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IN THE  
**Supreme Court of the United States**

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JOHN SCALISE and BENJAMIN SCALISE,

*Petitioners,*

v.

BOY SCOUTS OF AMERICA, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MICHIGAN

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**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether a petition may present federal constitutional issues that were not raised in or decided by the state courts below.

### **CORPORATE DISCLOSURE STATEMENT**

Boy Scouts of America and Lake Huron Area Council, Boy Scouts of America are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters as local Councils more than 300 not-for-profit corporations such as Lake Huron Area Council to support Boy Scouting and other Scouting programs in localities nationwide.

### **BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI**

Respondents Boy Scouts of America and Lake Huron Area Council, Boy Scouts of America (together, “Boy Scouts”) and Respondent Mt. Pleasant Public Schools (“MPPS”) respectfully request that this Court deny the petition for a writ of certiorari seeking review of a judgment of the Michigan Court of Appeals. The opinion of the Court of Appeals (A 1) is published at 265 Mich. App. 1, 692 N.W.2d 858 (2005). The denial of the application for leave to appeal to the Michigan Supreme Court (A 34) is published at 473 Mich. 853, 700 N.W.2d 360 (2005), and the denial of reconsideration (A 60) is reported at 474 Mich. 1065 (2006).

### **STATEMENT OF THE CASE**

The petition is frivolous. The complaint below raised only state law issues. Petitioners, an atheist father and his now 17-year-old son, brought suit against MPPS and Boy Scouts alleging that MPPS’s neutral policy permitting Boy Scouts access to school buildings on the same basis as other youth or community groups violated the Michigan Constitution and Michigan’s civil rights and public accommodation laws.

Petitioners present two questions for review. The first, whether “public school charter-partner-sponsorship associations with Boy Scouts of America . . . violate the Establishment and Equal Protection clauses of the United States Constitution,” was never presented to any court below. The second, whether “Boy Scouts of America’s First Amendment right of expressive association, as articulated by this Court in *Boy Scouts of America v. Dale*, 530 U.S. 640,

120 S. Ct. 2446 (2000), [is] an invalid affirmative defense,” was not decided by any court below.

No federal claim of any kind is included in Petitioners’ Complaint. (A 83 at ¶ 1, A 93-95 at ¶¶ 36-39.) Contrary to their current position, Petitioners brought claims solely under Michigan law. (*Id.*) Indeed, in their Application for Leave to Appeal to the Michigan Supreme Court, Petitioners repeatedly declared that they “brought their claims specifically under the Michigan constitution, which provisions are substantially broader in scope than the corresponding provisions in the U.S. Constitution.” (Application for Leave to Appeal at 26-27; *see id.* at 24, 28-29, 34.) Since Petitioners never pursued any federal claims, the decision of the Michigan Court of Appeals discussed only claims brought under Michigan law. (*See, e.g.*, A 2, A 5-8.)

Nor did the Court of Appeals decide whether Boy Scouts’ First Amendment freedom of expressive association under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), was a valid affirmative defense to Petitioners’ claims under Michigan law. Indeed, the Court of Appeals never cited or otherwise referred to *Dale* in its opinion. The Court of Appeals simply applied the Michigan constitutional and statutory provisions at issue.

Finally, as a factual matter, Petitioners misstate the record when they claim that this case involves “charter-partner-sponsorship associations” between MPPS and Boy Scouts. As the Court of Appeals observed, no MPPS schools serve as “charter partners” and only one school ever did. (A 2.) The Court of Appeals correctly held that, as

Petitioners conceded below, (Hr’g Tr. 14:7-9, May 3, 2002), Petitioners have no standing to challenge any prior activities at that one school because Benjamin Scalise never attended that school. (A 25.)

#### REASONS FOR DENYING THE PETITION

The petition should be denied because Petitioners never presented a federal claim to the courts below. As this Court noted in *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969), “[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.” *See Webb v. Webb*, 451 U.S. 493, 498-99 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). *See also* 28 U.S.C. § 1257(a); Rules 10 and 14 of the Rules of the Supreme Court of the United States.

**CONCLUSION**

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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