No. 83-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, 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' JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the First Amendment to the United States Constitution allow an organization 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 stands 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. Irene Gomez-Bethke and Hubert H. Humphrey, III have replaced Marilyn E. McClure and Warren Spannaus, respectively, as 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 at 93 through 130.[1]

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 equally 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 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 memberships 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

[1] Citations to the foregoing opinions will be to Appendix (herein "A.") and the appropriate page.

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.

This appeal is being docketed with this Court within ninety days from the entry of the court's order denying a petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISIONS, 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

The United States Jaycees is a nationwide civic organization. HRT II at 9, 21.[2] In exchange for membership fees, it provides its members with materials and opportunities for the development of leadership, communication, and management skills. Comp. Exhs. 6 at 3-5 and 80 at 1. Through its bylaws, the Jaycees regulates its component groups, state and local (usually city) chapters. P. Exh. 2. The primary aim of the Jaycees is to provide leadership training to its membership. *Id.*, Comp. Exh. 80. The organization has therefore developed numerous programs for its chapters which are designed to offer members an opportunity to develop and practice organization, communication and leadership skills and to thereby improve not only the individual but also his community and Jaycees chapter. Comp. Exhs. 22, 40, 42. Thus an individual who participates in or directs such a program could benefit by enhancing or developing organizational or management skills while simultaneously making a contribution to the improvement of life in his community and elevating the status of the Jaycees chapter. To assist in the successful completion of such a project, an individual Jaycee has at his disposal a variety of techniques developed by the Jaycees, the support of other Jaycees, and the organization's prestige earned by past Jaycees community projects. Comp. Exhs. 2, 6; HRT I at 137, 140, 178, 182. Finally, in addition

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[2] Citations to the record take several forms. The transcript and exhibits from the district court are referred to as T. and P. Exh. together with the appropriate page or number. The transcript and exhibits from the administrative hearing were introduced at and received by the district court. They are referred to as HRT I or HRT II (transcript) and Complainant (Comp.) or Respondent (Res.) Exh.

to the technical advice described above, the U.S. Jaycees provides its chapters and its members the important motivational device of an extensive award program which recognizes the achievements of Jaycees chapters and members. P. Exh. 1; Comp. Exhs. 1, 76.

Jaycees involvement in civic affairs has led it to articulate positions regarding issues of local, state and national concern. This has taken various forms. The Jaycees' Executive Board of Directors (its national officers and presidents of state chapters) adopts policy statements regarding issues of concern to the membership. Thus, for example, in 1980 the Jaycees urged Congress to act to achieve the voluntary use of prayer in schools. P. Exh. 1. Members of state and local chapters have participated in public affairs. In 1971, Minnesota Jaycees supported efforts to reduce the size of the Minnesota legislature. P. Exh. 19. Moreover, *Future*, a magazine published by the Jaycees and distributed to its membership, contains articles and editorial positions on issues of interest to the Jaycees.[3] P. Exh. 4. Finally, certain of the programs developed and disseminated by the Jaycees for its local chapters have a political cant. In 1981, the Jaycees made available a program to its local chapters which provided a mechanism whereby interested Jaycees could lobby for passage of the then-current economic program of the Reagan administration. P. Exh. 6.

Although women are eligible for membership in the Jaycees, they are relegated to second-class status, i.e., Associate Member. They cannot be an Individual Member. As such, women are prohibited from voting or from holding any elec-

[3] Pursuant to the Jaycees' by-laws, these opinions do not necessarily represent the official attitude or policy of the organization. P. Exh. 1.

tive office at the local, state, or national level. In addition, they are excluded from virtually all participation in as well as recognition from the Jaycees' awards program. Comp. Exhs. 1, 6, and 76; HRT I at 28, 49, 159, 161.

Despite these restrictions, Minnesota women have sought to obtain the benefits, both personal and professional, which are available from participation in the Jaycees. Since 1974 and 1975 respectively, the local chapters of the Minneapolis and St. Paul Jaycees have admitted and treated men and women as Individual Members. HRT I at 120, 157, 168. For example, membership in the Minneapolis chapter grew from 45 female members in 1975 to approximately 180 in 1979. HRT I at 123. In 1981, there were 311 female Individual Members in Minnesota. P. Exh. 21. Moreover, women have held various elective offices in those chapters. HRT I at 124, 169. As a result of this conduct, the Jaycees initiated proceedings to revoke the charters of those two chapters. Comp. Exh. 77; HRT I at 123, 168.

Faced with this threatened action, in 1978 members of the Minneapolis and St. Paul chapters filed charges of discrimination with the Minnesota Department of Human Rights alleging that this action constituted a violation of the public accommodations provision of the Minnesota Human Rights Act. On January 25, 1979, the Commissioner of the Department of Human Rights found probable cause to believe that these allegations were true, issued a complaint, and set the matter on for hearing before a state hearing examiner, George Beck. A. 94.

On February 27, 1979, the Jaycees filed suit in the United States District Court for the District of Minnesota seeking declaratory and injunctive relief against the enforcement of the Human Rights Act. The Jaycees claimed that the at-

tempted enforcement of the Human Rights Act against it deprived the Jaycees of the freedom to associate or not associate guaranteed by the first and fourteenth amendments to the United States Constitution. Moreover, it claimed that the definition of a place of public accommodation was unconstitutionally vague. That action was dismissed without prejudice. A. 95-96.

The hearing before Examiner Beck followed. The administrative proceedings concluded with the issuance on October 9, 1979 of Hearing Examiner Beck's decision. He held that the Jaycees was a place of public accommodation within the meaning of the Human Rights Act and that its sexually discriminatory membership policies violated the Act. 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 of Minnesota on the basis of sex. A. 107-109.

On October 31, 1979, the Jaycees returned to federal court, filing the action from which this appeal comes. A. 53. Thereafter, in response 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 (1980). A. 69 *et seq.* After receiving this answer, the Jaycees coupled 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 appellee's vagueness arguments. A. 65-66. In addition, the 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. A. 60-64.

The court of appeals disagreed. It held that when the Jaycees takes positions on political and civic issues, it is engaging in a traditional first amendment activity. A. 19-23. Thus, because the state's interest in eliminating sex discrimination is not sufficiently compelling, 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. Finally the court concluded that the Minnesota Supreme Court had construed the Human Rights Act in an unconstitutionally vague manner. A. 41.

SUBSTANTIALITY OF QUESTION

The state has attempted through legislation to eliminate sex discrimination in public accommodations, declaring that it "threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy." Minn. Stat. § 363.12, subd. 1 (1982).[4] This "public policy" confronts the Jaycees' desire to limit certain membership privileges in that organization on the basis of sex. *Id.* At issue in this case are questions made novel and constitutionally significant by the basis upon which the lower court favored the Jaycees' interest over the state's. It did so by extending to that organization a freedom to associate without any showing that such freedom is necessary to protect an enumerated first amendment right.

Though a membership organization, the Jaycees is a statutory public accommodation. Though the leadership training which it markets can be obtained without engaging in ideological activity, some Jaycees' projects and pronouncements involve civic and political issues. The freedom to take positions on such issues has, in other settings, been guaranteed by the speech, press, petition, and assembly clauses of the first amendment.

The lower court held that state regulation interfered with the associational freedom accorded these interests without sufficient justification. In so doing it has either cast freedom

[4] Thirty-three states and the District of Columbia have statutes prohibiting discrimination on the basis of sex in public accommodations. Four others which do not prohibit public accommodations discrimination on this basis do so on other grounds, e.g., race. *Cf.* Richardet v. Alaska Jaycees, 666 P.2d 1008 (Alaska 1983); United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. App. 1981) (Jaycees not place of "public accommodation").

of association as an independent constitutional right or clearly erred in attributing to the state regulation interference with traditional first amendment guarantees. Second, the court's unwillingness to term the state's regulatory interest compelling is based upon a balancing test in which the state's interest is acknowledged but depreciated in a factually and legally erroneous manner. Finally, the court has examined an offhand comment by the Minnesota Supreme Court while answering the certified question and concluded, contrary to the record and the intent of the supreme court, that it established a distinction between public and private organizations so fine as to be nonexistent and hence unconstitutionally vague. In so holding, the lower court created a standard for vagueness which contravenes that established in the decisions of this Court. The manner in which the court below has thwarted one aspect of Minnesota's efforts to eliminate sex-based discrimination in public accommodations merits the consideration of this Court.[5]

A. State Regulation Of The Jaycees' Membership Policy Is Not A Burden On That Organization's First Amendment Right To Speak, Assemble, Or Petition For Redress Of Grievances.

After an inconclusive discussion as to whether freedom of association is possessed of an independent first amendment status or is but a derivative right which protects enumerated

[5] The opinion of the lower court is based upon a factual characterization of the Jaycees which differs from those of the district court and the Minnesota Supreme Court. Moreover, the decision rests upon theories of constitutional law not supported by the decisions of this Court. These errors can be corrected by summary reversal of the judgment of the lower court.

rights of speech, press, petition and assembly, the lower court concluded that a "good deal"[6] of Jaycee activity is "association in pursuance of the specific ends of speech, writing, belief, and assembly for redress of grievances." A. 22-23. It then concluded that the state's regulation interfered with that freedom of association by diluting the all-male aspects of the organization, i.e., voting, holding elective office, and eligibility for receipt of awards, through female participation. *See* A. 24-25.

That portion of the opinion is grounded upon the lower court's observation that:

> It is natural to expect that an association containing both men and women will not be so single-minded about advancing men's interests as an association of men only.

A. 24.

Nowhere in the record, however, does there appear a Jaycees' position on a social, civic, or political issue in which one's outlook would be dictated by one's sex. Moreover, the record is empty of any Jaycees' project in which a member's participation would be inexorably linked to his or her sex.[7] Finally, there is no factual basis for the court's suggestion that "it is not hard to imagine" that women would seek to

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[6] Additional quantifying terms were "substantial" and "a not insubstantial part." A. 2, 22. Although the record contains evidence of many such activities, it does not support the use of these terms.

[7] To the contrary, women participate in and direct the numerous civic, personal development, and leadership programs which the Minneapolis and St. Paul Jaycee chapters offer. T. 57-60. Women thereby promote and foster the growth and development of the Jaycees.

change such references in the Jaycees' creed as the "brotherhood of man."[8] A. 24.

First amendment decisions of this Court do not accord freedom of association independent constitutional status but rather have treated it as a derivative protection which allows individuals to join together "to pursue goals independently protected by the first amendment."[9] *See also Garcia v. Texas State Board of Medical Examiners*, 421 U.S. 995 (1975), *affirming*, 384 F. Supp. 434 (W.D. Tex. 1974) (summary affirmance of a decision that rejected a freedom of association claim in the absence of a challenge to an underlying first amendment freedom); *Baker v. Nelson*, 409 U.S. 810 (1972), *appeal dismissed*, 291 Minn. 310, 191 N.W.2d 185 (1971). (Minn. Sup. Ct. rejected claim that ban on same-sex marriage violated first amendment). *Compare Buckley v. Valeo*, 424 U.S. 1, 15 (1976) *with Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974). Moreover, in two cases involving racial discrimination, this Court has summarily rejected the argument that such conduct by private individuals, in one instance private schools and in the other a union, can be shielded by the claim that the first amendment "freedom of association" permits individuals to construct racial barriers to entrance into these organizations. *Runyon v. McCrary*, 427 U.S. 160, 175-176 (1976); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945).

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[8] In pertinent part the Jaycees' creed expresses a belief that:

> The brotherhood of man transcends the sovereignty of nations; that economic justice can best be won by free men through free enterprise; that government should be of laws rather than of men . . . .

P. Exh. 1. Future female members may believe that these references are not gender specific but rather to a secondary meaning of the terms, i.e., mankind, the human race.

[9] L. Tribe, American Constitutional Law 702 (1978).

The state-mandated transformation of the Jaycees from a young men's organization to a young people's organization is not an abridgement of the first amendment right of free association because that change does not interfere with or impede a group goal which has first amendment significance. Thus the lower court's conclusion that the state abridged the Jaycees' freedom of association is based either upon an improper view as to the independent nature of that freedom, a view never taken by this Court, or unsupported by the record and hence clearly erroneous.

B. The State's Interest In Prohibiting Sex Discrimination In Public Accommodations Is Compelling And Thus Justifies Its Interference With Jaycees' Membership Requirements.

The lower court has agreed 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."[10] A. 27. Despite making this determination, the lower court concluded that the state's interest was insufficient to override what it viewed as a significant intrusion into the Jaycees' freedom of association.

[10] In Bates v. City of Little Rock, 361 U.S. 516, 524 (1960), this Court indicated that a "significant encroachment" by the government into a first amendment freedom is permissible upon showing an interest which is "compelling." Similar formulations occur in Elrod v. Burns, 427 U.S. 347, 362-63 (1976) and Buckley v. Valeo, 424 U.S. 1, 25 (1976). As was argued above, state interference with Jaycees' activities does not rise to the level necessary to merit the use of these tests.

The court first concluded that the state interest was impaired "only to a limited extent." A. 28. It noted that "places of public accommodation in the ordinary sense of business establishments" remain subject to the "full vigor of 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 on an implied disagreement with the findings of the Minnesota Supreme Court that the Jaycees is a statutory 'place of public accommodation.'" A. 42-43. It is precisely this sale of membership by a public accommodation, not only the Jaycees' community activities, which the state seeks to regulate.

Continuing with this reasoning "that the state interest being asserted is the interest in freedom from discrimination in public accommodations generally," the lower court found that the nature of the state's interest is reduced because it has not shown "that membership in the Jaycees was the only practicable way for a women to advance herself in business or professional life . . . ." A. 28. More disturbing than the harsh proof burden to which the majority thus puts the state[11] is the disquieting refrain of "separate but equal" which is sounded by this opinion. The majority seems to be

[11] Although the record does not show, if ever such a showing could be made, that the Jaycees is the only way for a woman to advance herself in a business or chosen profession, it does contain the testimony of three women from the Minneapolis and St. Paul Jaycee chapters. These women obtained, contrary to the Jaycees' by-laws, equal membership rights. Their testimony regarding the role which the Jaycees played in their career advancement is almost of classic success story proportions. *See* A. 100-102.

suggesting that the state's interest is satisfied if nondiscriminatory alternatives to the Jaycees are available to women. What this analysis overlooks, of course, is the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments."[12] It would be ironic if as this country struggles "to escape from the shackles of the 'separate but equal' doctrine of *Plessy v. Ferguson*"[13] in the area of racial discrimination, those same bonds were to be fixed to the wrists of women.

Moreover, the showing which the majority would have the state make may be so elusive as to escape demonstration. It is more an exercise in metaphysics than in fact finding to attempt to prove the precise degree to which Jaycees training is of benefit to a women's professional development.[14] Therefore, unless the lower court's "separate but equal" test is to be used, it should have been sufficient for the state to have demonstrated, as it did, that equal access to Jaycees membership is as beneficial for women as it is for men.[15]

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[12] Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964). *See also* Sail'r Inn, Inc. v. Kirby, 5 Cal. 3rd 1, 19, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340-41 (1971) and cases cited therein.

[13] Bob Jones University v. United States, 103 S. Ct. 2017, 2029 (1983).

[14] *See generally* C. Jencks, Inequality—A 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).

[15] The United States Bureau of Labor Statistics has indicated that almost one-third of all jobs held by males come through personal contacts. Job Seeking Methods Used by American Workers, Bull. No. 1886, U. S. Bureau of Labor Statistics, Table III (1972). The Jaycees undoubtedly provides an opportunity for men and women to establish such contacts. If experience helps destroy the stereotypes upon which discrimination flourishes, does it not serve a compelling state interest to have these contacts occur with men and women meeting as equals?

Another factor which in the opinion of the lower court diluted the state's interest was its belief that the public accommodations 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 either to men or to women." A. 29. Underlying this observation is another example of the court's unwillingness to accept the Minnesota Supreme Court's characterization of the Jaycees as a "public accommodation." In addition, the lower court made the serious factual error that these other groups would constitute public accommodations. Although the record adequately demonstrates why the Jaycees is such an organization, it is empty of sufficient facts to permit this designation of any other organization.[16]

Finally, the lower court indicated that state objectives could be met by use of less restrictive alternatives, "ways less directly and immediately intrusive on the freedom of association than outright prohibition," i.e., no tax credits, no membership or appearances by public officials. These options are mislabeled. 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

[16] This "selective prosecution" argument was raised 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). (A. 19.) This decision by the Jaycees precluded the state from demonstrating whether any charges were filed with it concerning other membership groups and from demonstrating that its enforcement activities were directed at other equally compelling interests protected by the Minnesota Human Rights Act. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962).

alternatives offered by the lower court have the same purpose as does Minnesota's statutory ban on sex discrimination in public acccommodations. Each seeks to force the Jaycees to allow women equal access to that organization. The methods suggested by the court are thus not less restrictive, they are merely less effective.

C. 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 *United States Jaycees v. McClure* "supplies no ascertainable standard for the inclusion of some groups as 'public' and the exclusion of others as 'private.' " A. 41. The court did not find the phrase "place of public accommodation" to be vague. Instead it assigned that vice to the following portion of the supreme court's opinion:

> 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.

305 N.W.2d at 771. A. 39.

First, the Minnesota Supreme Court did not hold "that the Kiwanis is 'private' and therefore not subject to the law." Instead it merely refused to accept arguments offered to it by the Jaycees that its organization and methods of operation were similar to those of the Kiwanis.[17] A. 80, 82-83. This rejection of one party's argument is simply that, not a statutory construction which has created a decisional gloss on the statute. The Minnesota Supreme Court has not held that the Kiwanis is private. It has merely rejected the Jaycees' suggestion that it is as private as the Kiwanis.

Second, the distinction which the Minnesota Supreme Court drew between public accommodations and private clubs is one which is well established in decisional law.[18] A. 82. Measured against that standard, the Jaycees cannot be termed a private club. The supreme court's reliance upon such cases to form the outlines of its public business-private association distinction does not leave the Jaycees "to guess as to how it might change itself in order to become 'private.'" A. 38. *See Grayned v. City of Rockford*, 408 U.S. 104, 110-12 (1972).

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[17] This argument was made to the administrative hearing examiner who rejected it on the basis that there was insufficient evidence to support the comparison. *See* A. 105, 122-123. The record of this hearing is the only documentary evidence which the Minnesota Supreme Court had before it in deciding *McClure*.

[18] *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, 131-33 (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).

CONCLUSION

Ten years ago the Minnesota Legislature extended the protection of the Minnesota Human Rights Act from sex discrimination in employment to a similar prohibition in housing and real property, public accommodations, public services and education. Minn. Laws 1973, ch. 729 § 3. The legislature recognized that equality for women could not be achieved simply by providing them equal job opportunities. The decision of the lower court now looms as an impediment to the state's comprehensive scheme to eliminate sex discrimination.

The Jaycees claims that one value of its organization is that it builds tomorrow's leaders today. Women should have access to that social training ground. They should be able to meet and compete with men in that arena. To brand them with second class status or to discourage them from joining that organization helps to perpetuate the myth that women are inferior and tarnishes the promise of the state to its citizens that they will be free from discrimination. For these reasons

and for the reasons above regarding the merits of the lower court's decision, appellants request that this Court either summarily reverse the lower court or note probable jurisdiction.

Respectfully submitted,

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