CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

April 15, 2014

The Honorable Richard D. Fybel, Chair
Supreme Court Advisory Committee
on the Code of Judicial Ethics
350 McAllister Street
San Francisco, California 94102-3688

Dear Justice Fybel and Committee Members:

This comment letter is submitted on behalf of the Christian Legal Society ("CLS"), an association of Christian attorneys, law students, and law professors. CLS has long believed that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their belief, speech, or assembly.

Demonstrating its commitment to pluralism, CLS was instrumental in passage of the federal Equal Access Act of 1984 that protects the right of both religious and LGBT student groups to meet on public secondary school campuses. Equal Access Act ("EAA"), §§ 20 U.S.C. 4071-74. See 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting the EAA). See, *e.g.*, *Board of Education v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student group's meetings); *Garnett v. Renton Sch. Dist.*, 987 F.2d 641 (9th Cir. 1993) (same); *Ceniceros v. Board of Trustees of San Diego Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997) (same); *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002) (same); *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp.2d 1291 (C.D. Cal. 2008) (same); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp.2d 1135 (C.D. Cal. 2000) (EAA protects Gay-Straight Alliance student group's meetings). CLS is proud of its efforts to protect free speech and expressive association rights for all student groups.

In contrast, the proposed change to Canon 2C would violate basic principles of pluralism. Because the freedoms of speech, religion, and assembly are essential to a healthy and pluralistic free society, judges should not be prohibited from belonging to the Boy Scouts of America. Therefore, CLS urges the Committee to retain Canon 2C as it is currently written and to reject the proposed change outlined in the Invitation to Comment SP 14-02 (February 5, 2014).

The proposed change to Canon 2C and its commentary would prohibit judges from participating in Boy Scouts with their children and grandchildren. By punishing entire families for wanting to associate with an organization that the State has deemed to be wrong on a matter of social policy, the proposed change would operate as a bill of attainder. The proposed change would heavily burden both the judge and his or her child and inflict needless emotional harm on the child.

The proposed change to Canon 2C would violate judges' constitutional right as parents to direct the education and upbringing of their children as they deem best. The change would also violate judges' First Amendment freedoms of speech, assembly, and association. Finally, as the Committee acknowledges, deletion of the religious organization exception – which is not proposed at this time -- would violate judges' constitutional rights of freedom of religion and religious association.

Canon 2C reflects the basic nondiscrimination norms of our society. Such nondiscrimination policies are good and essential. But they must be interpreted in light of the fact that they are intended to protect religious citizens, not penalize them for being religious. Too often nondiscrimination policies are misapplied in a wooden, unthinking manner to exclude religious citizens from the public square. But it is basic religious liberty, not discrimination, for religious organizations to require their leaders to agree with their religious beliefs. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012).

Misuse of nondiscrimination policies to exclude religious persons from the public square threatens the pluralism at the heart of our free society. The genius of the First Amendment is that it protects everyone's speech, no matter how unpopular, and everyone's beliefs, no matter how unfashionable. When that is no longer true and nondiscrimination policies are misused as instruments for the intolerant suppression of dissenting speech and beliefs, then the pluralism so vital to sustaining our political and religious freedoms will no longer exist.

A. Like unconstitutional bills of attainder, the proposed change would punish judges and their children for belonging to an organization that holds social views which the State disapproves.

To change Canon 2C to prohibit judges from belonging to Boy Scouts with their children and grandchildren punishes entire families for wanting to associate with an organization that the State has deemed to be wrong on a matter of social policy. The Invitation to Comment asserts that "[e]liminating the exception would not have any effect on a judge's family members, who could still join or continue to be members of the BSA." Invitation to Comment ("ITC") p. 4. But this statement demonstrates that the Committee fails to understand the significant role that parental involvement plays in a child's participation in the Scouting program.

The proposed change would mean that judges could not serve as leaders of their child's den,[1] pack,[2] or troop.[3] A judge would be required to explain to his or her second-grader why the

[1] Cub Scouts in the first through fifth grades are organized into "dens" according to grade level with each grade working to attain the next rank of advancement. For example, first-grade Cub Scouts work to attain the rank of "tiger"; second-graders work to attain the rank of "wolf"; third-graders work to attain the rank of "bear"; and fourth and fifth graders work to attain the rank of "webolos," which is an acronym for "we be loyal Scouts." Each den requires at least two parent leaders.

parent could not serve as den leader or packmaster like all the other parents. A judge would have to explain to a grandson that he or she cannot serve as a merit badge counselor for "Citizenship in the Community" or "Citizenship in the Nation." The proposed change would limit a judge's ability to be involved in his or her son's attainment of the rank of Eagle, from participating on his Eagle project to assisting him in earning the twenty-one merit badges required to achieve the rank of Eagle. (Several of the required merit badges, such as the Family Life and Personal Management merit badges, require parental participation.) Denying a judge the ability to be freely involved in his or her child's Scouting experience is a heavy burden that not only penalizes the judge, but inflicts an unnecessary emotional burden on his or her child.

Such state action is the modern version of a bill of attainder: the State targets a disapproved viewpoint for punishment and visits that punishment upon entire families. Such legal sanctions are, of course, long prohibited by American constitutional norms. U.S. Const. Art. I, § 10 ("No State shall pass any Bill of Attainder . . . ."); Art. I, § 9, cl. 3 (Congress may not pass a bill of attainder). In a case arising in California, the United States Supreme Court held that a federal law was an unconstitutional bill of attainder because it prohibited Communist Party members from holding office in labor unions. *U.S. v. Brown*, 381 U.S. 437 (1965). Writing for the Court, Chief Justice Warren explained that "the Bill of Attainder Clause was not to be given a narrow historical reading . . . , but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons *or groups*." *Id.* at 447 (emphasis supplied).

In his ruling, Chief Justice Warren relied on *Ex parte Garland*, 71 U.S. 333 (1866), in which the Supreme Court held unconstitutional, as a bill of attainder, a post-Civil War federal law that prohibited an attorney from practicing in federal courts unless he first swore that he had taken no part in the rebellion against the Union. Excluding attorneys from practicing in federal court because they engaged in armed rebellion against the federal government would seem a more justifiable employment restriction than excluding judges from holding judicial office because they are members of the Boy Scouts. If the former is unconstitutional, then certainly the latter is equally unconstitutional.

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[2] The "pack" is composed of all Cub Scouts in first grade through the first half of fifth grade. The pack requires numerous parents to serve either as uniformed leaders overseeing pack activities or as non-uniformed leaders on the pack committee overseeing the uniformed leaders' efforts.

[3] Scouts "bridge" from a Cub Scout pack into a Boy Scout troop during their fifth grade year and remain in it until they turn 18 years of age. Each troop has at least one adult scoutmaster and one assistant scoutmaster. Most troops utilize numerous additional adult leaders to supervise camping trips, coordinate "Scouting for Food," serve as advancement mentors, provide instruction for various badges, and assist at the meetings.

B. Like similar past attempts to punish politically disfavored organizations, the proposed change would violate judges' freedoms of speech, association, and assembly.

Fifty years ago, some states disapproved of the NAACP or the Communist Party and tried to punish citizens, including government employees, who affiliated with those organizations. The Constitution prohibited such punitive laws as violations of citizens' freedom of speech, assembly, and association.

At the same time that the federal government and many states were placing employment restrictions on Communist Party members, some states targeted the NAACP and the civil rights movement. These states imposed limits on individuals' right of expressive association in order to intimidate persons from belonging to disfavored organizations. The leading example, of course, is Alabama's requirement that the NAACP disclose the names of its members in order to incorporate in Alabama, a requirement that would certainly have led to immediate economic, social, and physical harm to Alabama citizens who were NAACP members. See John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 77-96 (Yale University Press 2012) (tracing the importance of freedom of speech and expressive association to the civil rights movement in the 1950s and 1960s). An Alabama state court trial judge granted the state "the injunction ex parte, explaining that he intended 'to deal the NAACP a mortal blow from which they shall never recover.'" *Id.* at 79. Relying upon freedom of speech and assembly, the United States Supreme Court protected the NAACP's refusal to disclose its membership lists. *NAACP v. Alabama,* 357 U.S. 449 (1958). See also, *Bates v. City of Little Rock,* 361 U.S. 516 (1960) (NAACP's freedom of association protected its right to refuse to provide its local membership lists to municipal officials).

Some states even restricted public employees' freedoms of speech, assembly and association as a condition of retaining their jobs, in an attempt to identify and penalize government officials who participated in disfavored organizations. For example, Arkansas required every public school and college teacher "to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years." *Shelton v. Tucker,* 364 U.S. 479 (1960). The United States Supreme Court held that Arkansas' restriction violated the First Amendment.

More recently, some states have disapproved of the Boy Scouts' adherence to countercultural beliefs regarding sexual conduct. The New Jersey Supreme Court, for example, found that those beliefs violated its nondiscrimination law regarding sexual orientation. Reversing, the United States Supreme Court held that New Jersey's application of its public accommodations law to require the Boy Scouts to admit a leader who advocated homosexual conduct "violates the Boy Scouts' First Amendment right of expressive association." *Boy Scouts of America v. Dale,* 530 U.S. 640, 644 (2000).

The Supreme Court protected the Boy Scouts' right of expressive association, in part, because "[t]his right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-48. The Court observed that "[g]overnment actions that may unconstitutionally burden this freedom may take many forms." *Id.* at 648. New Jersey violated the Boy Scouts' freedom of association by requiring it to include leaders whose views were contrary to the values the Scouts wished to instill. An equally serious form of burdening this freedom would be the inverse: to condition public office on a citizen forfeiting membership in a particular organization, as the proposed change to Canon 2C would require judges to do. Just as the "freedom of association plainly presupposes a freedom not to associate," so too the freedom of association plainly presupposes a freedom to associate. *Id.* (ellipses and quotation marks omitted).

Nearly two decades ago, the California Supreme Court explicitly recognized that "[m]embership in nonprofit youth organizations is not barred to accommodate individual rights of intimate association and free expression." Canon 2C Commentary. See ITC p. 4. The Constitution's protection for "individual rights of intimate association and free expression" has not changed. Neither should Canon 2C.

This is particularly true given the current overheated political atmosphere regarding recent threats to the Boy Scouts' tax exemption made by the California State Legislature. A few months ago, the California State Senate passed legislation, SB 323, to deprive the Boy Scouts of certain tax exemptions, although the measure has not yet passed the Assembly. See Eric Bradley, *Press-Telegram, Bill Targeting Tax Exempt Status of Boy Scouts Fails to Attract Enough Votes,* Sept. 12, 2013, *available at* http://www.presstelegram.com/government-and-politics/20130912/bill-targeting-tax-exempt-status-of-boy-scouts-fails-to-attract-enough-votes.

The proposed change to Canon 2C clearly targets judges' membership and participation in the Boy Scouts. As the Invitation itself denotes, when the California Supreme Court "added 'sexual orientation' to the list of protected categories included in Canon 2C, . . . the court adopted an exception permitting membership in nonprofit youth organizations to accommodate the interests of judges who were members of or active in the Boy Scouts of America (BSA)." ITC p. 2. In explaining its rationale for eliminating the nonprofit youth organization exception, the Committee "analyzed the exception in the context of a judge being a member of the BSA." *Id.* p. 4. The Committee then examined "the official policy of the BSA" before concluding:

> Because the BSA continues to discriminate on the basis of sexual orientation, the committee agreed that eliminating the exception, thereby prohibiting judges from being members of or playing a leadership role in the BSA, would enhance public confidence in the impartiality of the judiciary.

Id.

Such targeting of the Boy Scouts echoes past targeting of other politically disfavored organizations. In retrospect, we understand history's lesson that targeting Communists, the NAACP, and other political, social, and religious movements was a grave error. As the United States Supreme Court explained at the height of the Second World War, elementary school students, who were Jehovah's Witnesses, could not be expelled from public school for their refusal to salute the American flag because:

> 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 word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

C. Like other unconstitutional restrictions on public employment that interfere with parents' constitutional right to direct the education and upbringing of their children, the proposed change would punish judges and their children for joining an organization which the State disapproves.

The Committee's unsupported assumption that "[e]liminating the exception would not have any effect on a judge's family members, who could still join or continue to be members of the BSA" misunderstands the Scouting program and ignores the profound burden the proposed change would impose on judges and their children. As discussed in Part A *supra*, the proposed change would prevent judges from leading their son's den, pack, and troop and exclude them from serving as merit badge counselors. It would prevent judges from assisting their sons' in earning various merit badges and ranks, as well as attaining the rank of Eagle. It would interfere with parental bonding through the outdoor activities integral to the Scouting program. As the United States Supreme Court recognized, the Boy Scouts instills its values in children by "instructing and engaging them in activities like camping, archery, and fishing." *Dale*, 530 U.S. at 649-50, *citing Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement").

By preventing judges from joining the Scouting program with their children, the proposed change would violate the fundamental parental right to direct the upbringing of their children. In case law stretching over nearly a century, the Supreme Court has repeatedly reaffirmed that the Constitution protects the right of parents to direct their child's education and upbringing. See, *e.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The government cannot condition public employment upon the surrender of this fundamental parental right to direct the education of one's child. To that end, the Ninth Circuit Court of Appeals held that a public school district violated a public school principal's right to direct his children's education when it demoted him because he intended to educate his children at home. *Peterson v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351, *as amended*, 132 F.3d 1258 (9th Cir. 1997). Relying on *Meyer*, *Pierce*, and *Yoder*, the Ninth Circuit affirmed that "liberty in the Fourteenth Amendment encompasses the liberty of parents to determine the education of their children." *Id.* at 1358. If a public school district cannot discipline a principal for homeschooling his children, then a state cannot discipline a judge for leading and otherwise participating with his children in the Scouting program.

D. As the Committee acknowledges, deletion of the religious organization exception would violate judges' constitutional rights.

Despite the proposed change's entrenchment on judges' constitutional rights to direct the upbringing of their children, as well as their First Amendment rights of speech, association, and assembly, the Committee correctly reaffirms that the religious organizations exception is constitutionally required. The Invitation to Comment states that "[t]he committee proposes retaining the exception for religious organizations." ITC p. 1. It further states that "the commentary would retain the language noting that membership in religious organizations is constitutionally protected." ITC p. 4.

Canon 2C reflects the basic nondiscrimination norms of our society. Such nondiscrimination policies are good and essential. But they must be interpreted in light of the fact that they are intended to protect religious citizens, not penalize them for being religious. Too often nondiscrimination policies are misapplied in a wooden, unthinking manner to exclude religious citizens from the public square. Such an "application of the nondiscrimination policy against faith-based groups undermines the very purpose of the nondiscrimination policy: protecting religious freedom." Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 914 (2009). See also, Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194 (Cambridge University Press 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087599.

It is basic religious liberty, not discrimination, for religious organizations to require their leaders to agree with their religious beliefs. In its unanimous ruling in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), the United States Supreme Court held that federal nondiscrimination laws did not outweigh religious institutions' right to determine who their leaders would be. The Supreme Court acknowledged that nondiscrimination laws are "undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 710.

Misuse of nondiscrimination policies to exclude religious persons from the public square threatens the pluralism at the heart of our free society. The genius of the First Amendment is that it protects everyone's speech, no matter how unpopular, and everyone's beliefs, no matter how unfashionable. When that is no longer true — and our society seems dangerously close to the tipping point, as the proposed change to Canon 2C demonstrates -- when nondiscrimination policies are misused as instruments for the intolerant suppression of dissenting speech and minority beliefs, then the pluralism so vital to sustaining our political and religious freedoms will no longer exist.

Respectfully submitted,

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