No. 83-724

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

**KATHRYN R. ROBERTS, Acting Commissioner, Minnesota Department of Human Rights; HUBERT H. HUMPHREY, III, Attorney General of the State of Minnesota; and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,**

*Appellants,*

VS.

**THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of itself and its qualified members,**

*Appellee.*

**On Appeal from the United States Court of Appeals for the Eighth Circuit**

## AMICUS CURIAE BRIEF OF ROTARY INTERNATIONAL


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

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## AMICUS CURIAE BRIEF OF ROTARY INTERNATIONAL

## INTRODUCTORY STATEMENT

This brief is submitted by Rotary International as *amicus curiae* in support of the appellee in the above-captioned case. Written consents of appellants and appellee are on file with the Clerk of the Court.

## INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* Rotary International ("Rotary") arises from the fact that the Board of Directors of Rotary and Rotary District 530 are defendants and respondents in *Rotary Club of Duarte* v. *Board of Directors of Rotary International,* 2d Civ. No. B 001663, pending in the Court of Appeal of the State of California, Second Appellate District, Division Three. That case seeks an injunction preventing the defendants from enforcing Rotary's bylaws that restrict membership to males. The action was brought under a California statute (the Unruh Civil Rights Act, Cal. Civ. Code § 51) which is highly similar to the Minnesota statute involved in the instant case. The Unruh Civil Rights Act provides, in part, as follows:

> All persons within the jurisdiction of this state . . . no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

The trial court concluded that Rotary was not subject to the statute because the term "business establishment" does not extend to private membership organizations such as Rotary.[1] However, appellants assert in the appellate court that the statute does not apply to such organizations:

> Nor does the fact that International's clubs are personal associations create an exemption from the Unruh Act. [Appellant's Opening Brief, Court of Appeal, p. 6]

This construction of the California statute, if adopted, would be comparable to the construction of the Minnesota statute as applied to the Jaycees in the instant case, and

[1] The full text of the trial court's Statement of Decision is set forth in the Appendix to this brief.

would present the same constitutional issues.[2] Rotary believes that those issues should be resolved in the Jaycees' favor, and that it may be helpful to the Court if such issues are also considered in the context of the facts developed in the *Rotary Club of Duarte* case and official Rotary publications.

Rotary is a worldwide association of approximately 20,500 local Rotary Clubs in approximately 158 countries. Membership in the local clubs is restricted to business and professional men. An individual Rotarian is a member of a local club; all local clubs are members of Rotary International. While Rotary does not discriminate on the basis of race, religion or national origin, membership is by invitation only, and is based on choosing one male representative of each classification of business, profession, and institution in the community. This "classification principle," as it is known in Rotary, is intended to prevent the predominance in a club of any one group.

Regular attendance at weekly meetings is one of the conditions of club membership and average world-wide attendance at such meetings is 80%. Where conflicts prevent a Rotarian from attending his own club's meeting, he is required to make up his attendance at the regular meeting of another club. Rotarians are specifically requested not to use the privilege of membership for commercial purposes.

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[2] Since the trial court decision in favor of Rotary, the California Court of Appeal has decided *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *petition for hearing denied*, 4 Adv. Cal. 3d 29 (Jan. 6, 1984). *Curran* imposes a wide ranging and searching program of judicial supervision upon membership organizations which is far more intrusive than the Minnesota statute and seriously threatens Rotary's trial court victory. The Boy Scouts have filed a jurisdictional statement (No. 83-1513) with this Court seeking constitutional review akin to that at issue here.

Any use of the fellowship of Rotary as a means of gaining an advantage or profit has been declared by its Board of Directors to be foreign to the spirit of Rotary.

While there is no uniform set of rules for admission of new members which must be adopted by a local Rotary Club, the rules adopted must not be out of harmony with the Standard Rotary Club Constitution and the bylaws of Rotary International. The Board of Directors of Rotary has adopted Recommended Club Bylaws for local clubs, and the procedures described hereinafter are those set out in such bylaws.

The name of a candidate for admission must be proposed to the local club by the membership committee or by an active, senior active, or past service member. The sponsor submits the man's name to the club's board of directors on a membership proposal card. The board sends the card to the classifications committee and the membership committee. The former makes sure that there is an open classification of business or profession and that the prospective member's business or profession is accurately described by that classification. The latter evaluates the candidate from the standpoint of character, business and social standing, and general eligibility. To avoid embarrassment, the candidate's name is kept confidential throughout this preliminary procedure and the candidate himself is not told of these investigations.

If the reports of both committees are favorable and the board approves them, the proposer and a member of the information committee contact the man and ask whether he is willing to become a member and, if so, whether he is willing to have his application published to the members. Assuming that he is, his name, business and classification are published to the members. If there is no written objection received by the board within 10 days, the candidate

becomes a member. If there is such an objection, membership requires a further approving vote by the board. To be an active member, a man must work in a leadership capacity (owner, partner, manager, *et al.*) in the business or profession in which he is classified.

The motto of Rotary is "Service Above Self," and its Object, which is set forth in its Constitution and in the Standard Club Constitution, is the application of the Ideal of Service.

In addition to Service, fellowship is a prime motivating force in Rotary. Each club has a fellowship committee and special events are frequently planned. Rotary publishes a song book, *Sing, Rotarians, Sing,* which is popular in many English-speaking clubs. In Japan, banquets are planned for cherry blossom viewing and harvest moon viewing. While fellowship is pursued in different ways by different clubs, Rotarians subscribe to the words of Founder Paul Harris, who wrote: "Fellowship is wonderful; it illuminates life's pathway, spreads good cheer, and is worth a high price."

Rotary's all-male membership policy is believed by its members to enhance its fellowship and to enable it to operate more effectively over a worldwide base of varied cultures and social mores. Proposals to change this policy have consistently been voted down by Rotary's international legislative body.

## THE HEART OF THE CASE

Freedom of association is protected by the First Amendment. While Fourteenth Amendment guarantees of equal protection prohibit state action of a discriminatory character, the Fourteenth Amendment does not apply to private action, and it is wrong to extrapolate from the pro-

hibition against state action the existence of a power in the state to abrogate the precious rights which the First Amendment protects, except upon a showing of compelling state interest. Organizations such as Rotary and the Jaycees are no less entitled to protection of their associational rights than is the NAACP.

## ARGUMENT

### I. Freedom Of Association Is Protected By The First Amendment

It has been clear, at least since the landmark decision of *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), that the freedom to select one's associates is a right which, although not expressly mentioned in the First Amendment, is cognate to those rights therein enumerated, and entitled to equal protection.

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. [357 U.S. at 460-461]

This principle was perhaps best stated by Justice Douglas in his famous dissenting opinion in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972):

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish or all agnostic clubs to be established. *Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.* [407 U.S. at 179-180; emphasis supplied]

These words were quoted with approval by Justice Blackmun in *Gilmore* v. *City of Montgomery, Alabama*, 417 U.S. 556 (1974), where, speaking for the Court, he struck down a lower court order prohibiting use of a public park by discriminatory private groups. Justice Blackmun continued:

> The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversification of opinion that oils the machinery of democratic government and insures peaceful, orderly change. [417 U.S. at 575]

In *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), Justice Stewart, speaking for the Court, said:

> Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. . . .
>
> * * *
>
> . . . For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. [431 U.S. at 233, 234-235]

Again, hear the words of Chief Justice Burger, in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980):

> Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights.

> Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined. [448 U.S. at 579-580]

Finally, in *NAACP* v. *Button*, 371 U.S. 415 (1963), Justice Brennan agreed that "there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus, we have affirmed the right 'to engage in association for the advancement of beliefs and ideas.'" *Id.* at 430. Justice Brennan continued:

> The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. See, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697; *Terminiello* v. *Chicago*, 337 U.S. 1; *Kunz* v. *New York*, 340 U.S. 290. For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered. [371 U.S. at 444-445]

Let us take as a first premise, then, that freedom of association is a basic constitutionally protected right.

## II. The Fourteenth Amendment Prohibits State Action Of A Discriminatory Character; The Fourteenth Amendment Does Not Restrict The First Amendment Right Of Free Association

Over 100 years ago, in *The Civil Rights Cases*, 109 U.S. 3 (1883), it was established that the Equal Protection Clause of the Fourteenth Amendment does not prohibit the "(i)ndividual invasion of individual rights." *Id.*, at 11.

This principle has been reiterated in *Tillman* v. *Wheaton-Haven Recreation Association,* 410 U.S. 431 (1973), and *Gilmore* v. *City of Montgomery, Alabama,* 417 U.S. 556 (1974). Justice Rehnquist, speaking for the Court in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972), noted:

> In 1883, this Court in *The Civil Rights Cases,* 109 U.S. 3, set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, "however discriminatory or wrongful," against which that clause "erects no shield," *Shelley* v. *Kraemer,* 334 U.S. 1, 13 (1948). That dichotomy has been subsequently reaffirmed in *Shelley* v. *Kraemer, supra,* and in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). [407 U.S. at 172]

Justice Douglas had earlier dealt with this same dichotomy and the necessity of differentiating between state action and private action. In *Evans* v. *Newton,* 382 U.S. 296 (1966), he wrote:

> There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality, which of course bars a city from acting as trustee under a private will that serves the racial segregation cause. . . . A private golf club, however, restricted to either Negro or white membership is one expression of freedom of association. But a municipal course that serves only one race is state activity indicating a preference on a matter as to which the State must be neutral. [382 U.S. at 298-299]

After holding a park to be in the public sector, even though it was nominally controlled by private trustees, Justice Douglas continued:

> The service rendered even by a private park of this character is municipal in nature. It is open to every

> white person, there being no selective element other than race. Golf clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin, and other like organizations in the private sector are often racially oriented. A park, on the other hand, is more like a fire department or police department that traditionally serves the community. [382 U.S. at 301-302]

Thus, a second premise may be taken to be that the freedom of association protected by the First Amendment includes the right to discriminate or exclude from one's associates any person or class of persons, so long as state action is not involved.

## III. Thirteenth Amendment Cases And The "Private Club" Exemption Under The Civil Rights Act Are Irrelevant

Appellants and their *amici* rely heavily upon such cases as *Norwood* v. *Harrison,* 413 U.S. 455 (1973), and *Runyon* v. *McCrary,* 427 U.S. 160 (1976), which are irrelevant to to the issues presented here. Those cases were decided under the Thirteenth Amendment and upheld federal statutes passed under the authority of that amendment. The instant case involves no federal statute passed to enforce a constitutional provision; to the contrary, this case involves a state law which operates in derogation of the fundamental right to freedom of association which is protected by the First Amendment.

Appellants and their *amici* place great emphasis upon the statement of Chief Justice Burger in *Norwood* v. *Harrison,* 413 U.S. 455 (1973), to the effect that:

> [A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association pro-

> tected by the First Amendment, but it has never been afforded *affirmative* constitutional protections. [413 U.S. at 469-470; emphasis supplied]

Appellants, however, ignore the fact that the *affirmative* constitutional protection which was sought and denied in *Norwood* was the right to invoke the Equal Protection Clause to require state support in the form of free textbooks for a discriminatory private school. The key holding of the case is:

> That the Constitution may *compel* toleration of private discrimination in some circumstances does not mean that it *requires state support* for such discrimination.
>
> * * *
>
> . . . Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State. [413 U.S. at 463, 469; emphasis supplied]

The Jaycees do not seek state support for their organization, but they properly insist that the First Amendment compels toleration of their associational freedom to exclude females from membership.

Furthermore, as previously stated, *Norwood* is a Thirteenth Amendment case and Chief Justice Burger emphasized therein that:

> [E]ven some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts. [413 U.S. at 470]

That the Thirteenth Amendment permits Congress to prohibit purely private discrimination against blacks was established in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). That case involved a refusal by a private party to sell a home to a black and the Court held that such dis-

crimination was barred by 42 U.S.C. § 1982. The constitutionality of this statute as applied to private persons was upheld because the Thirteenth Amendment authorizes Congress "to eliminate all racial barriers to the acquisition of real and personal property." 392 U.S. at 439. As Justice Stewart said, speaking for the Court, the promise of freedom which the Thirteenth Amendment gave to black citizens would be " 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." *Id.* at 443.

Legislation intended to eliminate the last vestiges of slavery from this great Nation, therefore, may constitutionally impinge upon purely private rights. However, this affords no basis for appellants' position. Justice Stewart, speaking for the Court in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), explicitly recognized that the consolidated cases there presented:

> . . . do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. [427 U.S. at 167]

*Runyon* stands for no more than its holding:

> Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment . . . . [427 U.S. at 179]

Appellants and their *amici* also assert that the Jaycees are not a "private club" within the meaning of such cases as *Daniel* v. *Paul*, 395 U.S. 298 (1969); *Sullivan* v. *Little*

*Hunting Park, Inc.* 396 U.S. 229 (1969); and *Tillman* v. *Wheaton-Haven Recreation Association,* 410 U.S. 431 (1973). Rotary believes that if all relevant factors are considered, the Jaycees and its local chapters should be considered to be "private clubs"; further, Rotary insists that it and local Rotary Clubs fall within that category. *See Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972); *Solomon* v. *Miami Woman's Club,* 359 F. Supp. 41 (S.D. Fla. 1973); *Cornelius* v. *Benevolent Protective Order of the Elks,* 382 F. Supp. 1182 (D. Conn. 1974); and *Kiwanis Club of Great Neck, Inc.* v. *Board of Trustees of Kiwanis International,* 374 N.Y.S.2d 265 (1975), *aff'd,* 383 N.Y.S.2d 383 (1976), *aff'd,* 41 N.Y.2d 1034 (1977), *cert. denied,* 434 U.S. 859 (1977). However, the "private club" argument is no more than a red herring. It has no place in consideration of the issues presented here.

As noted above, under the Thirteenth Amendment, Congress is authorized to legislate against racial discrimination and has done so through numerous statutes. Among these are 42 U.S.C. §§ 1981, 1982 and 2000a, *et seq.* Neither § 1981 nor § 1982 contains any exception for private clubs, but such an exception is contained in § 2000a(e). In each of *Daniel* v. *Paul, Sullivan* v. *Little Hunting Park, Inc.,* and *Tillman* v. *Wheaton-Haven Recreation Association,* the Court held that the entity involved was not a "private club" within the meaning of § 2000a(e). Further, in *Tillman* the Court expressly noted that because Wheaton-Haven was not a private club, "it is not necessary in this case to consider the issue of any implied limitation on the sweep of § 1982 when its application to a truly private club, within the meaning of § 2000a(e), is under consideration." 410 U.S. at 438-439.

The Thirteenth Amendment reaches private acts of discrmination if Congress chooses to enact legislation pro-

hibiting such acts. In § 2000a(e), Congress exempted "private clubs," but there has been no holding by this Court that it was constitutionally required to do so, nor has this Court yet held that the exemption provided by § 2000a(e) imposes a limitation upon § 1982, which contains no such exemption. It may be that the Thirteenth Amendment permits Congress to proscribe the activities even of private clubs. Where the Thirteenth Amendment cannot be invoked, however, basic First Amendment rights, such as freedom of association, and the protection of those rights from infringement, are not limited to a narrowly defined class which may be termed "private clubs."

## IV. Organizations Such As The Jaycees And Rotary Have Associational Rights Which Must Be As Constitutionally Protected As Those Of The NAACP

Appellants and their *amici* argue that the Jaycees are not entitled to First Amendment protections. More particularly, such arguments fall into three broad categories: (1) the commercial objectives of the Jaycees do not qualify as First Amendment activities; (2) only "truly private clubs" having "selective" membership restrictions are entitled to freedom of association protection; and (3) freedom of association is inapplicable to "invidious" discrimination.

The NAACP serves as a useful yardstick for measuring the merit of these arguments since its membership has frequently been accorded freedom of association protection. *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1958); *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293 (1961); *NAACP* v. *Button,* 371 U.S. 415 (1963). Measured against the NAACP, the Jaycees are equally entitled to claim freedom of association protection.

Like the Jaycees, who seek, among other goals, the economic and business advancement of young men, the NAACP seeks those advantages for a limited segment of the population. Its objectives include ". . . to advance the interests of colored citizens . . . [and] to increase their opportunities for . . . employment . . . ." 357 U.S. at 451 & n.

In holding the NAACP entitled to freedom of association protection, this Court explicitly included the economic objectives of the organization within the protection.

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of "liberty" assured by the Due Process clause of the Fourteenth Amendment . . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, *economic,* religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. [357 U.S. at 460-461; emphasis supplied]

As long ago as 1945, this Court held that the mere fact that business interests may be involved in an associational group is not sufficient to cause the group to lose the protection of the First Amendment.

> The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one "engaged in business activities" . . . . [*Thomas* v. *Collins,* 323 U.S. 516, 531 (1945)]

Similarly, *United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217 (1967), stands for the proposition that the financial benefit of members of an association is an associational right which cannot be

abridged. See also *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The NAACP is assuredly not a "private club." Its membership criteria are substantially less selective than those of the Jaycees. Its constitution provides that "any person who is in accordance with its principles and policies . . . may become a member." *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 459 (1958). Membership was shown to be aggressively solicited through an interstate network of regional and local affiliates and the organization was required to register as a business. *Id.* at 451-452. Nevertheless, this Court held that a large organization, broadly open to the public, is entitled to constitutional protection of its freedom of association.

Turning again to Justice Douglas, who has written more opinions in this area than any other Justice, we learn that

> *The right of "association," like the right of belief . . . is more than the right to attend a meeting; it includes the right to express one's attitude or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion;* and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful. [*Griswold* v. *Connecticut,* 381 U.S. 479, 483 (1965); emphasis supplied]

For First Amendment purposes, the question is not whether a group which asserts associational rights is a "private club," but rather whether genuine associational purposes of the group exist and require constitutional protection. In terms of common understanding, does the group exist to serve the general public as "customers" or a more limited group as "members"? In this connection, see the concurring opinion of Justice Goldberg in *Bell* v. *Maryland,* 378 U.S. 226 (1964), in which he discusses at length the

development of the law relating to public conveyances and places of public accommodation and concludes that exclusion of blacks from such places is a violation of their constitutional rights. However, it was in precisely that context that Justice Goldberg stated:

> Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.
>
> We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests. . . . [378 U.S. at 313]

It is, of course, true that the Minnesota statute, by its terms, applies only to "places of public accommodation," and that the Minnesota Supreme Court has found the Jaycees to be such a place. However, as correctly stated by the Court of Appeals for the Eighth Circuit in this case, this finding alone cannot justify otherwise unconstitutional infringement of freedom of association:

> We must decide that issue for ourselves. "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button*, 371 U.S. 415, 429 (1963); *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975). [*United States Jaycees* v. *McClure*, 709 F.2d 1560, 1566 (8th Cir. 1983)]

The Jaycees do not exist for the purpose of providing goods and services to the general public. The Jaycees are not a sham organization created to avoid the reach of the Minnesota public accommodations statute while serving the public as customers. *Cf. Daniel* v. *Paul*, 395 U.S. 298 (1969); *Wright* v. *Cork Club*, 315 F. Supp. 1143 (S.D. Tex.

1970). The Jaycees' bylaws state that the corporation's purpose is to "promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organizations a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendships and understanding among young men of all nations." The Jaycees also have a Creed. Association with the Jaycees is an expression of opinion entitled to First Amendment protection as fully as association with the NAACP.

The Jaycees have embarked on a nation-wide program in support of President Reagan's economic policy and the court may take judicial notice of the fact that it is commonly believed that a substantial difference exists in the President's support by men and women (the so-called "gender gap"). Those who join the Jaycees make a conscious, voluntary choice to associate with other men who share a common purpose. Governance is in the members. The Jaycees thus have an associational *raison d'etre* and it is a part of their belief that their associational purposes will be furthered if they do not admit women into regular membership. This belief may or may not be correct; admission to regular membership might or might not provide women with benefits now accruing only to male members. None of this is relevant. What is relevant is that, by compelling the admission of women into membership, the State of Minnesota negates the right of those who believe as the Jaycees do to associate for a common purpose. Another group might be formed with substantially the same goals as the Jaycees, but with the belief that such goals would be best furthered

if blacks were not admitted. Yet another might admit both blacks and women. All of such organizations would be similar; they would not be identical. The State of Minnesota seeks to compel homogeneity which is the antithesis of freedom of association and runs counter to the pluralism which is one of America's strengths.

Finally, appellants and their *amici* assert that "invidious" discrimination is not entitled to First Amendment protection, citing *Norwood* v. *Harrison*, 413 U.S. 455 (1973). It has already been demonstrated that *Norwood* did not deny constitutional protection to invidious discrimination but merely held that the State cannot constitutionally be compelled to furnish support to such discrimination. In addition, as also pointed out, *Norwood* involved the Thirteenth Amendment, which is inapplicable here. Further, in *Gilmore* v. *City of Montgomery, Alabama*, 417 U.S. 556 (1974), this Court held that the First Amendment rights of all-white recreational groups could not be abridged by denying them access to a municipal park.

An accepted definition of "invidious" is "tending to cause discontent, animosity, or envy." Webster's Collegiate Dictionary (7th Ed.). The aggressive policies of the NAACP on behalf of blacks have assuredly caused discontent, animosity, and, in the case of affirmative action programs, envy among many white Americans. But the fact that the NAACP restricts its activities to the advancement of the cause of blacks has not caused it to lose its First Amendment rights. Quite the contrary. The unpopularity of its cause has been a major factor perceived by the Court as necessitating protection of such rights. At the present time, male-only organizations such as the Jaycees and Rotary are encountering governmental and social hostility akin to that directed at the NAACP in the 1960's. However, it will not do to assert that because the male versus female

discrimination practiced by such organizations is perceived as wicked, it is undeserving of constitutional protection. The First Amendment is both color-blind, and gender-blind. Freedom of association and the other rights protected by that amendment are protected whether the group invoking the Constitution is perceived as "good" or "bad," "right" or "wrong." Constitutional liberties are guarded regardless of whose ox is being gored.

> The course of our decisions in the First Amendment area makes plain that the protection would apply as fully to those who would arouse our society against the objectives of the [NAACP]. [*NAACP* v. *Button*, 371 U.S. 415, 444 (1963)]

Other organizations having policies of discrimination far more virulent and contrary to public policy than the male-only membership of the Jaycees have enjoyed First Amendment protection as well. *Knights of the KKK* v. *East Baton Rouge Parish School Board*, 578 F. 2d 1122, 1127-1128 (5th Cir. 1978); *Village of Skokie* v. *National Socialist Party of* America, 51 Ill. App. 3d 279, 366 N.E. 2d 347 (1977), *aff'd in part and rev'd in part*, 69 Ill. 2d 605, 373 N.E. 2d 21 (1978).

The Jaycees, Rotary, the Boy Scouts and the Kiwanis are all certainly no less entitled to First Amendment protection than the NAACP, the KKK, the American Nazi Party and thousands of other selective membership organizations which may be or be regarded as "invidiously discriminatory." The guiding principle to be kept in mind is that expressed by Justice Douglas in *Schneider* v. *Smith*, 390 U.S. 17 (1968):

> *The purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of people.* The First Amendment's ban against Congress "abridging" freedom of speech, the right peaceably to assemble and

> to petition, and the "associational freedom" . . . that goes with those rights creates a preserve where the views of the individual are made inviolate. This is the philosophy of Jefferson that "the opinions of man are not the object of civil government, nor under its jurisdiction. . . ." [390 U.S. at 25; emphasis supplied]

If the State of Minnesota is to constitutionally abridge the Jaycees' freedom of association, it must do more than classify the Jaycees as a place of public accommodation. In *Rotary Club of Duarte* v. *Board of Directors of Rotary International*, 2d Civ. No. B 001663, pending in the Court of Appeal of the State of California, Second Appellate District, Division Three, the Women Lawyers' Association of Los Angeles, in its *amicus* brief in support of plaintiffs, said:

> A private group, selective in its memberships and not open to the general public . . . , is still within the Unruh Act if it "has sufficient businesslike attributes to fall within the scope of the Act's reference to 'business establishments of every kind whatsoever'." [Brief, p. 16]

Rotary submits that such proposition is flatly wrong. *Thomas* v. *Collins*, 323 U.S. 516 (1945). First Amendment rights are too precious to be abridged merely upon a finding that "business" or "public accommodations" are involved. Where true associational freedoms are advanced, as they are in the instant case, only a compelling state interest can justify their curtailment. No such interest has been shown by the State of Minnesota.

## V. Minnesota Has Shown No Compelling State Interest In Requiring Admission Of Women Into The Jaycees, And The Statute It Invokes Is Both Vague And Overbroad

The burden which the state must meet when it seeks to abridge First Amendment rights is a heavy one. As expressed in *Thomas* v. *Collins*, 323 U.S. 516 (1945):

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153.
>
> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. *The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation.* [323 U.S. at 529-530; emphasis supplied]

In the instant case, the State of Minnesota believes sex discrimination in private associations to be harmful to women, if not to the entire citizenry of the State. Therefore, it asserts the right to proscribe it. But if this were all that were required to abridge First Amendment rights, those rights would indeed be illusory, for any association of which the state did not approve could be legislated out of existence to advance the state's interest in eliminating the disapproved activity.

As Justice Black put it in *United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217 (1967):

> The First Amendment would, however, be a hollow promise if it left government free to destroy or erode

> its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *Schneider* v. *State*, 308 U.S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). [389 U.S. at 222]

*De Jonge* v. *Oregon*, 299 U.S. 353 (1937), involved an attempt to outlaw a peaceable public meeting sponsored by the Communist Party because the Party advocated "criminal syndicalism." Striking down the law involved, this Court said:

> The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . .
>
> These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But *the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.* [299 U.S. at 364-365; emphasis supplied]

In *Kusper* v. *Pontikes*, 414 U.S. 51 (1973), Justice Stewart wrote:

> As our past decisions have made clear, *a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest.* . . . For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn* v. *Blumstein*, 405 U.S., at 343. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S., at 438. [414 U.S. at 58-59; emphasis supplied]

The expressed interest of the State of Minnesota in discouraging sex discrimination in private associations does not justify legislation which abolishes all private discriminatory organizations. In his opinion invalidating the Minnesota statute, Judge Arnold discussed a number of ways in which the state could have expressed its displeasure with the Jaycees' male-only policy which would be far less intrusive on the organization's First Amendment rights. This Court need not decide whether any of those ways would be constitutionally supportable. A blanket prohibition of the exercise of a protected First Amendment right is not, however, constitutionally valid under any circumstances.

In addition to the absence of a compelling state interest to justify the statute here in question, the statute also must also fall for vagueness and overbreadth. In *NAACP* v. *Button*, 371 U.S. 415 (1963), the Virginia Supreme Court attempted to draw a line between those activities which NAACP attorneys could perform for members and those which were prohibited solicitation. In refusing to sustain the constitutionality of the law as thus construed by the state court, Justice Brennan, speaking for this Court, said:

> If the line drawn by the decree between the permitted and prohibited activities of the NAACP, its members and lawyers, is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. . . . Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98; *Winters* v. *New York*,

> *supra*, at 518-520. Cf. *Staub* v. *City of Baxley*, 355 U.S. 313. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. *The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.* [371 U.S. at 432-433; emphasis supplied]

The Minnesota Supreme Court has construed the statute in this case as applying to the Jaycees, but not to the Kiwanis. As Judge Arnold points out in his opinion:

> The law, as construed by the Minnesota Supreme Court, simply provides no ascertainable standard for inclusion or exclusion, *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971), and is therefore void for vagueness. [709 F.2d at 1578]

## CONCLUSION

The Court may take judicial notice that "male chauvinism" is under attack from all sides at present. Defense of men-only organizations is not popular, and even the ACLU, famed for its defense of the rights of the American Nazi Party, has seen fit to join the women in the attack against the Jaycees. The climate of the times may be on the side of "equal rights." But if the precious freedoms protected by the First Amendment may be swept away whenever one of those freedoms is involved in an unpopular cause, then this great land is further down the road to a fictional 1984 than most of its citizens would wish to travel. Quoting again from Justice Brennan in *NAACP* v. *Button*:

> It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. [371 U.S. at 435]

Groucho Marx well expressed the basic human desire to select one's own associates when he said he would not wish to belong to any club that would admit someone like him. Unfortunately, to the person excluded, admission frequently appears to offer far greener grass than is available outside —and, indeed, perhaps in some instances it does. But as Justice Douglas has so lucidly stated, the Constitution and the Bill of Rights exist to get government off the backs of the people. "Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 180 (1972); *Gilmore* v. *City of Montgomery, Alabama*, 417 U.S. 556, 575 (1974).

For the above-stated reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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