*, 115 S. Ct. at 2350 (citing Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 20 (1986); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).