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In The  
**Supreme Court of the United States**

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CHRISTIAN LEGAL SOCIETY CHAPTER OF  
UNIVERSITY OF CALIFORNIA, HASTINGS  
COLLEGE OF THE LAW, PETITIONER,

v.

LEO P. MARTINEZ, ET AL.

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*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**BRIEF FOR INTERNATIONAL MUNICIPAL  
LAWYERS ASSOCIATION, NATIONAL LEAGUE  
OF CITIES, AND THE UNITED STATES  
CONFERENCE OF MAYORS AS AMICI CURIAE  
SUPPORTING RESPONDENTS**

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CHARLES W. THOMPSON, JR.  
DEVALA A. JANARDAN  
INTERNATIONAL MUNICIPAL  
LAWYERS ASSOCIATION  
7910 Woodmont Ave.  
Bethesda, MD 20814

LARS ETZKORN  
NATIONAL LEAGUE OF CITIES  
1301 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

JOHN DANIEL REAVES  
THE UNITED STATES  
CONFERENCE OF MAYORS  
1620 Eye Street, N.W.  
Washington, D.C. 20006

DEANNE E. MAYNARD  
*Counsel of Record*  
SETH M. GALANTER  
MORRISON & FOERSTER LLP  
2000 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
dmaynard@mofoc.com  
(202) 887-8740

DIANA B. KRUIZE  
KAY FITZ-PATRICK  
MORRISON & FOERSTER LLP  
425 Market Street  
San Francisco, CA 94105

*Counsel for Amicus Curiae  
International Municipal  
Lawyers Association*

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**BRIEF FOR INTERNATIONAL MUNICIPAL  
LAWYERS ASSOCIATION, NATIONAL  
LEAGUE OF CITIES, AND THE UNITED STATES  
CONFERENCE OF MAYORS AS AMICI CURIAE  
SUPPORTING RESPONDENTS**

The International Municipal Lawyers Association, the National League of Cities, and the United States Conference of Mayors respectfully submit this brief as amici curiae in support of respondents.<sup>1</sup>

**INTEREST OF AMICI CURIAE**

Amici curiae represent local governments and their attorneys from across the nation. Their members have adopted varied approaches to the policy questions pressed by petitioner regarding whether the government should condition receipt of government subsidies to private entities on those entities agreeing not to discriminate, what types of discrimination should be addressed in their jurisdictions, and under what circumstances exceptions should be made.

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<sup>1</sup> Pursuant to Rule 37.3(a), letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.



The *International Municipal Lawyers Association* (IMLA) is a non-profit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the federal and state courts.

The *National League of Cities* (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Founded in 1924, its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

*The United States Conference of Mayors* (Conference), founded in 1932, is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,204 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor. The Conference

has had strong policy supporting civil rights and opposing discrimination dating back to the early 1960's. In 1984, the organization adopted policy calling for the legal protection of gay and lesbian rights at all levels of government.

## SUMMARY OF ARGUMENT

This case has nothing to do with whether petitioner can exist and thrive. This is a question about public subsidies, which include not only funds but also special access to public facilities and fora. Petitioner and other groups are free to continue to exist without the subsidies if they do not wish to accede to the conditions that come with the subsidies.

Petitioner asks this Court to impose a one-size-fits-all rule that all governments, if they provide any subsidies to private entities, may not refuse to subsidize a private entity that discriminates on the basis of any characteristic (other than race or possibly sex) so long as the private entity is a “noncommercial expressive association[.]” Pet. Br. 2.

That categorical rule would stifle the innovation and flexibility that local governments have demonstrated in striking the difficult balance between promoting a diversity of private associations through subsidies while assuring that government dollars, drawn from all of the citizenry through taxes and fees, are not funneled to groups not open to all.

A. Governments have special obligations to ensure that those who receive public subsidies, drawn or created from funds provided involuntarily by all taxpayers, are not using those subsidies in an exclusionary manner.

As early as 1935, governments concerned about discrimination in employment on the basis of race

prohibited employment discrimination by those private contractors hired by the government, well before enacting prohibitions on private employment discrimination generally. The same pattern existed in the housing and public accommodation areas, where those who received government subsidies were the first entities (and sometimes the only entities) to become subject to non-discrimination conditions. The current Model Human Rights Ordinance issued by amicus IMLA recognizes the importance of government subsidies in determining which entities are subject to regulation.

Perhaps the ultimate recognition of the special obligations that should flow to recipients of government subsidies is Title VI of the Civil Rights Act of 1964, which relies on that principle to extend a non-discrimination requirement to any recipient who accepts any “Federal financial assistance.” 42 U.S.C. § 2000d. Although it is unknown how many localities have formally adopted rules similar to Title VI, a survey of the members of amicus IMLA done for this brief revealed that a significant percentage of local governments that responded had an ordinance, policy, regulation, or other document providing that, in order for an organization to be eligible for municipal benefits, the organization must not discriminate in its membership policies.

The reasons for conditioning receipt of government subsidies on a promise of non-discrimination are two-fold, and neither is viewpoint discriminatory. The first reason may have been best articulated by

President Kennedy in urging adoption of Title VI: “Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.” *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (quoting 110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting from President Kennedy’s message to Congress, June 19, 1963)).

The second reason, albeit less tangible, is equally important. Refusing to subsidize groups that discriminate avoids the appearance of government endorsement or entanglement. Even if not true in fact, providing benefits to discriminatory groups may give the impression to a reasonable observer that the government is supportive of, or at least indifferent to, discrimination. That appearance alone may encourage private-sector discrimination, contrary to substantial government interests.

While amici do not seek to force truly private, noncommercial expressive associations to include persons they do not want, by the same token, amici should not be required to subsidize such exclusionary associations with public funds and special access to public facilities and fora.

B. Governments at every level have extended the non-discrimination conditions on government subsidies beyond race. Those efforts of federal and state governments have been sustained by this Court from First Amendment challenges. *See Grove City College*

*v. Bell*, 465 U.S. 555 (1984); *Jonathan Club v. California Coastal Comm'n*, 488 U.S. 881 (1988).

Local governments have been at the forefront of eliminating discrimination and government support thereof, often acting well in advance of federal or state governments in identifying additional forms of invidious discrimination that warrant action. These democratic institutions have determined that, in their communities, discrimination on the basis of other personal characteristics results in burdens similar to that of race discrimination. Those burdens result in a group of people not being treated equally as citizens and members of that group being excluded from jobs, housing, public accommodations, and other aspects of civic life.

Municipalities have, in particular, taken the lead in prohibitions against sexual orientation discrimination, with the first law prohibiting sexual orientation discrimination enacted 38 years ago. In 1984, amicus The United States Conference of Mayors urged all local governments to adopt legal protections so that all Americans can fully participate in American society, regardless of sexual orientation. Today, over 181 municipalities have passed ordinances prohibiting sexual orientation discrimination. Amicus IMLA in its current Model Human Rights Ordinance offers its members language to include sexual orientation in a non-discrimination ordinance.

In response to amicus IMLA's survey, of those municipalities with an ordinance, policy, regulation,

or other document, providing that, in order for an organization to be eligible for municipal benefits, the organization must not discriminate in its membership policies, 80% prohibited discrimination on the basis of religion and 50% prohibited discrimination on the basis of sexual orientation. The vast majority of them do not offer exemptions, yet they report virtually no controversies in applying their rules. The constitutional rule urged by petitioner would stifle experimentation and nuanced approaches.

C. The adoption of petitioner's rule to exclude certain organizations from certain types of anti-discrimination conditions will lead to two possible consequences, neither of which is preferable to the status quo followed by the Ninth Circuit and urged by respondents.

First, municipalities may choose to simply eliminate subsidies. If local governments were to ultimately choose to deny all subsidies, everyone would suffer.

Alternatively, if municipalities are forced to subsidize groups that can discriminate on certain bases (such as religion or sexual orientation) but not others (race or sex), it may become effectively impossible for municipalities to police, and for courts to enforce, even unlawful discrimination.

## ARGUMENT

### **THE CONSTITUTION DOES NOT REQUIRE LOCAL GOVERNMENTS TO PROVIDE PUBLIC SUBSIDIES FOR PRIVATE ASSOCIATIONS THAT WISH TO DISCRIMINATE ON THE BASIS OF RELIGION OR SEXUAL ORIENTATION, EVEN IF THAT PRIVATE DISCRIMINATION IS CONSTITUTIONALLY PROTECTED FROM DIRECT GOVERNMENT REGULATION**

Petitioner asks this Court to impose a categorical rule: that all governments, if they provide any subsidies to private entities, may not refuse to subsidize a private entity that discriminates on the basis of any characteristic (other than race or possibly sex) so long as the private entity is a “noncommercial expressive association[.]” Pet. Br. 2. That rule, if adopted, would stifle the innovation and flexibility that local governments have demonstrated in striking the difficult balance between promoting a diversity of private associations through subsidies while assuring that government dollars, drawn from all of the citizenry, are not funneled to groups not open to all.

#### **A. Governments At Every Level Have Distinct Interests In Prohibiting Discrimination By Entities Receiving Public Subsidies That Would Be Undermined By Any Constitutionally Mandated Exception**

Local governments understand that they have special obligations to ensure that those who receive public subsidies, including funds and special access to



public facilities and fora, are not using those subsidies in an exclusionary manner because those subsidies are drawn (or were themselves created and maintained) from funds provided involuntarily by all taxpayers.

1. Historically, non-discrimination conditions tied to the receipt of government subsidies have been viewed as less problematic than unilateral government regulation of private discrimination, such as that addressed by the Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). And non-discrimination conditions have never been viewed as anything other than viewpoint-neutral requirements.

For example, governments concerned about discrimination in employment on the basis of race started by prohibiting employment discrimination by those receiving government subsidies, such as private contractors hired by the government. New York did so in 1935, and the federal government, other States, and municipalities followed suit. See J. Edward Conway, *State and Local Contracts and Subcontracts*, 14 BUFF. L. REV. 130, 132 & n.7, 134 & n.13 (1964-1965); National Conference of Comm'rs on Uniform State Law, *Model Anti-Discrimination Act* § 706(d) cmt. (1966), reprinted in 4 HARV. J. ON LEGIS. 224 (1966-1967); Paul H. Norgren, *Government Contracts and Fair Employment Practices*, 29 LAW & CONTEMP. PROBS. 225, 225-226 (1964).

Even when governments at every level later enacted legislation generally prohibiting private employment discrimination by large- and medium-sized employers, many excluded the smallest employers. Those laws nevertheless often contained special provisions to cover private entities receiving subsidies, no matter how many people they employed, because of their “special obligation to avoid discrimination.” Commissioners on Uniform State Law, *supra*, at § 301(1) cmt.

Similarly, governments began to address housing discrimination by prohibiting discrimination in “publicly assisted housing,” *e.g.*, housing built with tax exemptions or on land sold to the builder below cost by States or political subdivisions. *See* J. Harold Saks & Sol Rabkin, *Racial and Religious Discrimination in Housing: A Report of Legal Progress*, 45 IOWA L. REV. 488, 513-516 (1959-1960); Charles S. Rhyne & Brice W. Rhyne, National Institute of Municipal Law Officers, Report No. 148, *Civil Rights Ordinances: A Preliminary Report* 90-107 (1963) (reprinting ordinances). It was only later that governments moved to also prohibit private housing discrimination. *See* Saks & Rabkin, *supra*, at 521-523. Even then, it was still understood that entities receiving government subsidies were under special obligations to avoid discrimination. *See, e.g.*, Harvard Student Legislative Research Bureau, *A Proposed Model State Civil Rights Act*, 3 HARV. J. ON LEGIS. 63, 73-74, 95 (1965-1966).

In the area of public accommodations, likewise, some governments have elected to avoid regulating private clubs directly but still seek to influence clubs by conditioning government subsidies on non-discrimination. For example, for more than 20 years, States and municipalities have precluded the use of government funds to pay for membership at discriminatory clubs and have refused to issue liquor licenses to such clubs. See Anti-Defamation League of B'nai B'rith, ADL Law Report, *Private Clubs: Legislative Responses to Discriminatory Practices* 13-14, B13-B21 (Winter 1989). Indeed, over a quarter of a century ago, New York City prohibited city funds being expended at private clubs that did not afford full membership rights to any person because of race, creed, sex, or sexual orientation. *Id.* at B6.

The current Model Human Rights Ordinance issued by amicus IMLA recognizes the importance of government subsidies in determining which entities are subject to regulation. That model ordinance urges municipalities to define public accommodations subject to regulation as “any place that offers services, facilities, privileges, or advantages to the general public *or* that *receives financial support* through the general public *or through governmental subsidy of any kind.*” International Mun. Lawyers Ass’n, *IMLA Model Ordinance Service*, at 12-1.2 (1998) (emphasis added); see also *id.* at 12-1.1 to 12-1.2 (defining “distinctly private” organization as one that does not “regularly receive payment \* \* \* directly or indirectly from or on behalf of nonmembers”).

Perhaps the ultimate recognition of the special obligations that should flow to recipients of government subsidies is Title VI of the Civil Rights Act of 1964, which relies on that principle to extend a non-discrimination requirement to any recipient who accepts any “Federal financial assistance.” 42 U.S.C. § 2000d. Although it is unknown how many localities have formally adopted rules similar to Title VI, a survey of the members of amicus IMLA done for this brief revealed that a significant percentage of local governments had “an ordinance, policy, regulation, or other document, providing that, in order for an organization to be eligible for municipal benefits, the organization must not discriminate in its membership policies.” And some of those reporting no such policy might not offer any subsidies to private organizations.

2. The reasons for conditioning receipt of government subsidies, such as funds and access to government facilities and fora, on a promise of non-discrimination are two-fold, and neither is viewpoint discriminatory.

The first reason may have been best articulated by President Kennedy in urging adoption of Title VI: “Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.” *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (quoting 110 Cong. Rec. 6543 (1964) (Sen. Humphrey, quoting from

President Kennedy's message to Congress, June 19, 1963)).

For this reason, the government has a powerful interest in avoiding subsidizing private entities that discriminate against individuals on the basis of irrelevant personal characteristics. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion); see *Bob Jones Univ. v. United States*, 461 U.S. 574, 591, 604 (1983) ("[g]overnment has a fundamental, overriding interest in eradicating racial discrimination in education," which warrants denial of tax exemptions to discriminatory private schools, because "[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors'").

The second reason is equally important, albeit less tangible. Refusing to subsidize groups that discriminate avoids the appearance of government endorsement or entanglement. Cf. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, (1961) (noting that by its inaction, the State had "elected to place its power, property and prestige behind the admitted discrimination," although the State did not actually order the discrimination). Funding

discriminatory groups may give the impression to a reasonable observer (even if not true in fact) that the government is supportive of, or at least indifferent to, discrimination. That appearance alone may encourage private-sector discrimination, contrary to substantial government interests. In addition, it may make people feel like their government views them as outsiders. See *Romer v. Evans*, 517 U.S. 620, 635 (1996).<sup>2</sup> This is especially true if the organization at issue is using the government’s name in its title.

Although amici do not seek to force truly private, noncommercial expressive associations to include persons they do not want, by the same token, amici’s members should not be required to abandon their viewpoint-neutral conditions and subsidize such exclusionary associations with public funds. “That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.” *Norwood v. Harrison*, 413 U.S. 455, 463 (1973); see *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 97-98 (2d Cir. 2003), cert. denied, 541 U.S. 903 (2004).

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<sup>2</sup> Of course, some government activities that benefit private entities (such as police and fire protection or access to sidewalks and parks) do not pose any appearance of endorsement because they are equally available to all members of the public. It is likely for that reason that this Court has never viewed those activities as constituting subsidies. Cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) (distinguishing subsidies from “state-furnished services includ[ing] such necessities of life as electricity, water, and police and fire protection”).

**B. Municipalities Must Be Given The Same Latitude To Prohibit Religious And Sexual Orientation Discrimination By Entities Receiving Public Subsidies That Petitioner Agrees Is Available To Prohibit Race And (To Some Extent) Sex Discrimination**

1. Modern civil rights legislation in America cannot be understood apart from the legacy of slavery, the Civil War, and Jim Crow. And, indeed, race discrimination was the initial focus of much of the legislative action and case law discussed above.

But race discrimination is not the only way in which America has deviated from the ideals of the Declaration of Independence and the Fourteenth Amendment. Religious discrimination against Catholics and Jews, for example, has often influenced governments and private entities. *See Mitchell v. Helms*, 530 U.S. 793, 828-829 (2000) (plurality opinion); *County of Allegheny v. ACLU*, 492 U.S. 573, 604-605 (1989). Likewise, as this Court has recognized, discrimination on the basis of gender by governmental and private entities has long disadvantaged women. *See J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994) (noting that women, like racial minorities, have “suffered \* \* \* at the hands of discriminatory state actors during the decades of our Nation’s history”); *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

As they have believed necessary and proper, therefore, governments at every level have extended non-discrimination conditions on government

subsidies beyond race and, in fact, beyond characteristics that this Court has determined warrant heightened judicial scrutiny under the Equal Protection Clause. *See Romer*, 517 U.S. at 628-629.

At the federal level, in single across-the-board statutes, Congress has conditioned all federal financial assistance on recipients not discriminating on the basis of sex, disability, and age. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (sex); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (disability); Age Discrimination Act of 1975, 42 U.S.C. § 6101 (age). Those efforts to prohibit recipients of federal subsidies from discriminating have been sustained by this Court. *See Grove City College v. Bell*, 465 U.S. 555, 575-576 (1984) (rejecting First Amendment challenge to Title IX).

In numerous statutes, Congress also has conditioned particular federal funds on non-discrimination on the basis of religion and creed,<sup>3</sup> as well as sexual orientation.<sup>4</sup> Federal agencies also have exercised their discretion to prohibit certain recipients from discriminating on the basis of sexual orientation.<sup>5</sup>

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<sup>3</sup> *See, e.g.*, 42 U.S.C. § 708; 42 U.S.C. § 300w-7; 42 U.S.C. § 300x-57; 42 U.S.C. § 3789d(c)(1); 42 U.S.C. § 10406; 47 U.S.C. § 398.

<sup>4</sup> *See, e.g.*, Energy Supplemental Appropriations Act of 1994, Pub. L. No. 103-211, § 403(5), 108 Stat. 3, 40 (1994).

<sup>5</sup> *See, e.g.*, 42 C.F.R. § 460.98(b)(3).



State efforts likewise to prohibit recipients of state subsidies from discriminating have been sustained by this Court. Thus in *Jonathan Club v. California Coastal Commission*, 488 U.S. 881 (1988), this Court dismissed for want of a substantial federal question a private club's appeal that raised a First Amendment associational claim. In that case, the State refused to allow the club a favorable long-term lease to state-owned beachfront property unless the club agreed not to discriminate on the basis of race, religion, and sex. See *Jonathan Club v. California Coastal Comm'n*, 243 Cal. Rptr. 168 (Cal. Ct. App. 1988), rev. denied and ordered not to be officially published (Cal. 1988). In this Court, the club urged that the condition was unconstitutional because the State "infringe[d] upon [the club's] freedom of association" without establishing "the factors which must be present before an organization's association rights constitutionally may be regulated." Appellant's Juris. Statement at i-ii (Question 3), *Jonathan Club v. California Coastal Comm'n*, No. 88-179 (U.S. Aug. 1, 1988); see also *id.* at 18, 21-22 (arguing that "the condition attempts to force [the club] to allow the State to control [the club's] membership policy" and the club's associational right "protects [the club] from microscopic scrutiny of its membership and government intrusion into personal associational rights"). This Court's dismissal of the club's appeal for want of a substantial federal question constituted a decision on the merits in favor of the State. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

2. Local governments have been at the forefront of eliminating discrimination and government support thereof, often acting well in advance of federal or state governments in identifying additional forms of invidious discrimination that warrant action. *See* James B. Flickinger, Note, *Municipal Fair Employment Practices Ordinances and Commissions: A Legal Survey and Model Ordinance*, 45 NOTRE DAME LAW 258, 258-259 n.3, 264 n.25 (1970) (noting that cities prohibited age discrimination in employment as early as 1960).

These democratic institutions have determined that, in their communities, discrimination on the basis of other personal characteristics results in burdens similar to that of race discrimination. Those burdens result in a group of people not being treated equally as citizens and members of that group being excluded from jobs, housing, public accommodations, and other aspects of civic life. Such exclusions, local governments have found, “are a menace to the public peace and welfare, inimical to democracy, and harmful to the health and welfare of our citizens.” IMLA Model Human Rights Ordinance, *supra*, at 12-1.1.

Municipalities have, in particular, taken the lead in prohibiting sexual orientation discrimination, well in advance of States. Indeed, the absence of protection at the state or federal level is one of the reasons local governments adopt anti-discrimination laws. *See id.* at 12-1.9 (explaining that one of the “advantages of a local human rights ordinance” is to

“prohibit discrimination against persons because of characteristics not covered in federal law”).

In 1972, East Lansing, Michigan became the first municipality to ban discrimination based on sexual orientation, followed later that year by Ann Arbor, Michigan. See Note, *Constitutional Limits on Anti-Gay Rights Initiatives*, 106 HARV. L. REV. 1905, 1923-1924 (1993). In the following decade, dozens of other localities did the same. In 1984, amicus The United States Conference of Mayors adopted a policy resolution calling for local governments to “adopt legal protections for the rights of gay and lesbian Americans” in order to acknowledge “the right of all citizens, regardless of sexual orientation, to full participation in American society.” U.S. Conference of Mayors, *Resolutions Adopted: Fifty-Second Annual Conference* 22 (1984). Today, over 181 municipalities have passed ordinances prohibiting sexual orientation discrimination. See Human Rights Campaign Found., *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2007-2008* 4 (2009).

Amicus IMLA in its current Model Human Rights Ordinance offers its members language to include sexual orientation in a non-discrimination ordinance. It explains that, “[a]lthough some local governments may not include these categories [(marital status and sexual orientation) in their laws], many do. \* \* \* Even as this commentary is being drafted, local governments are facing this issue. This Model includes language on sexual orientation and provides this

commentary for those local governments that wish to adopt such prohibitions.” IMLA Model Human Rights Ordinance, *supra*, at 12-1.9 (footnotes and citations omitted).

Of those municipalities that responded affirmatively to IMLA’s question regarding whether they had an ordinance, policy, regulation, or other document providing that, in order for an organization to be eligible for municipal benefits, the organization must not discriminate in its membership policies, 80% prohibited discrimination on the basis of religion or creed and 50% prohibited discrimination on the basis of sexual orientation. *See also, e.g., Evans v. City of Berkeley*, 129 P.3d 394, 400 (Cal.) (rejecting First Amendment claim to city applying such a policy), cert. denied, 549 U.S. 987 (2006).

A few municipalities have elected to exempt some religious or private clubs from those rules; most have not. *Cf. Flickinger, supra*, at 267-268 & n.38 (noting that some, but not all, cities surveyed excluded “[r]eligious organizations and social, fraternal, charitable and sectarian groups *that do not receive government support*” from employment discrimination laws) (emphasis added). Those that have not offered exemptions report virtually no controversies in applying their rules. A constitutional rule would stifle experimentation and nuanced approaches.

**C. Adopting Petitioner’s Rule May Have Unintended Consequences Of Either Reducing Subsidies Or Substantially Undermining Prohibitions Against Race And Sex Discrimination**

This case has nothing to do with whether petitioner can exist and thrive. This is a question about public subsidies. Petitioner and other groups are free to continue to exist without the subsidies if they do not wish to accede to the conditions that come with the subsidies.

1. Petitioner speculates (Pet. Br. 31-33) that the non-discrimination condition adopted by respondents will permit individuals to take over groups with which they have ideological disagreements, and that the result will be a set of homogenous groups run by the same people espousing the same views.

If that were a real problem, government could address it by amending the non-discrimination rules or by applying general rules against disruptive behavior. But, contrary to petitioner’s hypothesis, amici have not seen that type of behavior at the local level. Likewise, on this record, despite having an “all comers” policy, homophobes have not invaded respondent Outlaw, and non-Christians did not take over petitioner’s predecessor during the *decade* that it complied with respondent’s non-discrimination policy. Pet. App. 58a.

2. In contrast, the adoption of petitioner’s rule to exclude certain organizations from certain types of

anti-discrimination conditions will lead to two possible consequences, neither of which is preferable to the ruled adopted by the court of appeals and urged by respondents.

First, municipalities may choose to simply eliminate subsidies. If local governments ultimately were to choose to deny all subsidies, everyone would suffer.

Alternatively, if municipalities are forced to subsidize groups that can discriminate on certain bases (such as religion or sexual orientation) but not others (race or sex), it may become effectively impossible for municipalities to police, and for courts to enforce, even unlawful discrimination.

The “ministerial exception” courts have created for Title VII of the Civil Rights Act of 1964 demonstrates the difficulties that may occur when certain types of discrimination are constitutionally protected. Some courts have held that some employment decisions by religious organizations that were purportedly made for religious reasons are immune from regulation. *See, e.g., Rweyemamu v. Cote*, 520 F.3d 198, 206 (2d Cir. 2008) (surveying cases). Those courts reason that it is impossible to enforce the substantive provisions on race or sex discrimination without questioning the religious rationale as pretext. As Judge Posner explained:

It might seem that unless a church had a doctrine placing limitations of age, race, ethnic origin, disability, or sex on [employees],

the application of laws forbidding employment discrimination would not involve the court in theological controversy. But this is not correct, because the church would be likely to defend its employment action on grounds related to church needs rooted in church doctrine.

*Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir.), cert. denied, 549 U.S. 881 (2006); see also *Rweyemamu*, 520 F.3d at 209 (a priest's claim of race discrimination in employment was not justiciable because "in order to prevail on his Title VII claim, he must argue that the decision of the Congregatio Pro Clericis was not only erroneous, but also pretextual. Such an argument cannot be heard by us without impermissible entanglement with religious doctrine.").

Similarly, petitioner's rule requiring subsidization of certain kinds of private discrimination, while permitting the government to refuse to subsidize others types of discrimination, would require judges to intrude into what each noncommercial, expressive association "really" believes and why in fact it refused or expelled a particular person as a member. The association might argue that a court cannot constitutionally make that inquiry because of the risk of substituting its own judgment as to what for that of the association makes an appropriate member. Petitioner's rule might thus have the effect of immunizing the association from any form of anti-discrimination requirement, including even the requirements with

regard to race and sex that petitioner acknowledges can constitutionally be applied.

### CONCLUSION

For the reasons set forth above and in respondents' briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

CHARLES W. THOMPSON, JR.  
DEVALA A. JANARDAN  
INTERNATIONAL MUNICIPAL  
LAWYERS ASSOCIATION  
7910 Woodmont Ave.  
Bethesda, MD 20814

LARS ETZKORN  
NATIONAL LEAGUE OF CITIES  
1301 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

JOHN DANIEL REAVES  
THE UNITED STATES  
CONFERENCE OF MAYORS  
1620 Eye Street, N.W.  
Washington, D.C. 20006

DEANNE E. MAYNARD  
*Counsel of Record*  
SETH M. GALANTER  
MORRISON & FOERSTER LLP  
2000 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
dmaynard@mofocom  
(202) 887-8740

DIANA B. KRUIZE  
KAY FITZ-PATRICK  
MORRISON & FOERSTER LLP  
425 Market Street  
San Francisco, CA 94105

*Counsel for Amicus Curiae*  
*International Municipal*  
*Lawyers Association*

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