

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOHN J. HURLEY AND SOUTH BOSTON ALLIED
WAR VETERANS COUNCIL, Petitioners v.
IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL
GROUP OF BOSTON, ETC., ET AL.

CASE NO: No. 94-749

PLACE: Washington, D.C.

DATE: Tuesday, April, 25, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN J. HURLEY AND SOUTH BOSTON :
ALLIED WAR VETERANS COUNCIL, :
Petitioners :
v. : No. 94-749
IRISH-AMERICAN GAY, LESBIAN AND :
BISEXUAL GROUP OF BOSTON, :
ETC., ET AL. :

- - - - - X

Washington, D.C.
Tuesday, April, 25, 1995

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:10 a.m.

APPEARANCES:

CHESTER DARLING, ESQ., Boston, Massachusetts; on behalf of
the Petitioners.

JOHN WARD, ESQ., Boston, Massachusetts; on behalf of the
Respondents.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 94-749, John J. Hurley and
5 the South Boston Allied War Veterans Council v. the Irish-
6 American Gay, Lesbian and Bisexual Group of Boston.

7 Mr. Darling.

8 ORAL ARGUMENT OF CHESTER DARLING

9 ON BEHALF OF THE PETITIONERS

10 MR. DARLING: Mr. Chief Justice, and may it
11 please the Court:

12 The central issue in this case is whether
13 Government can mandate the expression of messages and
14 viewpoints in a privately organized parade over the
15 objections of the private organizers.

16 After ordering the respondent, the Irish-
17 American Lesbian, Bisexual, and Gay Group of Boston, into
18 the 1992 and 1993 parades, and after a hearing before a
19 trial court, a judgment issued and was affirmed by the
20 supreme judicial court of Massachusetts, and in that
21 judgment the supreme judicial court upheld a statement and
22 declaration by the trial court that a proper celebration
23 of St. Patrick's and Evacuation Day requires diversity and
24 inclusiveness.

25 This pronouncement reflects only one of the

1 plain errors and misapplications of well-settled law that
2 requires reversal and a vacation in this action.

3 The Veterans Council clearly stated what the
4 expressive purpose of their parades were. They announced
5 during trial and prior to their application, filing their
6 application itself, that they wished to celebrate their
7 traditional religious and social values.

8 QUESTION: Well, Mr. Darling, my recollection is
9 that the trial justice in this case made a finding that
10 that was not -- that based partly on his, I guess,
11 disbelief of one of the witnesses, or doubt about the
12 witness' credibility, this was not kind of an idea-
13 centered parade.

14 MR. DARLING: Your Honor, the facts in this
15 case, where we have raised a claim, a First Amendment
16 claim, and where the expressions of my client have been
17 altered, we're asking that strict scrutiny be applied. If
18 that is done, then it will be seen that there were no
19 facts at all to support any conclusion that my clients
20 either discriminated or were conducting anything other
21 than their own celebratory parade.

22 QUESTION: Well, you're entitled to more careful
23 review on a First Amendment factual issue, certainly, than
24 otherwise, but still credibility issues have been
25 traditionally for the trier of fact, even in that area.

1 MR. DARLING: Mr. Chief Justice, as far as the
2 credibility of Mr. Hurley was concerned, that related to
3 testimony that he gave in response to questions asking at
4 what stage did they reject and why did they reject the
5 group as a marching unit.

6 QUESTION: But the Chief Justice's question
7 interests me also. What is the evidence to show that the
8 purpose of this parade was to express any viewpoint?

9 MR. DARLING: The parade is inherently
10 expressive, Justice --

11 QUESTION: Well, do you want us to make a
12 finding, than, that a parade is per se an expressive
13 activity?

14 MR. DARLING: Yes, I do, Your Honor, and --

15 QUESTION: Does your case depend on that?

16 MR. DARLING: No, sir, but what follows is that
17 unless my clients or future parade applicants receive the
18 protection of this Court they will be exposed to the
19 injunction and the onerous terms that have been applied by
20 both the trial court and affirmed by the supreme judicial
21 court in compelling them to either voice a message that's
22 mandated by the State or remain silent, or in order to
23 modify the injunction, to return to the court with hat in
24 hand asking if their speech finally met the focus and
25 diversity and inclusiveness that this case mandates in my

1 client's First Amendment parades.

2 QUESTION: Mr. Darling, you've answered, I
3 guess, two questions, and I want to make sure that you
4 stand by the answer in each one, and I want you to comment
5 again on the relevance of each one.

6 The first is you, I think you told Justice
7 Kennedy not only that the parade was expressive in its
8 nature -- I guess all parades are in your view -- but that
9 that was crucial to your case. You also said that the
10 particular message, the viewpoint, if you will, was
11 generally a celebration of religious and social values of
12 Irish Catholics. Is that viewpoint crucial, the existence
13 of that viewpoint as the expression conveyed by the
14 parade, crucial to your case?

15 MR. DARLING: I would think not, Justice Souter.

16 QUESTION: Okay.

17 MR. DARLING: The fact that any parade is
18 inherently expressive, coupled with the fact that
19 realistically nowadays people make applications for parade
20 permits, as has been done in this case --

21 QUESTION: May I just interrupt you and get to
22 another point? You're saying that your viewpoint is not
23 essential to your case, and I take it you're saying it's
24 not essential to your case that your parade have any
25 viewpoint at all.

1 MR. DARLING: That's correct.

2 QUESTION: But is it essential to your case that
3 the parade be expressive?

4 MR. DARLING: No, it's not. As far as I'm
5 concerned, if my clients march down a street on a permit
6 that's issued by the City of Boston, whether it's a moving
7 assembly or a group of persons, there will be some people
8 that will make a determination that my clients or that
9 group of people are expressing something. This case --

10 QUESTION: No, but let's assume they are wrong.
11 Let's assume that in fact they are expressing nothing, so
12 that the parade stands on the same footing, let's say, as
13 a public restaurant, would the result be the same in this
14 case?

15 MR. DARLING: If it was a permitted activity and
16 there was no expression involved, probably not, Justice --

17 QUESTION: Okay.

18 QUESTION: Well, I'm not sure. I take it -- and
19 we can ask the respondents. I take it that the whole
20 position of the respondents is that they want to proclaim
21 a message.

22 MR. DARLING: They do indeed, Justice --

23 QUESTION: And it seems to me that your answer
24 would be that even if your parade is nonexpressive in its
25 history and in its tradition, that you have the right to

1 keep it that way.

2 MR. DARLING: Well, Your Honor --

3 QUESTION: Or is that your -- it seems to me
4 that's a plausible position.

5 MR. DARLING: We have a judgment that made a
6 finding that it was impossible to discern any specific
7 expressive purpose in my client's First Amendment
8 activity, but this Court has access to the exhibits, and
9 particularly a video tape that demonstrates without
10 question that my clients are engaging in a First Amendment
11 activity with viewpoints and political messages and
12 celebrating their religious values. The judge, the trial
13 judge, acknowledged and identified those very values my
14 clients are expressing.

15 QUESTION: Well, just hypothetically, let's
16 assume, following Justice Souter's line of questioning,
17 that this parade was like a picnic or something that had
18 no expressive purpose whatsoever. That may be wrong.
19 Let's assume hypothetically.

20 It seems to me that you still have an argument,
21 and maybe you don't think you do. I should think you
22 still have an argument that even if it is neutral in its
23 custom and in its format, you have the right to say that
24 it cannot be used for some other person's message.

25 MR. DARLING: Well, we've described a group of

1 people --

2 QUESTION: You don't have to take the argument
3 if you don't want to.

4 MR. DARLING: We've described a group of
5 people --

6 QUESTION: I thought you made that argument in
7 your brief, frankly. I'm surprised that this comes to you
8 as a revelation. I thought it was in your brief.

9 MR. DARLING: Well, I'm sorry if I misspoke,
10 Justice Scalia, but the fact is that any group of people
11 or any individual cannot be compelled to speak in behalf
12 of the State or be the courier for the State's message.

13 QUESTION: Mr. Darling, I understood your brief
14 to say this is your parade and you can do with it what you
15 will, somebody else can do what they will with their
16 parade. That's the essence of your argument. It's your
17 parade to make it do whatever you want it to do.

18 MR. DARLING: That's correct, Justice. My
19 clients define the scope and content of the parade. They
20 vote to include and exclude people and groups with
21 messages that they approve of in their parade that are
22 consistent with the overall theme, a celebration of the
23 patron saint of the Archdiocese of Boston, St. Patrick.

24 QUESTION: Well, you --

25 QUESTION: Are there any limitations on that?

1 MR. DARLING: Yes. The limitations are adjudged
2 on a case-by-case and a group-by-group manner by the
3 veterans. They vote to include and exclude groups, and
4 they vote on the basis of their own personal feelings.
5 Not just Mr. Hurley but the vote of 60 people made the
6 determination to exclude the respondent in this case.

7 QUESTION: Mr. Darling, I thought you said you
8 couldn't do whatever you wanted with a parade. I thought
9 you conceded that you could not exclude gays, lesbians,
10 and bisexuals from marching in the parade if they want to
11 march, so long as they are not trying to convey a message
12 which you do not want conveyed.

13 You don't contest that the Massachusetts law is
14 applicable to the parade insofar as the exclusion of
15 someone simply for being a homosexual or lesbian or a
16 bisexual is concerned, right?

17 MR. DARLING: No, that's correct, Justice
18 Scalia. The fact that my clients do not have a litmus
19 test so far as sexual orientation is concerned for
20 participation in the parade is very clear from the record.
21 My clients have excluded messages, not the people. The --

22 QUESTION: What is the message in this case?
23 How would you state the message that GLIB is trying to
24 convey?

25 MR. DARLING: GLIB had three purposes that were

1 found as expressive during the trial. They were
2 enumerated by the court as first to express its members'
3 pride in their dual identities, second to demonstrate to
4 the Irish-American and the gay, lesbian, and bisexual
5 communities the diversity within those respective
6 communities, and to show support for the Irish-American
7 gay, lesbian, and bisexual men and women in New York City,
8 the ILGO members, who were seeking to participate in the
9 New York St. Patrick's Day parade.

10 They sought to demonstrate and proclaim their
11 diversity on the basis of their sexual orientation in the
12 parade. They also had a political message to support the
13 people that were excluded from the St. Patrick's Day
14 parade in New York, and my clients have messages that they
15 really don't have to explain. They merely have to display
16 them. They --

17 QUESTION: The message is, it's great to be
18 Irish.

19 MR. DARLING: That's one of them, Justice
20 Souter.

21 QUESTION: That's enough, isn't it?

22 (Laughter.)

23 MR. DARLING: One of them.

24 I cannot emphasize enough the fact that for 3-
25 1/2 years I've been explaining the basis for my client's

1 speech, and being asked why they wish to express their
2 religious values, what relationship do the Joey's clowns
3 have to St. Patrick, all of the most absurd questions I've
4 heard in my modest career.

5 What this case revolves around is messages. My
6 clients have their messages. They may be old-fashioned,
7 or they may be traditional messages.

8 QUESTION: Well, what you're saying, I gather,
9 Mr. Darling, is it isn't just a message it's great to be
10 Irish, but that it's great to be Roman Catholic, too.

11 MR. DARLING: Your Honor, Mr. Chief Justice, the
12 messages contained in my client's parade are numerous and
13 powerful messages. They include an anti-abortion group.
14 Now, that group had been excluded for several years
15 because they wished to display signs and pictures, and
16 shout to the crowd, the spectators, and hand out
17 literature as they passed down the street.

18 QUESTION: Well, could you answer my question
19 more directly? Is the Roman Catholic religion a part of
20 your message?

21 MR. DARLING: It certainly is, Mr. Chief
22 Justice. The Ancient Order of Hibernians have been an
23 integral part of the veterans parade for many years. They
24 declined to participate in the parade because of the
25 forced inclusion of the respondent in the '92 and 1993

1 parades. My clients wanted that religious component in
2 their parade, the Ancient Order of Hibernians. Because of
3 the forced inclusion of the viewpoint by the courts, the
4 Hibernians did not participate. My client's speech was
5 diminished.

6 QUESTION: Why do they let the Baptists join the
7 parade if it's a Catholic parade?

8 MR. DARLING: Well, it's part of their cultural
9 expression, Justice Stevens. They're ecumenical in their
10 Irish --

11 QUESTION: Up to a point.

12 (Laughter.)

13 QUESTION: Well, as I recall, the district court
14 found that St. Patrick would not have excluded the
15 homosexuals, lesbians, and bisexuals, isn't that right,
16 something to that effect. His mission was not just to the
17 straights, or something of that sort.

18 (Laughter.)

19 QUESTION: Is that a finding of the district
20 court, or the lower court here?

21 MR. DARLING: I believe that was a homily that
22 was added at the end of the judgment in the superior court
23 decision, but clearly the fact that homosexuals and
24 bisexuals and lesbians have marched in my client's parade
25 for years is of no great consequence to my clients, that a

1 gay city councillor who is openly gay who marched, and
2 that appears in the record, and he was not disturbed.

3 And Mr. Hurley did not have him excused from the
4 parade, as he did in '93, when the court ordered my
5 clients to include GLIB with their sexual orientation
6 massagist, and Mr. Hurley ordered the exclusion of a truck
7 with an antigay message on it, and assisted by the police
8 they were thrown out of the parade.

9 My clients do not care about the sexual
10 orientation or the religious background or the ethnic
11 composition of anyone in their parade. They select groups
12 that are consistent with what they perceive to be their
13 version of a celebration of St. Patrick in their
14 neighborhood, and it has some neighborhood features, and
15 that's why the Baptist Bible trolley is invited, and
16 that's why a number of local organizations are invited.

17 A great deal has been made about the factual
18 situation relating to people showing up and paying to join
19 in the parade. Well, this is not supported at all in the
20 evidence, not one iota.

21 QUESTION: So what are we supposed to do -- I
22 take it that you concede, or do you not, that if your
23 groups want to -- your group cannot discriminate on the
24 basis of race, can it?

25 MR. DARLING: It can in its --

1 QUESTION: Just -- you wouldn't let a person in
2 just because he was Afro-American, that was your only
3 reason?

4 MR. DARLING: Justice Breyer, my clients, if
5 they wish to discriminate on the basis of their speech, in
6 their speech they can, but as far as discriminating
7 independently of their speech, that is conduct, and --

8 QUESTION: No, no, that's not my point. My
9 point actually is that there's a factual finding in this
10 record, I take it -- the SJC says that the judge found
11 that GLIB was excluded from the parade because of the
12 sexual orientation of its members.

13 Now, that's a finding that we have here, and so
14 is that finding -- are we supposed to accept that, or
15 reject that?

16 I take it that there's a finding that the parade
17 normally includes everybody, and however they didn't
18 include these people not because they weren't proud to be
19 Irish, they were, but because they didn't like their
20 sexual orientation.

21 Now, I just read that sentence is what it said
22 in the SJC, so are you saying that you do have a right to
23 exclude because of the sexual orientation, or are you
24 saying that wasn't why they were excluded, and if it's the
25 latter, what do we do about the fact-finding?

1 MR. DARLING: I'm suggesting that the finding of
2 discrimination, Justice Breyer, was made inappropriately
3 on the very basis of the words you have just read. The
4 trial judge equated --

5 QUESTION: So you're saying the fact-finder --

6 MR. DARLING: The trial judge equated the sexual
7 orientation with messages and values. In my book, if you
8 combine a message and a value you've got a viewpoint, not
9 a sexual orientation.

10 QUESTION: But what are we supposed to do,
11 because what we have is that sentence of the supreme
12 judicial court, which I take it is a finding. Are we
13 supposed to say -- look into the record and say they're
14 wrong? Are we supposed to remand it for a further factual
15 finding? Are we supposed to take it as a fact? What do
16 you suggest we do?

17 MR. DARLING: I would suggest, Your Honor, that
18 the Court review the entire record, because I would be
19 very distressed if my clients' rights of free speech were
20 abridged on the basis of one judge's opinion of what
21 message and viewpoint combined to mean.

22 QUESTION: Well, it's not just --

23 MR. DARLING: Messages and values. Excuse me.

24 QUESTION: But one judge always finds the facts.
25 On page B4 of the appendix I think is the place

1 where the trial judge makes the finding that Justice
2 Breyer has asked about. Footnote 5, the last sentence of
3 footnote 5 on page B4 says the defendant's final position
4 was that GLIB would be excluded because of its values and
5 its message, i.e., it's members' sexual orientation.

6 That seems to conflate two different concepts.
7 It's quite a confusing finding.

8 MR. DARLING: Well, if values and message equate
9 to sexual orientation, I have difficulty with that,
10 Justice Kennedy, but you could read prior to the -- in the
11 same footnote, while we're on the same page, the pretext
12 and the credibility of Mr. Hurley were mentioned in this
13 area of the decision, and Mr. Hurley and the Veterans
14 Council knew nothing about this group when they first
15 approached the Veterans Council to march in their parade.
16 This is reflected in the record.

17 They had no name. They had three people that
18 were forming a group that wanted to march, so naturally,
19 when they finally sent in an application, which is
20 reflected in the exhibits, that described themselves as a
21 social club, they did not have enough information about
22 the group and they were also hearing information in the
23 community about the three participants that wanted to
24 organize the group.

25 After they found out what the messages of the

1 group were, they took a vote, and they voted to exclude
2 any group with any sexual theme from their parade.
3 They're entitled to do that. They're entitled to define
4 the parade in any form and shape that they wish. That was
5 not pretextual.

6 The court found, as being discriminatory, the
7 very fact that my clients voted to exclude any groups with
8 sexual themes to be discriminatory in itself. Therefore,
9 I think the focus is correct on that area. I sincerely
10 think that values and messages do not necessarily mean
11 sexual orientation. They mean a viewpoint, and it's the
12 viewpoint that was imposed on the parade that brought us
13 here today.

14 If my clients were marching with a group of
15 people that did not have the signs and the messages that
16 are reflected in this record, then there would be no
17 dispute. The fact that the sign, the proclamations on the
18 sign, and their announced messages that were determined to
19 be as I read to the court by the trial judge, my clients
20 can reject. They can include and exclude any messages
21 they wish to.

22 QUESTION: Yes, but --

23 QUESTION: Mr. Darling, before you finish, there
24 was one of the friends of the court that suggested that
25 there was an open issue here about perhaps State action.

1 I think you would concede, would you not, that if this
2 were the State of Massachusetts or the City of Boston
3 parade, they could not pick and choose among messages.

4 MR. DARLING: That's correct, Justice.

5 QUESTION: And what about the notion that
6 because there were so many close ties between your group,
7 the Veterans Council, and the City of Boston, this State
8 action or governmental action was implicated?

9 MR. DARLING: The matter was fully litigated at
10 trial. There was a finding by the trial court that there
11 was no State action. Respondent --

12 QUESTION: There was a finding that Boston
13 wasn't involved and so the municipal defendants were
14 dismissed, but what about the notion that you took on the
15 mantle of the State?

16 MR. DARLING: The fact that -- there was a also
17 a fact found that the veterans were private actors. As to
18 assuming some role that may have been assigned by James
19 Michael Curley back in 1947, whatever happened then
20 respectfully is not relevant now.

21 Today, the Boston Transportation Department
22 issues permits on a first come, first served basis. My
23 clients have applied for and received the permit for many
24 years. No one else has applied.

25 My clients run their parade. They generate the

1 money for the parade. They raise the money for their
2 parade. They have meetings to design the content of that
3 parade. They have no contact with the city. In 1992, in
4 1993 we had two mayors that were literally trying to force
5 this group into the parade. My clients resisted that.

6 If it was a city sponsored or city -- my clients
7 were administering the parade for the city, then my
8 clients would simply have said well, you take your parade
9 and go, we'll do ours. They've never, ever felt they were
10 acting in the role of an administrator for the City of
11 Boston. They conduct and run their own parade and they
12 design it in a form and style of their choosing.

13 QUESTION: And that was found by the trial
14 court, wasn't it. I mean, it said that there was no
15 symbiotic relationship, is how it was addressed.

16 MR. DARLING: Yes, Justice Scalia, and the judge
17 made a very detailed number of findings relating to the
18 symbiotic relationship, or the -- all the way back to
19 Evans v. Newton as far as what had traditionally been done
20 by the city.

21 QUESTION: Mr. Darling, can I just raise one
22 question? I'm concerned about the question Justice Breyer
23 asked you, because the court of -- supreme court, or
24 court -- whatever you call this top court, does expressly
25 say the finding was not clearly erroneous.

1 Now, are you saying we can decide this case
2 without setting aside that finding, and if you say we must
3 take a -- review the record de novo on that finding, do we
4 also have the right to review the de novo on that State
5 action?

6 MR. DARLING: I would think the compelling need
7 of protecting fundamental First Amendment rights would
8 require a complete review relating to our First Amendment
9 claims.

10 QUESTION: Would that include complete review of
11 the finding of no State action?

12 MR. DARLING: I would think not, Justice
13 Stevens, but if that was so, and this Court did, I'd be
14 delighted if the Court would revisit the State action that
15 was visited upon my clients by two mayors of Boston that
16 coerced my clients into including a group into their
17 parade that they did not wish to include.

18 QUESTION: Does the respondent challenge the
19 finding of no State action here?

20 MR. DARLING: No. They -- Mr. Chief Justice,
21 they ask that the judgment of the State court be affirmed
22 in every significant --

23 QUESTION: They didn't cross petition, did they?

24 MR. DARLING: They did not, no, sir.

25 I reserve the balance of my time if there are no

1 further questions.

2 QUESTION: Very well, Mr. Darling. Mr. Ward,
3 we'll hear from you.

4 Mr. Ward, just to perhaps follow up on that
5 question as -- you do not challenge the conclusion of the
6 Massachusetts courts that there was no State action here?

7 ORAL ARGUMENT OF JOHN WARD

8 ON BEHALF OF THE RESPONDENTS

9 MR. WARD: Mr. Chief Justice, and may it please
10 the Court:

11 We do not press that issue here.

12 We included -- I believe that the Court is free
13 to affirm the judgment of the court below on any grounds
14 it chooses, and we certainly --

15 QUESTION: Well, we can affirm on an alternate
16 grounds, but not one that you have not advanced in your
17 brief.

18 MR. WARD: We dropped a footnote acknowledging
19 amicus' position. We do not --

20 QUESTION: An amicus cannot raise a separate
21 issue.

22 MR. WARD: We do not press that position in this
23 Court, Your Honor.

24 This is a case about discrimination. The
25 finding of the trial judge in this case was that the

1 council excluded the members of GLIB on the basis of their
2 sexual orientation, that they excluded them for who they
3 were, not what they said.

4 QUESTION: Well, do you agree that we can review
5 that in a First Amendment case, that we can review that
6 finding and address Justice Breyer's question so that
7 perhaps that finding is in fact not dispositive for us?

8 MR. WARD: The Court can certainly review the
9 facts in a First Amendment case to determine whether or
10 not First Amendment rights have been violated. However, a
11 finding of discrimination is uniquely dependent upon
12 credibility, and even in Hernandez v. New York, for
13 example, the Court pointed that out, even where
14 constitutional rights are implicated.

15 QUESTION: Well, do you contest -- I assume you
16 concede that your clients wanted to be in the parade
17 because they wanted to proclaim a message.

18 MR. WARD: Well, I think the term "message" as
19 it's been used in this case really is more confusing than
20 illuminating, Justice Kennedy.

21 My clients wanted to be included in the parade.
22 They -- the trial -- they wanted to be included in what
23 the trial judge found to be an open recreational event.
24 The trial judge found that they had been discriminated
25 against. He ordered that they be included on the same

1 basis as everybody else. Everybody else self-identified.

2 QUESTION: Do you think it's a fair conclusion
3 from this record that the plaintiffs had no interest in
4 proclaiming their message in this event?

5 MR. WARD: I think that there is a difference
6 between who someone is and what their message is. They
7 did not come in with a sign saying "Gay is Good."

8 QUESTION: Precisely, but the First Amendment is
9 concerned with the latter.

10 MR. WARD: I'm sorry.

11 QUESTION: The First Amendment is concerned with
12 the latter, and if messages are the grounds for the
13 exclusion from the parade, it would seem to me that that
14 is the end of it.

15 MR. WARD: The council has the right to exclude
16 on the basis of viewpoint. What the trial judge found was
17 that they excluded on the basis of sexual orientation.
18 That's discrimination under State law.

19 QUESTION: To get back to the question of why
20 GLIB wanted to be in the parade, they didn't want to be
21 there to recreate, as was found by the Massachusetts
22 supreme court. GLIB's purposes are to express its
23 members' pride in their dual identities as Irish or Irish-
24 American, to demonstrate to the Irish-American community
25 and to the Gay, Lesbian, and Bisexual community the

1 diversity within those -- and to show support. All of
2 those are expressive activities. They were there to
3 express something, weren't they?

4 MR. WARD: Justice Scalia, I think that when
5 Linda Brown went to school in Little Rock her going in
6 there was expressing something. For purposes of the
7 discrimination statute, the expression is incidental.

8 When a discriminator excludes someone, that also
9 under some circumstances sends a very powerful message.

10 QUESTION: But it's not incidental. If these
11 people were allowed in to march in other units and were
12 not excluded from -- was there any evidence of that by --

13 MR. WARD: There was no finding about that,
14 Justice Scalia.

15 QUESTION: No finding at all.

16 MR. WARD: No, there was no finding that they
17 were let in in other units.

18 QUESTION: No finding that they weren't, either.

19 MR. WARD: No, that's --

20 QUESTION: Was there any evidence whatever that
21 a person would be excluded from the parade, marching in
22 another unit, if that person was homosexual or lesbian or
23 bisexual? Was there any evidence whatever of that?

24 MR. WARD: There was only Mr. Hurley's testimony
25 which the trial judge disbelieved, but I think the point

1 is, Your Honor --

2 QUESTION: Which was the opposite.

3 MR. WARD: Which was he said I never --

4 QUESTION: And that's the basis on saying that
5 this existed, that somebody else said it didn't exist.

6 MR. WARD: He said, I never knowingly excluded
7 someone on the basis of their sexual orientations, which
8 is not the same thing as saying, I knew that so-and-so was
9 gay and let him in.

10 QUESTION: It's also not the same thing as
11 evidence that somebody was excluded simply because of his
12 sexual orientation.

13 MR. WARD: The -- I think that the point here,
14 Justice Scalia, is that one -- under the
15 antidiscrimination laws one cannot be penalized for merely
16 self-identifying any more than the -- when a discriminator
17 excludes --

18 QUESTION: Why is that? This isn't a matter of
19 penalizing. It's a matter of not wanting to convey the
20 expressions, the demonstrations, and the showings of
21 support that this group wanted to make in that particular
22 parade.

23 MR. WARD: For the same reason that if the
24 council had said, we don't object to the presence of Jews,
25 just Jewish surnames, or we don't object to the presence

1 of blacks provided they somehow conceal who they are.

2 This group, the order of the trial court simply
3 said, let them in on the same basis as everybody else. If
4 they wanted to -- if the council wanted to exclude all
5 signs, they could have done so. They were certainly
6 entirely free to do that. There was nothing in the order
7 of the court that said that GLIB, unlike any other group,
8 can come in with some sort of message.

9 QUESTION: That may be the rule for the
10 Massachusetts antidiscrimination law, but if Massachusetts
11 antidiscrimination law results in forcing parade
12 organizers to allow people with signs and placards that
13 are inconsistent with what the parade says its message is,
14 then it's a problem under the First Amendment, isn't it?

15 MR. WARD: That is correct, but what I -- I
16 think I --

17 QUESTION: You're saying that didn't happen.

18 MR. WARD: I'm saying that didn't happen, and
19 I'm saying it for two reasons, Mr. Chief Justice. First
20 of all, there was a State finding also that this was an
21 open recreational event, that there really was --

22 QUESTION: Well, let's pose it in a different
23 context. Suppose there's a Ringling Brothers Barnum and
24 Bailey Circus in town and they have a parade, and an
25 animal rights group wants to join the parade with their

1 signs that say, animals shouldn't be used as they are in
2 circuses. Now, do you think they have a right under a
3 public accommodation law to join that parade?

4 MR. WARD: Justice O'Connor, I see a very clear
5 distinction between viewpoint discrimination and
6 discrimination against people simply for being who they
7 are.

8 QUESTION: Yes, but a Barnum and Bailey parade
9 doesn't have any viewpoint other than just, gee, the
10 circus is in town and everybody come.

11 (Laughter.)

12 MR. WARD: I think that if the issue here --

13 QUESTION: A public event.

14 MR. WARD: A public accommodation, right, but
15 what the council is saying is that they're reading into
16 the mere presence of a group that's protected under the
17 Massachusetts statute, a message. Discriminators always
18 do that. That's what discrimination --

19 QUESTION: They're not reading into it. The
20 group said that they wanted to express their pride in
21 their dual identities as Irish and homosexuals.

22 This group does not believe, whether you agree
23 with it or not, that being homosexual is something to be
24 proud of, and therefore do not want that idea to be
25 expressed in their parade. Why is that not simply saying

1 you don't have to have expressed what you do not want to
2 have expressed?

3 MR. WARD: Because whatever the group had as its
4 expressive notion when it formed, all it said in the
5 parade is, we are Irish-American lesbians, gay men and
6 bisexuals.

7 QUESTION: But the point -- suppose that were
8 true. You know the case of Wooley v. Maynard --

9 MR. WARD: Of course.

10 QUESTION: -- the driver's license that said
11 live free or die?

12 MR. WARD: Right.

13 QUESTION: The driver of that car was not
14 engaged in expression. He didn't think about it. But the
15 point was that once somebody told him he had to express a
16 message, the court found that this was State interference,
17 and that this was State-mandated expression which is
18 contrary to the First Amendment.

19 MR. WARD: The difference, I think, Justice
20 Kennedy --

21 QUESTION: And the point is that even if the
22 parade were not expressive earlier, and I doubt that, but
23 even if it were, I should think the organizers could say
24 we don't want it turned into an expressive activity, and
25 that this case is much easier than a driver's license

1 case.

2 MR. WARD: I think, Justice Kennedy, that GLIB
3 is like the numbers, it's not like the sign. In other
4 words, what the council was doing is what discriminators
5 always do. They're conflating identity with some message
6 that they read into it, and --

7 QUESTION: But Mr. Ward, what about this --

8 QUESTION: Well, can we just get one thing
9 established. You would agree that if the reason for the
10 exclusion of your clients was solely because of their
11 message -- solely because of their message -- that the
12 exclusion would be within the First Amendment rights of
13 the organizers of a private parade?

14 MR. WARD: However, there was no message in that
15 sense.

16 QUESTION: Would you agree with that
17 proposition?

18 MR. WARD: I would agree that the council is
19 free to discriminate on the basis of viewpoint. It is not
20 free --

21 QUESTION: Including your client's viewpoint.

22 MR. WARD: Correct. In other words -- yes. If
23 my clients came in with a sign saying, "Gay is Good," they
24 could keep it out. However, that's not what happened
25 here. The finding --

1 QUESTION: Mr. Ward, there is -- there are
2 three -- there's a statement I think in the court of first
3 instance and in the supreme judicial court of three
4 purposes. They sound like they're expressive. The last
5 one was support for the New York group that was seeking to
6 march in the parade there. Now, would you review those
7 three and tell me why each of them is not conveying a
8 message?

9 MR. WARD: I don't disagree that each of those
10 purposes is expressive, Justice Ginsburg. My point is
11 that none of those messages was stated in anything that
12 GLIB said in the parade. They simply carried a sign.

13 QUESTION: Well, none of the parade's messages
14 were, either, and we're talking about that which is kind
15 of reasonably implicit and reasonably conveyed throughout.
16 Are you taking the position that unless you literally have
17 a sign with a declarative statement on it that the rule
18 does not apply?

19 MR. WARD: I'm taking the position that when all
20 other groups in the parade are allowed to simply self-
21 identify, that the act of my client in simply self-
22 identifying, which is all they did, is not the expression
23 of an antithetical message in that sense. The Court did
24 not order --

25 QUESTION: So you are then saying that -- I

1 guess you're saying that in the absence of an express
2 declarative statement, none of these three purposes to
3 which Justice Ginsburg has alluded and the Massachusetts
4 courts found as your expressive point is in fact a point
5 being expressed at all.

6 MR. WARD: I'm saying -- no, they certainly did
7 not find any expression in the parade.

8 Groups have a motive for organizing. People
9 that test --

10 QUESTION: Well, didn't they find that your
11 three purposes were expressed by you marching, by your
12 group's marching with self-identification?

13 MR. WARD: No, they did not find that, Justice
14 Souter. They found that these were the purposes for the
15 formation of the group.

16 QUESTION: Yes.

17 MR. WARD: They found that the group marched in
18 the parade, that they were discriminated against because
19 of their sexual orientation, not because of any extrinsic
20 message that they sent, or that they conveyed.

21 QUESTION: Well, what did your group's sign say?

22 MR. WARD: It said simply, Mr. Chief Justice, it
23 said "Irish-American, Gay, Lesbian and Bisexual Group of
24 Boston," which is the identity of who these people were.
25 It did not say, repeal the sodomy laws. It did not say,

1 we question your traditional values. It did not say
2 anything of that kind.

3 QUESTION: That is enough to show that you are
4 proud of that fact, which is what their object is to
5 express their pride in those dual identities. That's all
6 you need to show that pride, is to hang it up in a sign.
7 How else does one show pride in a certain thing?

8 MR. WARD: In the same sense that a black person
9 marching in the parade, I take it, would be proud of his
10 or her identity.

11 QUESTION: That's right, and if that person held
12 up a sign and said, black unity, that would be an
13 expression of pride in blackness.

14 MR. WARD: Except that generally speaking,
15 lesbians, gay men, and bisexual people are not immediately
16 evident to the --

17 QUESTION: Exactly. I mean, the point at issue
18 is whether there's an expression of anything in their mere
19 marching with a sign saying what they are, and it seems to
20 me you must acknowledge that it is -- there is an
21 expression of pride in what they are.

22 MR. WARD: I would call it self-identifying,
23 just as a Star of David, just as --

24 QUESTION: So long as you mean, by self-
25 identifying, pride. I'll accept that.

1 (Laughter.)

2 QUESTION: May I ask you a question, Mr. Ward?
3 It's really remarkable in this case, it seems to me, both
4 of you seem to agree on the applicable law. They agree
5 they can't exclude you because of who you are, and you
6 agree they can exclude you if you're sending a message.

7 So the real question is, how do you decide which
8 it is, and the point, the question is, for me at least, do
9 you answer that question by looking at your motive, their
10 interpretation of what you look like, or the reasonable
11 neutral person's interpretation of the sign? What is the
12 standard?

13 MR. WARD: I think it's objective facts. I
14 think that's what's illustrative here, are the tests that
15 the court has used in the club cases. It's an objective
16 question. It's an objective question.

17 You look at two things. You look at what kind
18 of event the council has created, what the court found
19 that it was an open recreational event, and then you look
20 at the impact of the inclusion of the unwanted group on
21 that event.

22 In this case -- and this Court's cases have
23 suggested that if a group is so organized around a
24 discernible specific expressive purpose that the mere
25 inclusion of the unwanted group would seriously disable

1 them from their expressive purposes, then perhaps the
2 group wins. In this case --

3 QUESTION: Well, I don't know that seriously
4 disable is found in any of our cases. I think quite the
5 contrary, that if you have an expressive purpose, you're
6 entitled to maintain the purity of that expression.

7 MR. WARD: Except that, Justice --

8 QUESTION: Newspapers, for instance, can't be
9 required to print retraction articles.

10 MR. WARD: Exactly. However, what the trial
11 judge found and what the supreme judicial court affirmed
12 was that the relationship of the council to this event was
13 that of standing basically indifferent to the messages,
14 that that's what really happened, and that that --

15 QUESTION: Well, but I think even if that were
16 so historically they could change their position when
17 another group wants to have a message.

18 MR. WARD: Well, I think that clubs often did
19 that when they wanted to exclude black people, and this
20 Court consistently said you can't reorganize around a
21 racist purpose and become thereby a private club. I think
22 the analogy fits here.

23 QUESTION: Mr. Ward, can I ask another question,
24 following up on my preceding question? If it's an
25 objective test, and say objectively the neutral observer

1 would say yes, there's an expression going on here, but
2 nevertheless the evidence was very clear that the real
3 motive was that they didn't want you to march with them,
4 which is what that found, that real motive would really
5 not be controlling under the objective test, would it?

6 MR. WARD: Well, it controls as to the finding
7 of discrimination. It controls as to the finding.

8 QUESTION: Yes, but it would be permissible
9 discrimination if the objective observer --

10 MR. WARD: Oh --

11 QUESTION: -- would think that there's a message
12 there they don't like. Now, maybe they would have
13 excluded you whether or not there was a message, but maybe
14 they can get away with it if there's a message. That's
15 the --

16 MR. WARD: I think what that really means,
17 Justice Stevens, is there are some circumstances under
18 which discrimination is incidental. That's the Ku Klux
19 Klan case, for example, where the Ku Klux Klan, which we
20 both cite, the Ku Klux Klan wanted to march through a town
21 of Maryland with members only, and the NAACP wanted to
22 march alongside of them.

23 The trial judge said the mere inclusion of this
24 unwanted group would destroy the message. That's a far
25 cry from this case, where the trial court and the supreme

1 judicial court both found an open recreational event in
2 which the parade organizers, despite what they later said,
3 which was found to be basically pretextual, stood more or
4 less indifferent to the messages.

5 Upon the arrival of the hated group, or the
6 unwanted group, let's say, they immediately assert that we
7 have always organized around a specific expressive purpose
8 that excludes the mere presence of this group.

9 The trial judge didn't buy it. Frankly, I don't
10 blame him. And the remedy that he ordered was, treat them
11 like everybody else. It was not, give them special rights
12 to come in with some sign saying whatever they wanted to
13 say. It would say simply to exclude them. You let
14 everybody else self-identify. Let them self-identify.

15 QUESTION: Well, they didn't. They didn't let
16 everybody else -- was that the finding, that no group was
17 ever excluded? They kept out the KKK, didn't they?

18 MR. WARD: On the basis, Justice Scalia, that
19 they can discriminate on the basis of viewpoint. However,
20 the finding was that that's not what was going on here.

21 QUESTION: Oh, well, if you assume that there's
22 no expression going on here I think that's probably right.
23 But let me --

24 QUESTION: Could I just ask one quick question?
25 Could they exclude the Ku Klux Klan on the basis of the

1 uniforms they wear, or the sheets and so forth?

2 MR. WARD: Anything they want to, sure.

3 QUESTION: But why is that different from self-
4 identification?

5 MR. WARD: Because that goes to the essence,
6 otherwise you would give a discriminator an objector's
7 veto. Every time somebody came along and self-identified
8 they'd say, we don't object to you. We object to your
9 Jewish surname, or to your Star of David, or to your --
10 some other feature.

11 QUESTION: Yes, but the person with a Jewish
12 surname has got that Jewish surname permanently, but a
13 Klansman doesn't necessarily have to wear a robe. He
14 could come without the robe.

15 MR. WARD: No, but we -- under the Massachusetts
16 statute sexual orientation is what it is, and to say that
17 merely announcing it disentitles you from exercising the
18 right of equality -- I mean, for example, in an employment
19 situation, the employer could say, I never knowingly fired
20 a gay person, but then if somebody finds out that the
21 employee is gay and the State law bans discrimination on
22 that basis, nobody would say that, well, okay, you weren't
23 kicking him out for his sexual orientation but simply for
24 announcing that fact. It just doesn't --

25 QUESTION: But that's very different than

1 compelled speech. I mean, how is it that the Government
2 can compel someone in their private speech to convey
3 values or a message of someone else? I didn't think that
4 was possible under the First Amendment.

5 MR. WARD: It isn't Your Honor. However, that's
6 not what happened here. What happened here was much more
7 like the Pruneyard case, where the organizers of the
8 event -- the Boston marathon also has a parade permit and
9 provides entertainment for a million people. That mere
10 fact doesn't convert, doesn't answer the question about
11 what the relationship of the organizers to the event was,
12 and what the State courts found here was that the
13 relationship of the organizers to the event was one more
14 of gatekeeper than a --

15 QUESTION: Well, the trial court says the
16 veteran's position is paradoxical. A proper celebration
17 of St. Patrick's and Evacuation Day requires diversity and
18 inclusiveness. I suggest that for a State entity, which
19 is the court, to tell a private speaker how to celebrate
20 St. Patrick's Day is antithetical to First Amendment
21 principles.

22 MR. WARD: Your Honor, I think that what the
23 trial justice was doing was characterizing their position,
24 not dictating it to them.

25 QUESTION: But Mr. Ward, you agree with that,

1 don't you, because you urged, did you not, that this case
2 was now moot, because you now concede that this parade has
3 an expressive purpose and therefore they can take the
4 position that you're opposing -- they can now take it --
5 your conduct hasn't changed. What has changed, that you
6 now say it's legitimate to deny you the right that was
7 vindicated for you in this case.

8 MR. WARD: Well, Justice Ginsburg, we don't say
9 that they win. We simply say that they've created a new
10 legal controversy, and as a matter of fact, as I'm sure
11 you know, they marched in '95 under the protest theme
12 by --

13 QUESTION: But I thought you said the reason
14 this case is moot is that you're not contesting that, that
15 you did not contest -- after the district court ruled
16 against you, you didn't appeal.

17 MR. WARD: No, we have appealed.

18 QUESTION: You have.

19 MR. WARD: That fact has changed. Yes, Your
20 Honor. We have appealed -- we appealed actually on
21 abstention grounds.

22 QUESTION: I wanted to ask you, I'm having
23 trouble with your Ku Klux Klan example, because there is
24 no State law that says we're going to protect members of
25 the Ku Klux Klan the same way we protect sexual

1 orientation. I take it there is a State law that protects
2 sexual orientation and forbids discrimination on that
3 basis just as race, religion, national origin.

4 MR. WARD: Correct.

5 QUESTION: And we take that as a given.

6 MR. WARD: That's right.

7 QUESTION: So as far as we're concerned, it has
8 to be exactly the same as if we're saying, no African
9 Americans, or no Irish, or whatever.

10 MR. WARD: Exactly.

11 QUESTION: That's the given. All right. Now,
12 under those circumstances, is it actually motive that is
13 irrelevant? I mean, if in fact the real reason were
14 because of sexual orientation and the group doesn't really
15 care about the message, that's just a pretext, then I
16 guess your point is there is no -- there is no
17 constitutional right when you don't care about --

18 MR. WARD: Right.

19 QUESTION: -- the sign that says "GLIB."

20 MR. WARD: Right.

21 QUESTION: That's your -- all right. Now, what
22 I'm getting to is this. If that's where we're all more or
23 less starting, and the real motive would be relevant,
24 here we have your finding. Have you found in Supreme
25 Court cases, and this is what -- you've read them more

1 recently.

2 Who goes into the factual record to decide
3 whether or not that finding really is supported or not
4 supported? Is it supposed to take place in this Court?
5 Are there cases that say we would remand it for further
6 consideration by the SJC, or back to the trial court?
7 How, from your reading of the cases, should we deal with
8 the proper resolution of that factual matter?

9 MR. WARD: Well, I think the most recent case,
10 at least the most recent case that I've come across, is
11 Hernandez v. New York, the jury selection case in which
12 the trial judge made a finding of no discrimination, and
13 what this Court says was, because this is a who-did-what-
14 to-who question --

15 QUESTION: It wasn't a First Amendment case.

16 MR. WARD: No, it wasn't.

17 QUESTION: Try Bose.

18 MR. WARD: Correct.

19 QUESTION: Bose was a First Amendment case.

20 MR. WARD: Bose was a First, but even in Bose,
21 Justice Scalia, great deference is given to factual
22 questions, particularly a question like discrimination,
23 which depends largely on credibility. Every
24 discriminator, generally speaking, asserts a racially
25 neutral or neutral explanation for their behavior.

1 QUESTION: What evidence was there for
2 discrimination on the basis of sexual orientation as
3 opposed to expression?

4 MR. WARD: The shifting rationales given by the
5 chief witness for petitioners was the basic evidence that
6 the trial justice relied on.

7 QUESTION: Why does that show discrimination on
8 the basis of sexual orientation?

9 MR. WARD: Because --

10 QUESTION: It might show casting about for
11 something that the trial court would accept.

12 MR. WARD: To the trial judge and to me it shows
13 that the person was not being credible in his
14 explanations, that his real basis was discrimination based
15 on sexual orientation.

16 QUESTION: I don't see how it leads to that
17 conclusion. It leads to the conclusion that he's trying to
18 come up with something that the court will accept. As it
19 turns out, nothing.

20 MR. WARD: I think it's typical of what
21 discriminators always do, Justice Scalia. They always
22 come up with some sort of explanation. They never want to
23 say we don't want them in because of their sexual
24 orientation.

25 QUESTION: How did this shift? I mean, what

1 were the shifts in their explanation?

2 MR. WARD: They started out with safety reasons.
3 They started out with some unsubstantiated beliefs that
4 this was a group of radicals that were -- they got to this
5 business of no sexual themes, which Mr. Darling
6 acknowledged in the trial court meant no self-
7 identification.

8 QUESTION: But the trial judge finds that G-L-B
9 would be excluded because of its values and its message,
10 i.e., its members' sexual orientation. If that's what the
11 trial court means by sexual orientation, I'm very
12 troubled, and --

13 MR. WARD: Justice -- excuse me, Justice
14 Scalia --

15 QUESTION: Yes.

16 MR. WARD: That's not what he found. He found
17 that on page -- Justice Kennedy quoted it at the
18 beginning --

19 QUESTION: B4.

20 MR. WARD: B4. I -- they excluded them on the
21 basis of their sexual orientation and I so find. Before
22 that, he drops a footnote explaining what their version of
23 this is, but that's not the version that he adopts. He
24 says --

25 QUESTION: But the i.e. is i.e., it's not the G-

1 L -- the defendant's final position was the G-L-I-B would
2 be excluded because of its values and its message, i.e. --
3 and this is the court speaking -- its members' sexual
4 orientation, so apparently the court thinks that exclusion
5 on the basis of sexual orientation consists of excluding
6 because of value and message.

7 MR. WARD: Well, Justice Scalia, I take that
8 footnote to be, including the i.e., to be his
9 characterization of their position, not his, but in any
10 event --

11 QUESTION: Of the defendants' position?

12 MR. WARD: I think so. But in any event, the
13 conflation of mere identity with messages and values is
14 paradigmatically what discrimination is. You say, I don't
15 like you because of who you are, and I find in that
16 messages and values. That in itself has never received
17 any protection in this Court. It's never been permitted
18 to be converted into viewpoint discrimination. That's
19 paradigmatically a pretext.

20 QUESTION: I don't know what you're saying about
21 the i.e., because this is very important to me. It says
22 what the finding of sexual orientation means. You're
23 saying that the trial judge was saying that the
24 defendants, that is, the veterans group managing the
25 parade, admitted that they were excluding people because

1 of their members' sexual orientation? Is that what the
2 i.e. means?

3 MR. WARD: That that -- no, that that was their
4 final position, that their final position was --

5 QUESTION: Isn't that his characterization of --

6 MR. WARD: His characterization of their final
7 position, yes.

8 In the end, this is a case about discrimination.
9 The finding of the two courts below, well-supported in the
10 record, was that the reason, the real reason that GLIB was
11 kept out was its members' sexual orientation and not any
12 message, because there was no message in that sense, and
13 for that reason the judgment of the supreme judicial court
14 should be affirmed.

15 QUESTION: Thank you, Mr. Ward.

16 Mr. Darling, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF CHESTER DARLING

18 ON BEHALF OF THE PETITIONERS

19 MR. DARLING: Again, I would urge, Mr. Chief
20 Justice and Your Honors, that any review of the record
21 will reflect that there is absolutely no evidence of
22 discrimination on the basis of sexual orientation by my
23 clients in this record -- in the whole enterprise.

24 My clients discriminated against messages,
25 historically they have. They included the NAACP, they

1 excluded the KKK, they excluded an anti-gay group, and
2 they wished to exclude a group --

3 QUESTION: Mr. Darling, would you comment
4 directly on your opponent's argument that the particular
5 signs they were going to carry, and it's all -- forget
6 your motive in letting them out and they're motive in
7 doing it, but just, I want to watch the parade. Now,
8 would I see anything that would be more than what he
9 describes as self-identification?

10 MR. DARLING: A sign that stated, Irish-
11 American, Gay, Lesbian, and Bisexual Group of Boston.

12 QUESTION: Is that self-identification, or is
13 that message, and if so, what is the message?

14 MR. DARLING: It's a message, it's an
15 identification, it's a proclamation, and it is a message
16 that my clients did not deem appropriate including in
17 their expression of their version of a celebration of a
18 St. Patrick's Day parade, however they designed it.
19 The --

20 QUESTION: It seems to me that there's some --
21 I'm wrestling with this, to be very honest with you.
22 There is some force to the notion that this is, maybe a
23 Jewish group wanted to wear yarmulkes for self-
24 identification. Would they be permitted to march if they
25 didn't wear their yarmulkes?

1 MR. DARLING: What my clients do, Justice
2 Stevens, is evaluate a group on the basis of their message
3 and what they'll contribute to my client's speech, their
4 overall celebration.

5 QUESTION: But what do we look at -- would you
6 agree that to decide what their message was we should just
7 look at what they purported to carry in the parade, not
8 all this other evidence about, they thought it might give
9 moral support to people in New York, or something like
10 that?

11 MR. DARLING: In my opinion, they wouldn't
12 exclude Jewish people that wore yarmulkes. They would
13 exclude people --

14 QUESTION: No, but my question was, in trying to
15 decide what the message is, do we just look at what they
16 were going to do in the parade, or do we look at their
17 testimony that I think this will also give moral support
18 to other groups around the country, and so forth and so
19 on? What do we look at to decide whether or not it is a
20 message on the one hand or merely self-identification on
21 the other? .

22 MR. DARLING: Well, it's also a distinction,
23 too. That sign makes a distinction on the basis of sexual
24 orientation. It announces a distinction between one
25 sexual orientation and another, and it's clear how absurd

1 extending this argument goes, because if the actual
2 statute itself was applied to the fact that that sign
3 represented a distinction on the basis of sexual
4 orientation, that GLIB themselves had violated the very
5 statute that they are imposing on --

6 QUESTION: Suppose that their actual reason was
7 that the sign calls attention to a fact that makes them
8 feel uncomfortable. Is that a justification?

9 MR. DARLING: Any --

10 QUESTION: Where does that stand?

11 MR. DARLING: As far as my clients are
12 concerned?

13 QUESTION: No, where does it stand as far as the
14 law is concerned?

15 MR. DARLING: My clients --

16 QUESTION: Suppose that what happens is that
17 that just makes them feel uncomfortable, since it's
18 public, and they don't like it. Now, where does that
19 stand under First Amendment law?

20 MR. DARLING: My clients can exclude it. They
21 can exclude any message in any parade that they deem
22 inappropriate.

23 Thank you very much.

24 CHIEF JUSTICE REHNQUIST: Thank you,
25 Mr. Darling.

1 The case is submitted.

2 (Whereupon, at 11:08 a.m., the case in the
3 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

JOHN J. HURLEY AND SOUTH BOSTON ALLIED WAR VETERANS COUNCIL, Petitioner v. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, ETC., ET AL.

CASE NO. :94-749

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Federico

(REPORTER)

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