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' REPLY BRIEF

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
RICHARD L. VARCO, JR.
Special Assistant
Attorney General
Counsel of Record
1100 Bremer Tower
Seventh Place and
Minnesota Street
St. Paul, MN 55101
Telephone: (612) 296-7862
Counsel for Appellants

Of Counsel:
THOMAS R. MUCK
Deputy Attorney General
RICHARD S. SLOWES
Assistant Attorney
General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO. 83-724

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' REPLY BRIEF

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PROTECT THE JAYCEES' PRACTICE OF RESTRICTING ITS MEMBERSHIP BENEFITS ON THE BASIS OF SEX.

The Jaycees contends that its "core purpose" is to provide "beneficial service" to only young men and young men's organizations. Appellee's Brief at 11, 12. It then argues that the state's insistence that it also serve women interferes with

this purpose in an unconstitutional manner. *Id.* at 9. Underlying this contention is the mistaken assumption that the stated purpose itself is entitled to constitutional protection under the rubric of freedom of association. There is, however, nothing intrinsic in the objective of providing some benefit to young men or young men's organizations that calls for such protection. More to the point, that purpose is no more entitled to constitutional protection simply because it is the objective of a group rather than of an individual. This Court has never held, and should not now hold, that the concept of freedom of association constitutionalizes every goal that a group adopts. Freedom of association protects group advancement of beliefs and ideas. It does not constitutionally shield, as the Jaycees here insists, the practice of those ideas simply because it is engaged in by a group. *Compare NAACP v. Button*, 371 U.S. 415 (1963) (Associational freedom protects advocacy of ideas and redress of grievances, therefore group sponsorship of legal services to advance those ideas) *with Garcia v. Texas State Bd. of Medical Examiners*, 421 U.S. 995, *aff'g mem.* 384 F. Supp. 434 (W.D. Tex. 1974) (Although group advocated reducing cost of health care to low-income individuals, freedom of association does not guarantee a right to practice this belief by forming a health care corporation for this purpose which, contrary to Texas law, did not have a board of directors composed entirely of doctors). Thus, merely because the Jaycees may have identified a restricted group that it wishes to serve does not in and of itself justify a constitutional guarantee of non-interference.

The Jaycees argues further that its restrictive membership practice is entitled to constitutional protection because it is "the only effective expression of the underlying belief that young men, as a class, need or deserve such an organization."

Appellee's Brief at 11. That contention is based on yet another unjustifiably expanded perception of freedom of association. While the first amendment protects the Jaycees' right to believe in and advocate the need for men-only organizations, it does not guarantee the right to effectuate it. That was precisely the point made by the Court in *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976). (First amendment allows advocacy of racial segregation, first amendment does not protect its practice.) Moreover, the Court gave no indication that this limitation on the scope to which the freedom of association can be stretched was restricted to cases involving racially-based discrimination.

II. EQUALITY OF MEMBERSHIP FOR WOMEN WILL HAVE NO EFFECT ON THE JAYCEES' OPPORTUNITY TO ENGAGE IN FREE SPEECH.

The Jaycees have not shown that granting women equal membership rights would interfere with any position which it might take on any civic issue. There is therefore not even a "reasonable probability" that its associational communication will be threatened or abridged by the equal participation of women. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). Despite the Jaycees' attempt to construct such evidence out of whole cloth regarding the issues of abortion, the ERA, and the draft, one's position on these issues is not determined by one's sex.

Moreover, although the Jaycees' by-laws restrict the ability of female members to obtain all of the benefits from its programs of individual, community, and chapter development, nothing in the Jaycees' Creed, the ideological basis of the organization, dictates or compels associational viewpoints

which would be determined by or affected by sex.[1] Women as well as men can and no doubt do adhere to each of these tenets. Indeed the same is true of a woman's ability to carry out the "core purpose" of the Jaycees. Appellee's Brief at 11. The organization's executive vice-president testified that women can aspire to the same goals set for male members in the Jaycees' by-laws. P. Exh. 1 at 1 (T. 10). Women can desire to devote time to community service in the public interest, can have a spirit of genuine Americanism and civic interest, and can desire to participate in the affairs of their community, state and nation. T. at 73-75. As such, female voting members and female officers would not disrupt the associational pronouncements of the Jaycees.[2]

The Jaycees' attempt to cast itself in the mold of organizations, such as the NAACP, which have been accorded protection from various types of state interference based on freedom of association is unavailing. It is simplistic to assert

---

[1] The Jaycees' Creed consists of the following beliefs:

> That faith in God gives meaning and purpose to human life; 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; that earth's greatest treasure lies in human personalities; and that service to humanity is the best work of life.

P. Exh. 1 at 1 (T. 10).

[2] In this respect, a favorable decision in this case would not have the purported disastrous effect on ethnic and religious organizations suggested by the Jaycees. Those groups are formed around or defined by ideas and experiences which if not adhered to or shared by one seeking admission to the group might interfere with the associational pronouncements of those organizations. A religious group, for example is composed of adherents to tenets which define what the group is. Those beliefs are central to the definition and composition of the group. The Jaycees' creed is neutral on the issue of sex-based distinctions of any kind.

that the NAACP received that protection merely because it was a group or because it seeks to advance the interests of blacks. Rather, the NAACP received protection because the activity in which it engaged to effectuate its purpose involved expression and petition for redress of grievances, activity specifically protected by the first amendment.

The inappropriateness of the comparison which the Jaycees makes between itself and advocacy groups is also evident upon examination of the purposes of the Jaycees and one such group, the NAACP, and upon review of the first amendment values protected by "associational freedom" [3] in *NAACP v. Alabama*, 357 U.S. 449 (1958). The Jaycees' purpose as it has evolved, is to provide leadership training to men using, among other educational techniques, participation in civic affairs. App. to Juris. Stat. at 57. On the other hand, the purpose of the NAACP includes promoting equality of rights and eradicating "caste or race prejudice among the citizens of the United States"; advancing "the interest of colored citizens", and securing "for them impartial suffrage", increased opportunity for acquiring "justice in the courts, education for their children, employment according to their ability and complete equality before the law." *NAACP v. Alabama*, 357 U.S. at 451. Adherence to these principles characterizes a member of the NAACP and distinguishes that person from the public. The Jaycees has no similar set of beliefs which underlie or require its exclusion of women. Indeed, even if the Jaycees' purpose is viewed as emanating from a belief in the need for men-only organizations, it is

[3] Associational freedom also protects certain intimate associations. Griswold v. Connecticut, 381 U.S. 479 (1965). Nonetheless the notions of privacy which underlie that protection, *id.* at 485-86, do not compel a similar result in this case. The Jaycees with its size and impersonal entrance requirements simply does not qualify for such consideration.

apparent that membership is not currently premised on belief in that ideology, as evidenced by the increase from 10% in 1975 to 33% in 1981 of the percentage of male Jaycees favoring some form of equal membership for women. App. to Juris. Stat. at 99, Appellee's Brief at 9.

What the Jaycees seeks to protect is not the opportunity to meaningfully express its views but rather the all-male aspect of its association. In contrast, what the NAACP sought to and did protect in *NAACP v. Alabama* was a state imposed restriction on its ability to communicate its views and hold its beliefs. Furthermore, if the state had sought to interfere with the content of the NAACP's advocacy, it would thereby have infringed upon the first amendment's guarantee of free speech. *Brandenburg v. Ohio,* 395 U.S. 444 (1969). A similar result would have been reached if the state had sought to regulate the NAACP because of the content of its speech. *Healy v. James,* 408 U.S. 169 (1972). Freedom of association properly protects against these sorts of incursions into communal expression or advocacy. If the Jaycees is required to offer equal membership rights to its female members, none of the foregoing infringements upon free speech will occur. The state will not thereby regulate the content of the Jaycees' speech, will not impose content based regulations on the organization, and will not force it to give up or make more difficult its right to speak out on any issue. It is therefore erroneous for the organization to claim that equal membership benefits for women will abridge its right to free speech.

III. THE MINNESOTA SUPREME COURT'S OPINION IN McCLURE V. UNITED STATES JAYCEES DOES NOT RENDER THE PUBLIC ACCOMMODATION PROVISION IN THE HUMAN RIGHTS ACT OVERBROAD AND THUS UNCONSTITUTIONAL.

The Jaycees suggests that the Minnesota Supreme Court's construction of the public accommodations provision in the Human Rights Act is overly broad. Appellee's Brief at 43-49. In order to sustain this challenge, the Jaycees must show that the statute as construed "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). Moreover, "where conduct and not merely speech is involved . . . the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The Jaycees' overbreadth argument is supported only by the assumption that the statute would apply to numerous organizations which limit membership by, *inter alia*, sex, religion, or national origin. Appellee's at 46-47. Nothing in the record before this Court permits it to adequately determine whether the activities and membership practices of any of the referenced organizations are such as to cause them to be public accommodations like the Jaycees.

Religious and ethnic organizations, for example, may not offer goods or services to the public. Some organizations may not engage in the sale of goods and services. It is uninformed speculation to ignore such potentially important differences between the Jaycees and such groups and to claim as does the Jaycees that each would be covered by the supreme court's opinion.

Overbreadth challenges are permitted "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. at 612. In this case there is insufficient basis for the Court to make such a prediction or assumption. Because the Court cannot determine that the Minnesota Supreme Court opinion reaches a substantial amount of constitutionally protected conduct, the Jaycees' overbreadth challenge should fail. *Village of Hoffman Estates*, 455 U.S. at 494.

CONCLUSION

The judgment of the court of appeals should be reversed.

April 9, 1984

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
RICHARD L. VARCO, JR.
Special Assistant
Attorney General
Counsel of Record
1100 Bremer Tower
Seventh Place and
Minnesota Street
St. Paul, Minnesota 55101
Telephone: (612) 296-7862

Of Counsel:
THOMAS R. MUCK
Deputy Attorney General
RICHARD S. SLOWES
Assistant Attorney
General