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

## APPELLANTS' BRIEF


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## QUESTIONS PRESENTED

1. Does the First Amendment to the United States Constitution allow a business that markets leadership training through the sale of memberships to discriminate against women in violation of a state human rights law merely because the organization also takes positions on some public issues when the sex of the members has no demonstrated effect on the content of those positions?

2. In rejecting the United States Jaycees' suggestion that it is a private membership organization, did the Minnesota Supreme Court create a distinction between public accommodations and private membership organizations which is vague and hence unconstitutional?

## PARTIES TO THE PROCEEDING

The caption of this case contains the name of one of the parties, George A. Beck, to the proceeding before the United States Court of Appeals for the Eighth Circuit whose judgment in the above stated questions appellants seek to have reviewed. Kathryn R. Roberts and Hubert H. Humphrey, III have now replaced Marilyn E. McClure and Warren Spannaus, respectively, as Acting Commissioner of the Minnesota Department of Human Rights and Attorney General.

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## OPINIONS BELOW

The opinion of the United States District Court for the District of Minnesota is reported at 534 F. Supp. 766 (D. Minn. 1982); that of the United States Court of Appeals for the Eighth Circuit at 709 F.2d 1560 (8th Cir. 1983). The opinion of the Minnesota Supreme Court is reported at 305 N.W.2d 764 (Minn. 1981). The decision of Administrative Hearing Examiner George A. Beck is unreported and is reproduced in the Appendix to Appellants' Jurisdictional Statement at 93 through 130.[1]

[1] Citations to this document will be to Appendix (herein "App.") and the appropriate page.

## JURISDICTION

This appeal is taken from a judgment entered June 7, 1983, by the United States Court of Appeals for the Eighth Circuit. A timely petition for rehearing of the panel's 2 - 1 decision was denied by an evenly divided (4 - 4) court in an order entered August 1, 1983. The court reversed the judgment of the district court and ordered it to enter injunctive relief with respect to appellants (defendants—below) on the basis that they were acting pursuant to a state statute which unconstitutionally infringed plaintiff's first amendment associational rights and was unconstitutionally vague as interpreted. The action in the lower court was brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. This federal court action was commenced by the United States Jaycees after it was enjoined from sex discrimination in the sale of its membership by Hearing Examiner George Beck in an administrative contested case brought pursuant to the Minnesota Human Rights Act, Minn. Stat. ch. 363 (1982). Prior to issuing its decision in this matter, the district court certified to the Minnesota Supreme Court the question whether as a matter of state law the United States Jaycees is a place of public accommodation within the meaning of Minn. Stat. § 363.01, subd. 18 (1982). That question was answered in the affirmative. A notice of appeal to this Court was filed in the United States Court of Appeals for the Eighth Circuit on October 11, 1983. The appeal was docketed with this Court on October 31, 1983, within 90 days from the entry of the lower court's order denying the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2).

## CONSTITUTIONAL PROVISION, STATUTES

This appeal involves the following federal and state laws: First Amendment, United States Constitution, as it relates to freedom of speech and association:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

Minn. Stat. § 363.03, subd. 3 (1982):

> It is an unfair discriminatory practice:
>
> To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.

Minn. Stat. § 363.01, subd. 18 (1982):

> 'Place of public accommodation' means a business accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public.

# STATEMENT OF THE CASE

## A. Procedural History.

In 1974 and 1975 respectively, the Minneapolis and St. Paul chapters of the United States Jaycees began to sell memberships to women which placed them on equal footing with male members. Females in those chapters could therefore vote, hold office, and were eligible for awards. By treating women in this manner, these local chapters were acting contrary to the Jaycees' by-laws which reserved these membership privileges to males. After being notified by the Jaycees that their charters were in danger as a result of their treatment of female members, members of the Minneapolis and St. Paul chapters filed charges of discrimination in 1978 with the Minnesota Department of Human Rights alleging that the proposed charter revocations constituted a violation of the public accommodations provision of the Minnesota Human Rights Act. Minn. Stat. § 363.03, subd. 3 (1982). Thereafter, on January 25, 1975, the Commissioner of the Department of Human Rights found probable cause to believe that the Jaycees was engaging in illegal sex discrimination, issued a complaint, and set the matter on for a hearing before a state hearing examiner, George Beck. App. at 94.

On February 27, 1979, the Jaycees filed suit in the United States District Court for the District of Minnesota seeking to enjoin enforcement against it of the Human Rights Act. The Jaycees claimed that the proceedings before Examiner Beck deprived it of the freedom to associate or not associate guaranteed by the first and fourteenth amendments to the United States Constitution. Moreover, the organization claimed that the definition of a place of public accommodation, Minn. Stat. § 363.01, subd. 18 (1982), was unconstitutionally vague. That action was dismissed without prejudice. App. at 95-96.

The hearing before Examiner Beck followed. The administrative proceedings concluded with the issuance on October 9, 1979, of Beck's decision. He held that the Jaycees was a public accommodation within the meaning of the Human Rights Act and that its sexually discriminatory membership practices violated the statute. He therefore enjoined the Jaycees from revoking the charter of any local chapter in Minnesota and from discriminating against any member or applicant for membership within the state on the basis of sex. App. at 107-109.

On October 31, 1979, the Jaycees again initiated a federal court proceeding pursuant to 42 U.S.C. § 1983. Underlying that action was an unanswered question of state statutory law. Therefore, pursuant to a request from the district court, the Minnesota Supreme Court answered in the affirmative the certified question as to whether the United States Jaycees was a "place of public accommodation" within the meaning of Minn. Stat. § 363.01, subd. 18 (1982). App. at 69 *et seq.* The record which the supreme court had before it consisted of the transcript and exhibits of the administrative hearing before Beck. Joint Appendix at 35.

At the trial which followed in the district court, the Jaycees joined its claim of associational freedom with the additional assertion that the public accommodation provision of the Human Rights Act was vague as construed. The district court rejected the Jaycees' vagueness arguments. App. at 65-66. In addition, the trial court held that the state's interest in securing freedom for its citizens from sex discrimination outweighed whatever associational interest, the existence and extent of which it left undecided, was accorded the Jaycees by the first amendment. *Id.* at 60-64.

This decision was reversed by a divided court of appeals panel. It held (2-1) that when the Jaycees takes positions on

political and civic issues, it is engaging in a traditional first amendment activity. App. at 19-23. Reasoning that the state's interest in eliminating sex discrimination is not sufficiently compelling to override the Jaycees' associational interest in determining the composition of its membership, the court held that the Jaycees is entitled to the freedom to associate in a sexually discriminatory manner. The court reached this conclusion in the absence of any evidence that sex is a factor in any Jaycees' position on a political or civic question.

On August 1, 1983, an evenly divided court (4-4) denied the state's timely filed petition for rehearing. An appeal to this Court was filed on October 11, 1983 and docketed in this Court on October 31, 1983. In an order dated January 9, 1984, this Court noted probable jurisdiction. 51 U.S.L.W. 3497 (U.S. Jan. 9, 1984) (No. 83-724).

### B. Background: Nature of the United States Jaycees.

#### 1. The Public Nature of the Jaycees.

The United States Jaycees is a nationwide civic organization which styles itself as a "leadership training organization." HRT 2 at 8, 9; P. Exhs. 1 and 2 (back covers) (T. 10, 13).[2] It consists for the most part of approximately 295,000

[2] The record before this Court has two sources. First, the transcript and exhibits from the United States District Court are referred to as "T." and "P. Exh." together with the appropriate page or number. Parenthetical citations following these exhibits are included in compliance with Rule 34.5 of this Court. Second, and more extensive, is the transcript and exhibits in the proceeding before Administrative Hearing Examiner George Beck. The two volume transcript of that proceeding is referred to as "HRT 1" or "HRT 2". The exhibits are "Complainant (Comp.)" or "Respondent (Res.) Exh." These exhibits and this transcript were introduced at and received by the district court. T. at 3-6.

Individual Members spread throughout 7,500 local (usually city) chapters in each of the 50 states and the District of Columbia.[3] P. Exh. 21 (T. 45); T. at 12. Its by-laws state that the organization's purpose is to provide its members:

> 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 friendship and understanding among young men of all nations.

P. Exh. 1 (T. 10) at 1. What has evolved from this purpose is an organization which, in exchange for a fee, provides its members with written materials and opportunities for development of leadership, communication, and management skills. Comp. Exhs. 6 at 3-5 and 80 at 1.[4] It also provides awards and recognition for achievement in those skills. Comp. Exh. 76. Jaycees membership is aggressively marketed to the public and is sold to interested persons on an unselective basis. App. at 104-5, 119.

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[3] The Jaycees' by-laws create seven classes of membership. These include Individual Members, Associate Individual Members, Local Organization Members (local chapters), and State Organization Members (state chapters). P. Exh. 1 (T. 10) at 3-6.

[4] This training:

> is based on the concept of 'Developing the Whole Man' by utilizing three essential functions: Individual Development, Management Development, and Community Development Programming. These three inter-related and mutually complimentary functions form a triangle to represent the Jaycees' goal which is to enhance the potential of each individual Jaycee member as well as benefit the community in which he lives.

P. Exh. 1 (T. 10), back cover. The organization has developed and made available to its members numerous programs which provide opportunities to develop organization, communication, and leadership skills. P. Exh. 20 (T. 42) at 6-7; Comp. Exhs. 2, 6 at 5, and 52 at 3-4.

That memberships are sold on an unselective basis is evident from the lack of criteria for selecting members. Save for age and sex, the Jaycees has published nothing with respect to criteria for Individual Membership. Instead it encourages as large and as diverse a membership as possible. HRT 1 at 112, 135-136. The lack of membership criteria is evident in the operation of the Minneapolis and St. Paul chapters. In considering membership applications, neither chapter uses a selection committee, employs a background check, or sets any standard for admission other than age.[5] HRT 1 at 124-32, 174-76.

Public offering of membership is evident in the marketing techniques used by the Jaycees—those of a business selling goods and services. Continuous public solicitation of new members is one of the hallmarks of the Jaycees. Thus, Jaycees' literature touts the need for membership growth, employing terms more commonly used in sales promotion campaigns. Publications which are made available on a nationwide basis stress the need for utilizing techniques by which membership in the Jaycees can be increased. Thus, the Officers and Directors Guide offers "hints on 'how to sell Jaycees' which you can review and use to recruit Jaycees", Comp. Exh. 6 at 21-25; the Regional Directors Handbook advises those individuals not to "set membership goals for chapters. Let them set their own (as long as they plan an *increase* in membership)", Comp. Exh. 44 at 14 (emphasis in original); and the United States Jaycees Recruitment Manual speaks of "Jaycees, the product you are selling." Comp. Exh. 24 at 5. The importance of convincing members of the public to purchase a Jaycees membership is also evident from the large number of individ-

[5] Jaycees' by-laws limit Individual Membership to males aged 18-35. P. Exh. 1 (T. 10) at 3-4.

ual and group achievement awards presented by the Jaycees which are conditioned, in part, upon recruiting activities. Comp. Exh. 76 at 6-7. Thus, for example, the organization prizes record-breaking achievements regarding increased membership sales, *e.g.*, most in the year by one person (348), most in a month (134), most in a lifetime (1,586). Comp. Exh. 70 at 2. *Accord* Comp. Exhs. 45, 66.

**2. The Nature of Jaycees' Programs and Activities.**

In exchange for a membership fee, Jaycees are allowed to enhance their management and leadership skills and to acquire recognitional credentials through a number of programs, materials, and awards. One such program which the Jaycees developed involves the raising of funds for the Muscular Dystrophy Association. P. Exh. 13 (T. 32).[6] A Jaycee who managed that program could benefit by enhancing or developing management skills while at the same time contributing to the improvement of his community and elevating the status of his Jaycees chapter. As aids to the successful completion of this project, the Jaycee would have at his disposal a variety of organizational techniques developed by the Jaycees, the support of other Jaycees, and the name recognition which has resulted from Jaycee community involvement. App. at 102-103, 106.

The Jaycees provides to its members a variety of materials regarding the organization and management of people and time. Comp. Exhs. 22, 23, and 38. One example of this type of program is the Jaycees' "Speak Up" program which is designed to train individuals in the art of public speaking.

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[6] Other examples of these programs are the Junior Athletic Championship, Cardiopulmonary Resuscitation, and Shooting Education programs. P. Exhs. 16 (T. 34-35), 14 (T. 33), and 17 (T. 35).

Comp. Exh. 53. Finally, the Jaycees furnishes to its members extensive materials regarding chapter and state organization management. *E.g.*, Leadership Dynamics (Comp. Exh. 41), Officers' and Directors' Guide (Comp. Exhs. 6, 52), and Chapter President's Management Handbook (Comp. Exh. 2).

Participation by Jaycees in community affairs has not been limited to apolitical or non-ideological activities. P. Exhs. 14, 16 (T. 33, 34, 35). Thus in 1979, for example, the Jaycees provided a program to its local chapters which explained how members could organize "get out the vote" drives. P. Exh. 20 (T. 42) at 8. In 1981 the Jaycees made available a program to its local chapters which provided the organizational framework pursuant to which interested Jaycees could lobby for passage of the then-current economic program of the Reagan administration. P. Exh. 6 (T. 24). *See also* P. Exh. 7 (T. 25) (Program pursuant to which Washington Jaycees could organize to support a constitutional amendment requiring Congress to balance the annual budget).

In addition to providing programs by which its chapters and members can participate in the political process, the organization itself makes statements regarding issues of concern to the membership.[7] These policy statements are adopted, except for unusual or compelling reasons, by the Jaycees' Executive Board of Directors (its national officers and presidents of its state chapters). P. Exh. 1 (T. 10) at 56-58. Thus, for example, in 1980, the Jaycees urged Congress to act to

[7] The activities of the Jaycees at national, state, and local levels are reported in the organization's magazine, "Future", a copy of which is sent to each Jaycee. Comp. Exh. 26, T. at 45. This magazine contains articles and editorial positions on issues of interest to the Jaycees. P. Exhs. 4 and 22 (T. 18, 21, 46). Nevertheless, Jaycees' by-laws provide that the opinions in this magazine do not necessarily represent the official attitude or policy of the organization. P. Exh. 1 (T. 10) at 3.

achieve the voluntary use of prayer in schools and to legislate in a manner that would ensure "that the natural resources of Alaska can be developed in a rational manner for the good of the nation." P. Exh. 1 (T. 10) at ii.[8]

Jaycees chapters have engaged in similar activity at the state and city level.[9] In 1971, for example, Minnesota Jaycees supported efforts to reduce the size of the Minnesota Legislature. Maryland Jaycees sought legislation which would permit voting rights for ex-offenders. In 1962 Jaycees from Watertown, Massachusetts were involved in efforts to obtain passage of a city charter.

The Jaycees also provides to its members awards and recognition for achievement. The attractiveness of membership in the Jaycees is not therefore limited to opportunities for individual development and community contribution. In conjunction with its programs, the Jaycees has developed and utilizes an extensive awards program. This program recognizes, at the local, state, and national level, the contributions and achievements of individual Jaycees and Jaycees chapters. P. Exh. 1 (T. 10) at 33-34; Comp. Exhs. 6 at 72-74 and 76. These awards thus serve as an added incentive for individual Jaycees to make the most of membership in that organization. Comp. Exh. 6 at 20.

### 3. The Nature Of The Jaycees' Treatment Of Female Members.

The extensive marketing of membership in which the Jaycees engages occurs against a backdrop of sex discrimination. Women cannot purchase a membership which entitles

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[8] A list of the policy statements, *i.e.*, external policies, adopted by the Jaycees from 1956 through 1981 is found in P. Exh. 3 (T. 15).

[9] A list of state and local Jaycees projects regarding public issues is contained in P. Exh. 19 (T. 38-39).

them to the same benefits that men receive. Women can join that organization and can participate in programs of individual, community, and chapter development. They cannot, however, be Individual Members, but instead are relegated to the category of Associate Individual Members. P. Exh. 1 (T. 10) at 3-4. In that position women are denied the privilege of voting and the opportunity of seeking and holding elective office at the local, state, or national level. T. at 57-60; HRT 1 at 107. Although they can render meritorious service through participation in Jaycees activities and programs, female Jaycees are excluded from formal recognition of such conduct by their peers. They are barred not only from elective leadership positions, but also from participation in virtually all of the Jaycees awards programs. Comp. Exh. 76; HRT 1 at 28, 159-161. *See* T. at 60.

Although it is prohibited by the Jaycees' by-laws, local chapters in Minnesota have admitted women as Individual Members. Since 1974 and 1975 respectively, the Minneapolis and St. Paul chapters have admitted and treated women on an equal basis. HRT 1 at 120, 157, 168. Female membership in the Minneapolis chapter grew from 45 in 1975 to approximately 180 members in 1979. *Id.* at 123. In 1981, there were 312 female Individual Members in Minnesota. P. Exh. 21 (T. 45). As might be expected, women have run for and been elected to various offices in those chapters. HRT 1 at 124, 169. As a result of the admission of women on equal footing with men, the Jaycees initiated proceedings in 1978 to revoke charters of the Minneapolis and St. Paul chapters. Comp. Exhs. 77-78; HRT 1 at 123, 168.

## SUMMARY OF THE ARGUMENT

The State of Minnesota has demonstrated to its supreme court that the United States Jaycees is a public accommodation as that term is defined in the Minnesota Human Rights Act. It therefore obtained an injunction against the organization's sexually discriminatory treatment of its female members. The decision of the court of appeals which, in effect, dissolved that injunction contains three errors.

First, application of the Minnesota Human Rights Act to the Jaycees is not prohibited by the first amendment to the United States Constitution. The Jaycees' claim and the court of appeals' decision to the contrary, there is no independent freedom to associate found in that amendment. Freedom of association is a derivative protection for the collective exercise by individuals of the enumerated freedoms of press, speech, petition or assembly. If female members of the Jaycees are permitted to vote, hold office, and to be eligible for awards in that organization, this will not result in any impediment to the exercise by male Jaycees through that organization of any enumerated first amendment right. The first amendment is not, therefore, a barrier to Minnesota's restrictions on the membership practices of the Jaycees.

Second, even if the application of the Minnesota Human Rights Act to the Jaycees did abridge a first amendment freedom, the interest of the state is so compelling as to override it. The State of Minnesota has an important public policy which it has statutorily articulated in the Minnesota Human Rights Act of securing for its female citizens freedom from discrimination in employment, housing, public services, education, and public accommodations. That interest is more significant than and overrides whatever associational interest the Jaycees has

in imposing sex-based restrictions in the sale of its memberships. In reaching a contrary conclusion, the lower court refused to accord full weight to the Minnesota Supreme Court's finding that the Jaycees is a place of public accommodation and therefore suggested that the state's interest can be met without enjoining the Jaycees from discriminating against its female members. Moreover by suggesting that the state has not demonstrated that the Jaycees is the only route to success for a professional person, the court improperly narrowed the scope of the state's interest in securing equal access for women to all commercial activities which serve the public. Finally, in suggesting that the state has less restrictive methods of regulating the Jaycees' illegal discriminatory conduct, the lower court has offered only less effective means.

Third, the Minnesota Supreme Court has not established an unconstitutionally vague distinction between businesses which are open to the public and private associations. The court did not leave the Jaycees without a comprehensive standard to guide its conduct. It discussed in detail the application of the law to the facts concerning the Jaycees. The court also referred to analogous case law establishing the differences between public and private associations. The standard established by the court is clear and definite. Moreover, the Human Rights Act applies to the Minnesota Jaycees as it presently operates. The lower court's conclusion that the state supreme court established an unconstitutionally vague standard does not permit it to relieve the Jaycees of responsibility for complying with the Human Rights Act. To have done so was erroneous because the Jaycees has no standing to challenge as vague a statute which unquestionably applies to it.

# ARGUMENT

## I. APPLICATION OF THE MINNESOTA HUMAN RIGHTS ACT IS NOT A BURDEN ON THE JAYCEES' FIRST AMENDMENT RIGHT TO SPEAK, ASSEMBLE, OR PETITION FOR REDRESS OF GRIEVANCES.

The question presented is whether application of the Minnesota Human Rights Act to the Jaycees places an unconstitutional burden on the first amendment rights of that group. Throughout this litigation the Jaycees has claimed that a first amendment associational freedom permits it to determine "the composition of its membership and its ownership on such terms as they see fit." J. App. at 8. *Accord* T. at 50-51 ("[W]ho our members are and what we do is a matter of freedom of association and it cannot be interfered with by the state"). An examination of the first amendment and of this Court's decisions reveals that this claim has no basis in the Constitution; is wrong on the facts; and rests upon a theory of law rejected by this Court.

### A. Freedom Of Association Protects First Amendment Rights But Is Not An Independent First Amendment Right.

Freedom of association is not an enumerated first amendment freedom. Instead, it is a derivative right whose existence the Court has sometimes deemed necessary in order to protect the collective exercise by individuals of enumerated first amendment rights such as free speech or assembly.

Rejection of the idea that freedom of association is an independent constitutional right is most evident in opinions of this Court regarding racial discrimination. In these cases

organizations sought to do precisely what the Jaycees seeks to do in this matter. The practice of racial segregation, it was argued, was sheltered as a form of constitutionally protected association. This socially destructive view of the first amendment was dismissed by the Court in *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). The Court commented that:

> Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

The Court's remarks in *Norwood* were presaged by its decision in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). In that case, New York prohibited labor unions from denying membership to any individual on the basis of race, color, or creed. A union, which limited its membership to male caucasians or American Indians, argued that this law violated the fourteenth amendment "as an interference with its right of selection to membership and abridgement of its property rights and library of contract." *Id.* at 93. In affirming New York's regulatory authority, the Court indicated that it saw:

> no constitutional basis for contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees.

*Id.* at 94 (citations omitted).

Similarly, the Court failed to perceive that associational freedom would justify discrimination in *Runyon v. McCrary*, 427 U.S. 160 (1976). In *McCrary* white parents argued that the racially discriminatory admission practices of private

educational institutions were shielded by a claimed first amendment freedom of association. *Id.* at 175-176. This Court rejected the broad argument of the parents. It observed that while a freedom of association has been recognized it has been recognized to preserve free speech, *i.e.*, the " 'effective advocacy of both public and private points of view, particularly controversial ones, that the First Amendment is designed to foster.' " *Id.* at 175. The Court did recognize that the first amendment protected the rights of parents to hold segregationist views and to establish schools for the purpose of promoting these beliefs. *Id.* It did not follow, the Court held, "that the *practice* of excluding racial minorities from such institutions is also protected by the same principle." *Id.* at 176 (emphasis in original).

When this Court has referred to a freedom of association, it has done so in response to an infringement upon a first amendment guarantee of free speech, press, petition, or assembly. Freedom of association emerged as a derivative right in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958). In that case Alabama sought to compel the state chapter of the NAACP to reveal the names and addresses of its Alabama agents and members. *Id.* at 451. This disclosure was requested in an atmosphere of racial animosity which had in the past "exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 461. Prior to determining whether the Constitution protected the organization from this disclosure, the Court noted that "effective advocacy . . . is undeniably enhanced by group association" and that there is a "close nexus between the freedom of speech and assembly." *Id.* at 460. The Court was, appellants submit, merely holding that disclosure of the information sought by the state would chill or

impede the NAACP's exercise of free speech and assembly and that a "freedom of assocation" best described that which it sought to protect—the collective exercise by NAACP members of those rights.

Similarly, in *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court reviewed an Arkansas statute requiring every teacher in a state-supported school or college to choose between termination and annually filing an affidavit setting out each organization to which that individual had belonged or regularly contributed to within the past five years. *Id.* at 480-81. This statute, it was claimed, deprived Arkansas teachers of their "rights to personal, associational, and academic liberty." *Id.* at 485. The Court invalidated the law. The basis of this Court's decision in *Shelton* was its recognition that because the disclosing teacher served at the will of individuals to whom the disclosures were made, public pressure upon teachers who were viewed as belonging to "unpopular or minority organizations could easily be brought to bear." *Id.* at 486-87 and n. 7. It is this potential chilling of free speech, speech made in an associational form, which was the basis of this Court's opinion. *Id.*

The mistaken notion which the Jaycees has regarding the scope of associational freedom is best contained in the observation by the court of appeals that:

> There are rights protected by the federal Constitution not specifically spelled out in so many words in that document. Among these rights is the right or freedom of association, and this right has not been rigidly limited to groups whose activities fall clearly within the specific guarantees of the First Amendment.

App. at 18. This statement cannot be supported by the decisions of this Court upon which the appellate court relied.[10] In each of those cases, the challenged action was an infringement upon a first amendment guarantee of free speech, press, petition, or assembly. None of the cases holds that there is a freedom of association independent of an enumerated first amendment freedom. Absent a threat to such freedom, there is no constitutional freedom of association.

The unprecedented view which the Jaycees takes of associational freedom as protecting not an enumerated first amendment right but solely a form of association has been properly rejected by this Court in non-racial contexts. Thus in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7, 9 (1974), the Court dismissed the assertion by a group of six unmarried men and women that a zoning regulation which prohibited their living together in a residential neighborhood violated their constitutionally protected freedom of association. *See Paris Adult Theater I v. Slaton*, 413 U.S. 49, 65 (1973). This Court has summarily disposed of similar past attempts to improperly use freedom of association. *Garcia v. Texas State Board of Medical*

[10] These cases are Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577-79 (1980); Buckley v. Valeo, 424 U.S. 1, 25 (1976); Healy v. James, 408 U.S. 169, 181 (1972); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). App. at 13-16. *Buckley, Healy, Shelton,* and *NAACP v. Alabama* protect the freedom to associate necessary to espouse beliefs and ideas. *United Mine Workers* and *Button* protect the association necessary to seek legal redress. *Richmond Newspapers*, citing *NAACP v. Alabama*, notes in *dicta* that freedom of association is protected together with explicit constitutional guarantees. 448 U.S. at 579-80. *Griswold* finds no independent constitutional basis for freedom of association but grounds it upon a need to protect express first amendment guarantees. 381 U.S. at 483.

*Examiners*, 421 U.S. 995 (1975), *aff'g mem.* 384 F. Supp. 434, 440 (W.D. Tex. 1974) (Corporation without any licensed doctors on its board of directors sought to provide low cost health care to low-income citizens. Court held that there was no first amendment freedom to associate for purpose of practicing medicine without a license); *Baker v. Nelson*, 409 U.S. 810 (1972), *dismissing appeal from* 291 Minn. 310, 191 N.W.2d 185 (1971) (Minnesota Supreme Court rejected a claim that the ban on same-sex marriage violated first amendment).

Freedom of association has no independent existence. It derives from a need to protect enumerated first amendment rights in a particular case. Absent a threat to an enumerated right, it has no application in this case.

### B. The Record Does Not Support The Conclusion That Equal Membership Rights For Women Will Abridge Any Enumerated First Amendment Right Of The Jaycees.

In *Runyon v. McCrary*, 427 U.S. at 176, this Court questioned whether prohibiting racial discrimination by a private school would impede the exercise of any first amendment rights of the pupils' parents. The Court observed:

> [I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle (emphasis in original).

The Court concluded that the record did not show that advocacy by the parents of their beliefs in the form of teaching of any particular idea or dogma would be inhibited by prohibiting the practice of discrimination. *Id.* Likewise, in the instant case the record does not show that the advocacy by Jaycees of any of its beliefs, or indeed its exercise of any other first amendment freedom, would be impaired by giving women full membership rights.

To the contrary, the record shows that "the specific content of most of the resolutions adopted over the years by the Jaycees has nothing to do with sex." App. at 24. Consistent with that fact, there is nothing in the record which would indicate that prospective Jaycees are screened on the basis of ideology or that the Jaycees has taken a position on any issue in which gender would of necessity dictate the outcome. *See* T. at 72-73;[11] HRT 1 at 135-36.

Although equal membership privileges for women would not result in gender specific infringement upon an enumerated first amendment right, it has been suggested that the Jaycees' associational freedom was impinged to the extent that this equality would change the organization's purpose. "It will become an association for the advancement of young people." App. at 24. This conclusion is but a tautology which is at odds with reality. Even in their present second-class status, women can and do make significant contributions to the fundamental aims of the Jaycees. Womens' activities are thus completely consistent with the by-law stated purposes of the Jaycees. Women can partake of and direct the numerous civic, personal development, and leadership programs which local Jaycees chapters

[11] Thus, the Jaycees differs from a political party whose control of organizational procedures and hence membership is based upon a desire to limit the content of the organization's speech. *See* Cousins v. Wigoda, 419 U.S. 477 (1975).

offer. T. at 57-60; HRT 1 at 150-156. Women thereby "promote and foster the growth and development of" the Jaycees. P. Exh. 1 (T. 10) at 1. Equality of membership among the sexes would not deprive male Jaycees of the by-law mandated "opportunity for personal development and achievement . . . [or deny them] an avenue for intelligent participation . . . in the affairs of their community, state, [or] nation." *Id.* Simply put, the Jaycees can point to no organization goal to which women cannot and do not aspire, no organization function which women cannot perform, and no organization position regarding which sex mandates a point of view. *See* T. at 73-75. Allowing women to vote, hold office, and receive awards will therefore change nothing about the organization except its sexually restrictive nature.

The Jaycees' claim that freedom of association protects its denial of equal access to women should be rejected on the same basis that this Court rejected the claim of the parents in *McCrary* that associational freedom insulated their racially motivated practice of denying educational opportunities to black children. To do otherwise, to adopt the holding of the lower court is to grant constitutional license to the segregationist practices of any public accommodation which takes positions on behalf of its customers or members regarding political or civic issues. Just as integration of the *McCrary* schools would not interfere with the racial philosophy or teachings at those institutions, so too will the integration of the Jaycees have no effect on participation by members of that group in civic affairs and community service or on the positions articulated by that organization on public issues. This Court should, therefore, reject as constitutionally groundless the idea that the first amendment protects not only the right to espouse sex discrimination, but in the context of the Jaycees, the right to practice it.

## II. THE STATE'S INTEREST IN PROHIBITING SEX DISCRIMINATION IN PUBLIC ACCOMMODATIONS IS COMPELLING AND THUS JUSTIFIES AN ABRIDGEMENT OF A FIRST AMENDMENT FREEDOM.

Even if this Court were to conclude that some first amendment freedom has been abridged, the Minnesota Human Rights Act may still be applied to the Jaycees. This Court has held that even a "significant encroachment" by the government into a first amendment freedom is permissible if the regulation is in furtherance of a state interest which is "compelling". *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). *Accord Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Any encroachment in the instant case is hardly significant. As argued above granting women full membership privileges will not prevent the Jaycees from carrying on the programs and activities which it has for years. In any event, an interest of compelling magnitude underlies the state's prohibition against sex discrimination in public accommodations.

Equality of access to the market place for women is a significant state interest. No one can seriously dispute that "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments"[12] is not felt as deeply by women so treated as by persons accorded it on the basis of color. *See also Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 19, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340-41 (1971) and cases cited therein. The Minnesota legislature has recognized this, indicating that it is "the public policy" of the state to obtain for its citizens "freedom from discrimination . . . [i]n public accommodations because of race . . . [and] sex" and declaring

[12] Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964). The Court noted that the primary purpose of the public accommodations provision of the Civil Rights Act of 1964 was to eliminate this deprivation for persons of color.

that the opportunity to obtain such access is a civil right. Minn. Stat. § 363.12 (1982). Further evidence of the desire of the Minnesota legislature to provide equality of opportunity for women in Minnesota is its ratification of the proposed amendment to the Constitution of the United States relating to equal rights for men and women under the law. Minn. Laws 1973, Resolution No. 1 at 2465. Finally, this interest in equal economic opportunities for women is evident in the responsibilities and duties assigned by the legislature to the Advisory Council on the Economic Status of Women. Minn. Stat. § 3.9222 (1982). The council is responsible for studying all matters relating to the economic status of women in Minnesota and recommending to the legislature "action designed to enable women to achieve participation in the economy." *Id.*

Given the foregoing, it is understandable that the lower court concluded that the state's interest in clearing "the channels of commerce of the irrelevancy of sex, to make sure that goods and services and advancement in the business world are available to all on an equal basis" is a public purpose of the "first magnitude." App. at 27. What is not understandable, however, and what constitutes error on the part of the lower court is its conclusion that an interest of this significance did not override the associational freedom to which the Jaycees was deemed to be entitled.

Numerous errors permeate that conclusion. First, after concluding that the state's interference with the Jaycees' right of association would be "direct and substantial,"[13] it noted that

[13] App. at 26. As was noted above, this conclusion was reached without any evidence that Jaycees' positions on political and social issues would be affected by a change in the sex of its members. The degree of interference found has been accurately described only if the Jaycees has a first amendment right to determine the composition of its membership. In the absence of such a freedom, equality of membership for women infringes upon no associational right of the Jaycees.

such intrusion would impair the state's regulatory interest "only to a limited extent." App. at 28. The court noted that "places of public accommodation in the ordinary sense of business establishments" remain subject to "the full vigor of the law . . . . It is only the Jaycees' membership practices that would be affected if this particular application of the state public accommodations law is prohibited." *Id.* The Jaycees' sexually discriminatory sale of memberships would, however, remain undisturbed. As Judge Lay correctly noted in dissent, this circular reasoning "rests upon an implied disagreement with the findings of the Minnesota Supreme Court that the Jaycees is a statutory 'place of public accommodation.' " *Id.* at 42-43. It is precisely the sale of membership by a public accommodation which the state seeks to regulate. To say, in effect, that women can still buy such items as food and clothes unreasonably narrows the state's interest in having all public accommodations open to women by judicially picking and choosing which ones should be open.

Second, the lower court found that the state's interest was diminished because it had not shown "that membership in the Jaycees was the only practicable way for a woman to advance herself in business or professional life." App. at 28.[14] The

[14] As a practical matter it is probably impossible to identify from among the myriad of events in an individual's life a solitary decision or action which guarantees an advance in one's career. *See generally* C. Jencks, *Inequality—Reassessment Of The Effect Of Family And Schooling In America,* 191-92 (1972) (Predicting a man's occupational status is like predicting his life expectancy: certain measurable factors make a difference, but they are by no means decisive). At the administrative hearing, three businesswomen testified that the training, experience, and recognition which they received as members of the Minneapolis or St. Paul Jaycees contributed to success in their respective careers. HRT 1 at 190-195, 199-212. One woman indicated that when she inquired about advancement in her company, she was told that she should join the Jaycees. She did so and was subsequently promoted. *Id.* at 210-212.

lower court's suggestion that it would view the state's interest as more compelling if the Jaycees was the only reasonable way for a woman to advance herself in business misapprehends the purpose of the public accommodations provision of the Human Rights Act. The transcendent state goal which it is designed to ensure is equality of access to commercial activity, not the success of a particular racial, sexual, or ethnic group in a given walk of life. While participation in the Jaycees and in Jaycees training is no doubt one avenue to success in the business world, it is but one of many commercially available opportunities for men and women to better themselves. The state need not therefore have to demonstrate that the Jaycees represents the sole route to advancement for professional women.[15]

Moreover, in addition to taking a myopic view of the state's interest, the supposition that there are other avenues of professional advancement is based upon the moribund theory of "separate but equal." This notion of racial equality has rightfully been assigned to the constitutional graveyard[16] and should not now be resurrected and used to deprive women of equal opportunity.

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[15] One attribute of discrimination is that it is based upon stereotypical notions of one group by another. The Jaycees portrays itself as a breeding ground for tomorrow's leaders. *See, e.g.,* Comp. Exh. 99 at 7. If the state has a compelling interest in eliminating discrimination, it has an equal interest in ensuring that the formative experiences of future leaders include men and women working as equals on projects of leadership, development, community service, and civic betterment such as are engaged in by the Jaycees. Jaycees' by-laws which relegate women to followers and elevate men to leaders solely on the basis of an immutable characteristic are antithetical to that interest.

[16] Bob Jones University v. United States, 103 S. Ct. 2017, 2029 (1983). *But cf.* Vorchheimer v. School District of Philadelphia, 430 U.S. 703 (1977), *aff'g by equally divided court* 532 F.2d 880 (3rd Cir. 1975).

Another factor which, in the opinion of the lower court, diluted the state's interest was its belief that the public accommodation provision of the Minnesota Human Rights Act was being applied "selectively" to the Jaycees and not to any of the "hundreds of private (in the sense of nongovernmental) associations in this country whose membership is limited to either men or women." App. at 29. The record does not permit the conclusion that any one of these "private associations" is a public accommodation. In fact, the hearing examiner rejected such a comparison between the Jaycees and the Kiwanis for precisely this reason. App. at 122-123.[17] Although the record adequately demonstrates why the Jaycees is a public accommodation, it is empty of sufficient facts to permit this designation of any other organization and hence of support for the lower court's conclusion that the Jaycees was selectively prosecuted.[18]

Finally, the lower court indicated that state objectives could be met by use of less restrictive alternatives, "ways less di-

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[17] Evidence on the Kiwanis, for example, consisted of its constitution and by-laws, a 1977 roster of its Minneapolis members, and a thumbnail sketch of it in 1 *Encyclopedia of Private Associations* (15th ed. 1980), Gale Research Co.; Res. Exhs. A and B; P. Exh. 25 at 748. Moreover save for the encyclopedia descriptions, evidence concerning other purported "private associations" was limited to the by-laws/policies, standing rules and procedures of the Association of Junior Leagues, Inc., the International Association of Lions Clubs' constitution and by-laws, the constitution of Rotary International organization, and the constitution and by-laws of Optimists International. Res. Exhs. C, D, E, F, and G. *See* App. at 123.

[18] This claim was made but never pursued by the Jaycees in the trial court. United States Jaycees v. McClure, 534 F. Supp. 766, 768, n. 6 (D. Minn. 1982), App. at 56. That court also concluded that the record before it contained insufficient evidence as to the activities of groups such as the Kiwanis "to allow any determination whether the statute would apply to them and whether . . . [they] engage in protected First Amendment activity." *Id.* at 67.

rectly and immediately intrusive on the freedom of association than an outright prohibition", *i.e.*, no tax credits, no membership or appearances by public officials. App. at 29-30. A properly designated "less restrictive alternative" is one which allows attainment of an objective in a manner which minimizes infringement on a first amendment activity, *e.g.*, reasonable time, place or manner restrictions on picketing as opposed to a ban on all such activity. The methods suggested by the court are thus not less restrictive alternatives, they are merely less effective ones.

The interest of the state in providing equality of access to the market place is clearly compelling, one which justifies an abridgement of first amendment freedoms of the kind asserted by the Jaycees.

## III. THE MINNESOTA SUPREME COURT'S OPINION IN MCCLURE V. UNITED STATES JAYCEES DOES NOT CREATE AN UNCONSTITUTIONALLY VAGUE DISTINCTION BETWEEN PUBLIC ACCOMMODATIONS AND PRIVATE MEMBERSHIP ORGANIZATIONS.

The lower court concluded that the Minnesota Supreme Court introduced an unconstitutionally vague standard into the public accommodations provision of the Minnesota Human Rights Act because its opinion in the *United States Jaycees v. McClure*,[19] "supplies no ascertainable standard for the inclusion of some groups as 'public' and the exclusion of others as 'private.'" App. at 41. The lower court did not find the statutory phrase "place of public accommodation" to be vague. Instead, it assigned that vice to the Minnesota Supreme Court's interpretation of it. The lower court was clearly in

[19] App. at 69-92.

error.[20] The opinion of the Minnesota court was clear and unambiguous.

The holding of the Minnesota court and the standard which emerges from the opinion is that an organization that sells goods and privileges in exchange for membership fees, which solicits and recruits its members on an unselective basis from the public at large and which does so at various sites within Minnesota is a "public accommodation" within the Minnesota Human Rights Act. App. at 77-91.

In arriving at this conclusion, the Minnesota court made a detailed three-prong analysis of the facts before it:

> Our examination of the national organization (and its local affiliates) proceeds along three lines set out in Minn. Stat. § 363.01 (18) (1980): (1) is the national organiza-

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[20] The vagueness test which should be used in this case is one applied to statutes not defining criminal conduct or regulating first amendment privileges in a criminal context and was established in A. B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925). In that case the Court rejected the idea that only a criminal statute could be unduly vague and established that the rule or standard of conduct at issue must not be *"so vague and indefinite as really to be no rule or standard at all." Id.* at 239 (emphasis added). *Accord* Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 123 (1967).

The *Small* standard is appropriate in this case since this case involves neither a criminal prosecution nor a first amendment privilege. Although the public accommodations provision of the Human Rights Act has a criminal component, Beck's injunction resulted from a civil proceeding. Moreover there is no indication that a criminal prosecution is either pending or threatened.

Finally, it is not clear that the Jaycees would be a public accommodation for the purpose of enforcing the provision of the Human Rights Act which makes it a misdemeanor to discriminate in that area on the basis of sex. Minn. Stat. § 363.101 (1982). Minnesota law permits a two-prong construction of a statute containing civil and criminal components. The former can be construed liberally, the latter strictly. State v. Moseng, 245 Minn. 263, 269, 95 N.W.2d 6, 11 (1959).

> tion a *business* in that it sells goods and extends privileges in exchange for annual membership dues?; (2) is the national organization a *public* business in that it solicits and recruits dues-paying members but is unselective in admitting them?; and (3) is the national organization a public business *facility* in that it continuously recruits and sells membership at sites within the State of Minnesota?

App. at 77-78 (emphasis in original).

On the first prong of the analysis, the Minnesota court found that the Jaycees was a business within the meaning of the Act because the Jaycees regarded "its members more as customers than as owners," *id.* at 78, and treated its memberships as a "product" to be sold. It was thus a "business." *Id.* at 79-80.

On the second prong of the analysis, the Minnesota court looked to analogous case law construing public accommodation statutes as to whether a group is public or private.[21] The court derived from the cases two principal characteristics of non-public organizations: selectivity in choosing members and limitations on the size of membership. *Id.* at 82-84. Since neither of these exist in the Jaycees organization, the court found that the Jaycees was not private, concluding that "[b]y virtue of its unselective, vigorous sale of memberships, the

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[21] The Jaycees' attempt to portray itself as not open to the public is similar to claims made by numerous other organizations. The litigation which has emerged from this aspect of civil rights law has left a well-established body of decisional law on the distinction between public accommodations and private clubs. *See* Wright v. Salisbury Club, 632 F.2d 309, 311, 313 (4th Cir. 1980) (42 U.S.C. § 1981); Quijano v. University Federal Credit Union, 617 F.2d 129, 131-133 (5th Cir. 1980) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (b)(2)); United States v. Trustees of Fraternal Order of Eagles, 472 F. Supp. 1174, 1175-76 (E.D. Wisc. 1979) (Title II, 42 U.S.C. § 2000a (e)); Fesel v. Masonic Home of Delaware, Inc., 428 F. Supp. 573, 577-78 (D. Del. 1977).

national organization is a *public* business." *Id.* at 85 (emphasis in original).

On the third prong of the analysis, the Minnesota court found that the Jaycees was a business facility within the Act because it had a fixed business site at the affiliated state organization's headquarters in Minnesota and mobile sites in the sometimes door-to-door, company-to-company solicitation of members. *Id.* at 89-90.

The holding and analysis of the Minnesota court is clear, unambiguous, and articulate.

The vagueness argument of the Jaycees, which was accepted by the lower court, is predicated not upon the reasoning of the opinion as a whole, but upon a remark made in connection with the second prong of the supreme court's analysis in which it was addressing one of the arguments of the Jaycees that it was a private organization. The remark was:

> Private associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. § 363.01 (18) (1980) [the definition of a public accommodation]. Any suggestion that our decision today will affect such groups is unfounded.
>
> We, therefore, reject the national organization's [Jaycees] suggestion that it be viewed analogously to private organizations such as the Kiwanis International Organization. Instead, we look at what this national organization is by itself.

App. at 83. *See* App. at 39.

In making this remark, the supreme court was not holding that the Kiwanis is private. Instead it was addressing and rejecting a contention of the Jaycees. The Jaycees argued that its organization and methods of operation were similar to that of the Kiwanis which it characterized as private. The supreme court rejected the analogy because the record showed the

Jaycees to be public. The court merely rejected the "suggestion that it [Jaycees] be viewed analogously to private organizations such as the Kiwanis International Organization." It rejected the whole suggestion and in so doing it was not necessary that it find that the Kiwanis was private. It did not. Instead it focused its attention on the facts of the Jaycees and whether it was public. This rejection of the Jaycees' contention[22] hardly creates an ambiguity in view of the clear holding of the court.

Even if the Minnesota court in rejecting the Jaycees' contention did create some ambiguity, it was inappropriate for the lower court to enjoin the application of the Minnesota Human Rights Act to the Jaycees. Nowhere in its opinion did the lower court hold that as it presently operates, the Jaycees is not a public accommodation within the meaning of the Human Rights Act. At best, the court held that in some hypothetical mode that organization might operate in a manner which would leave it uncertain as to whether it would be considered open to the public. Therefore because the Human Rights Act now prohibits the conduct in which the Jaycees is engaged, that organization cannot challenge the statute for vagueness on the basis that its future conduct or the conduct of some other organization might not clearly fall within its scope. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *Parker v. Levy*, 417 U.S. 733, 755-56 (1974).

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[22] This same argument was made to the administrative hearing examiner who rejected it on the basis that there was insufficient evidence to support the comparison. *See* App. at 105, 122-123. Moreover, at the district court, the Jaycees contended that the Minnesota Supreme Court's interpretation of the statute made it applicable to organizations such as the Boy Scouts and the Kiwanis. Judge Murphy noted that there was "insufficient evidence in the record pertaining to the activities of these groups to allow any determination whether the statute would apply to them and whether the groups engage in protected First Amendment activity." App. at 67.

By enjoining the present application of the statute, the lower court has improperly granted standing to a hypothetical Jaycees organization and issued erroneously what is in effect an advisory opinion indicating that this organization is being subjected to an unconstitutionally vague statute.

## CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the court of appeals and should remand this case for proceedings consistent with this Court's opinion.

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Respectfully submitted,

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