No. 83-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, HUBERT H. HUMPHREY III, and GEORGE A. BECK,

Appellants,

—v.—

THE UNITED STATES JAYCEES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ORGANIZATION FOR WOMEN, AMERICAN JEWISH COMMITTEE, CENTER FOR CONSTITUTIONAL RIGHTS, COALITION OF LABOR UNION WOMEN, CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, EQUAL RIGHTS ADVOCATES, INC., NATIONAL CONFERENCE OF BLACK LAWYERS, NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS, NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC., NORTHWEST WOMEN'S LAW CENTER, WOMEN EMPLOYED, WOMEN'S ACTION ALLIANCE, INC., WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LAW PROJECT, WOMEN'S LEGAL DEFENSE FUND AND WOMEN U.S.A. IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CODES, STATUTES AND RULES:

Page

OTHER AUTHORITIES:

STATEMENT OF THE CASE

The United States Jaycees (the "U.S. Jaycees" or "Jaycees") is a civic organization of some 300,000 members with numerous local chapters nationwide. The U.S. Jaycees refuses to admit women to full membership, according them only associate status. Associate members are ineligible to vote, hold office or receive awards. The issues to be resolved in this case are whether application to the Jaycees of the Minnesota Human Rights Act (the "Act"), Minn. Stat. Ann. §§ 363.01-.14 (West 1966 & Supp. 1983), which prohibits sex discrimination in places of public accommodation, unconstitutionally interferes with the Jaycees' First Amendment rights and whether, as applied to the Jaycees, the Act is unconstitutionally vague.

Since 1974 and 1975, the Minneapolis and St. Paul chapters of the Jaycees have admitted women as full members, in violation of the rules of the national organization. When the national organization threat-

ened in 1978 to revoke the charters of these chapters, the chapters filed charges with the Minnesota Department of Human Rights claiming violation of the Minnesota Human Rights Act. The Act prohibits sex discrimination in places of public accommodation and defines place of public accommodation to include "a business ... facility of any kind ... whose goods ... [and] privileges ... are ... sold or otherwise made available to the public."

Hearing Examiner George Beck held in-depth hearings on the claims against the Jaycees and on October 9, 1979 issued a decision finding that the Jaycees was a place of public accommodation whose discriminatory practices violated the Minnesota Human Rights Act. The U.S. Jaycees was enjoined from revoking the local chapters' charters and from discriminating against any members or applicants for membership on the basis of sex. Minnesota v. United States Jaycees

(Minn. Dep't of Human Rights Oct. 9, 1979) ("DHR Findings" and "DHR Memorandum"), at A-93.[1/]

The Jaycees then instituted an action in federal district court claiming that application of the Minnesota Human Rights Act violated a constitutionally protected right of freedom of association, and, subsequently, that the Minnesota statute was unconstitutionally vague. Under the procedure of Minn. Stat. Ann. § 480.061(3) (West 1966 & Supp. 1983), the district court certified to the Minnesota Supreme Court the question of whether the Jaycees was a place of public accommodation within the meaning of Minn. Stat. Ann. § 363.01 (18). The Minnesota Supreme Court answered affirmatively. United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981). The district court then upheld the application of the Minnesota Human Rights Act to the Jaycees, finding that the State's compelling interest in prohibiting sex discrimination outweighed any associ-

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1/ A- refers to Appellants' Appendix.

ational rights of the Jaycees and rejecting the Jaycees' vagueness claim. 534 F. Supp. 766 (D. Minn. 1982).

A divided panel of the Eighth Circuit, Chief Judge Lay dissenting, reversed. The lower court rejected the findings of the district court and the Minnesota Supreme Court that the Jaycees was a business organization and held that the Jaycees was a public advocacy group whose right of association and First Amendment rights were violated by application of the Minnesota Human Rights Act and, in the alternative, that the Act was unconstitutionally vague as applied. 709 F.2d 1560 (8th Cir. 1983). A petition for rehearing en banc was rejected by an equally divided Eighth Circuit on August 1, 1983. (Appellants' Appendix at A-131). The appeal to this Court ensued. Probable jurisdiction was noted on January 9, 1984.

INTEREST OF AMICI

This brief amicus curiae is submitted on behalf of the National Organization for Women,

American Jewish Committee, Center for Constitutional Rights, Coalition of Labor Union Women, Connecticut Women's Educational and Legal Fund, Equal Rights Advocates, Inc., National Conference of Black Lawyers, National Conference of Women's Bar Associations, National Federation of Business & Professional Women's Clubs, Inc., Northwest Women's Law Center, Women Employed, Women's Action Alliance, Inc., Women's Bar Association of the State of New York, Women's Equity Action League, Women's Law Project, Women's Legal Defense Fund and Women U.S.A. in support of Appellants' position that the State of Minnesota may constitutionally apply its Human Rights Act to the Jaycees.[2/] These organizations oppose gender-based discrimination and recognize the importance of equal access for women to organizations like the Jaycees.

2/ The interest of the amici curiae is set forth in the Appendix to this brief.

Consent to file this brief on behalf of the named organizations has been obtained from the parties pursuant to Supreme Court Rule 36.2. Letters of consent are being filed together with this brief.

SUMMARY OF ARGUMENT

The U.S. Jaycees is a leadership training organization intimately tied to advancement in business and civic life. It provides leadership training by offering courses in such areas as management skills and public speaking, and providing members with various opportunities to exercise and thereby develop their leadership skills through community projects and as officers, directors, and committee chairmen. Female and male members of the Jaycees have pointed to the personal and professional gains they have realized as a result of participating in the leadership-building programs of the Jaycees. Because the Jaycees members are in the early stages of their careers, the opportunities provided by the Jaycees to know and work

with peers and business and civic leaders in the community are critical to future job success. Serving as an officer of the Jaycees, which women, as associate members may not do, further enhances this opportunity to make contacts among community leaders.

Full participation in these opportunities is equally important for women. Recent studies of college students amply demonstrate growing convergence of men's and women's career goals including the identification of career as their highest priority. To deny women leadership positions, voting rights, and awards in organizations like the Jaycees is to place women at a significant competitive disadvantage in their career development.

Current constitutional jurisprudence does not prevent the state of Minnesota from compelling the Jaycees to comply with Minnesota law prohibiting sex discrimination. The Constitution recognizes a protected freedom of association, but only when tied to the

exercise of an explicit First Amendment right. This Court has not extended such protection to organizations like the Jaycees, which primarily engage in business or commercial activities. Although the Jaycees has on occasion taken political positions, such stands are peripheral to the organization's core purpose. Because the political pronouncements of the Jaycees are gender neutral, application to the Jaycees of Minnesota law banning sex discrimination would not infringe on any First Amendment activities in which the Jaycees do engage.

The fact that the Jaycees is a membership organization does not in itself insulate the Jaycees from anti-discrimination law. Moreover, since the Jaycees currently admits women as associate members, compelling it to grant full equality to women does not drastically interfere with the Jaycees or threaten other, truly private organizations. The interest of the State in applying its Human Rights Act to the Jaycees is

one of vital local concern and should not be impaired by the federal courts.

The Minnesota Human Rights Act is not unconstitutionally vague. The Minnesota Supreme Court, interpreting its own statutes, articulated clear standards for determining application of the statute to civic organizations. There is ample notice which allows the public to distinguish readily between acts that are permissible and those that run afoul of the law.

I.

THE JAYCEES IS A LEADERSHIP TRAINING ORGANIZATION INTIMATELY TIED TO ADVANCEMENT IN BUSINESS AND CIVIC LIFE

After two days of hearings, eight witnesses, and 100 exhibits, DHR Memorandum, at A-94, the Minnesota Department of Human Rights concluded that the Jaycees was a place of public accommodation within the meaning of the State Human Rights Act and ordered the Jaycees to comply with the Act by admitting women to full membership. The Hearing Officer perceptively recognized that "[t]o deny [Jaycees] training and help in advancement to women in business while it is fully available to men would place women at a significant competitive disadvantage." DHR Memorandum, at A-121. These conclusions are amply supported by the record.

A. The Jaycees offers leadership training leading to advancement in business and civic life.

Providing leadership training is the primary purpose of the U.S. Jaycees. The organization advertises as its motto, "Build Tomorrow's Leaders Today,"[3/] and describes itself as "an action organization with the purpose and object of building leadership."[4/] Its recruiting materials boast that "[t]he United States Jaycees has provided thousands of eager young leaders to America's vast business complex."[5/] This self-professed purpose was accurately perceived by the Minnesota Department of Human Rights: "The by-laws

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3/ Simpson, Jaycees Challenged on 'Men Only' Rule, Working Woman, Sept. 1979, at 61.

4/ U.S. Jaycees, Service to Humanity: The Jaycee Future 7 (1969) (hereinafter Service to Humanity). One Jaycees chapter president has stated, "The Jaycees does not market itself as a boys' club. It is advertised as a leadership training organization." Simpson, "Jaycees Challenged on 'Men Only' Rule," supra, at 63.

5/ Service to Humanity, at 2.

of the U.S. Jaycees make it clear that they are not merely an organization designed to engage in good works. They are rather an organization primarily designed to train future leaders for civic and business responsibilities." DHR Memorandum, at A-121, quoting Junior Chamber of Commerce of Kansas City v. The Missouri State Junior Chamber of Commerce and the U.S. Jaycees, 508 F.2d 1031, 1035 (8th Cir. 1975) (Heany, J., dissenting).[6/]

The Jaycees provides leadership training in two ways: (1) courses in areas such as management skills and public speaking, and (2) opportunities to exercise and thereby develop leadership skills through community projects and as officers, directors or committee chairmen.

6/ Indeed, nowhere in hearings before the Minnesota Department of Human Rights was it suggested that the Jaycees is a political advocacy group.

The leadership training courses, which the Jaycees calls "individual development" programs, are designed by the national headquarters in Tulsa. DHR Findings No. 19, at A-102 to A-103. The Jaycees course entitled "Personal Dynamics" teaches self-awareness and evaluation, goal setting, personal planning and personal skills; "Communication Dynamics" deals with problems such as listening skills, human relations and letter writing; "Speak-Up" is a public speaking course; "Leadership Dynamics" discusses leadership styles and skills and personnel management. See Complainants' Exhibits 22, 23, 41, 53, listed at A-125 to A-127. A small fee is charged for the materials used in these courses, which include workbooks, a chairman's guide and diplomas. Complainants' Exhibit 33, listed at A-126.

Jaycees members are well aware of the value of these courses. One Minnesota Jaycees member stated in testimony before the Department of Human Rights that the Jaycees' "Speak-Up" program developed

her speaking abilities and aided in her presentations at work. DHR Findings No. 17, at A-101 to A-102. Indeed, a Jaycees recruitment manual coaches recruiters to use the following dialogue:

> What other organization will provide you with a personal development education for $25.00 a year? Just being in the Speak-Up program and being able to speak more effectively could mean a $25.00/month raise in pay the next time you and your boss talk about salaries.

See Complainants' Exhibits 24, 7, listed at A-125. On the basis of such evidence, the Minnesota Department of Human Rights correctly found that "the payment of dues by members and the return of leadership training programs by the Jaycees is not unlike the purchase of training courses from a for-profit organization such as Dale Carnegie." DHR Memorandum, at A-115.

In addition to the instructional program provided through formal courses, the U.S. Jaycees offers its members a laboratory with unique opportunities to exercise and develop leadership skills through committee work, community service projects and hold-

ing office in the organization. Women who have been admitted to membership in the Jaycees have pointed to the personal and professional gains they have realized as a result of participating in a leadership-building volunteer group that cuts across career lines. See Simpson, Jaycees Challenged on 'Men Only' Rule, supra, at 65. One Minnesota Jaycee testified that through her Jaycee participation she acquired speaking, leadership and organizational skills at a young age that helped her to gain a promotion. DHR Findings No. 16, at A-100 to A-101. Another Minnesota woman, who joined the Jaycees at her supervisor's request, described the organization as offering "probably the best leadership training for women in the country." The All-Male Club: Threatened on All Sides, Business Week, August 11, 1980, at 90, 91.

Clearly the Jaycees' leadership training, although described in the organization's publications as "Service to Humanity," does not take place in a rarified

atmosphere of purely altruistic concerns.[7] Indeed, the Jaycees was "originally organized for the sole purpose of promoting the business interests of its members." New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 858 (2d Cir. 1975).

The value of the Jaycees' leadership training services in business has been acknowledged by the business community itself. Corporations frequently sponsor their employees for membership, DHR Findings No. 23, at A-105, and encourage employees to become Jaycees.[8] The benefit to the corporation comes from

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7/ Service to Humanity, supra, is the title of a Jaycees recruitment brochure. Although many Jaycees projects are of great value to the community, there is no question that the Jaycees member derives very tangible benefits directly affecting his business life by participating in those projects.

8/ Minnesota Jaycee Sally Pederson testified that she was advised by the personnel department to join the Jaycees when she inquired about advancement from her employer. Pederson subsequently obtained two promotions with a resume replete with Jaycees activities. She was questioned extensively about those activities during the (footnote continued)

the improved management skills of its employees and the publicity the corporation obtains when one of its employees receives public recognition for participation in a Jaycees public service project.

Individuals who join the Jaycees are seeking to enhance their career potential through both leadership training courses and the experience gained in running large-scale volunteer projects in an organization with high visibility and respect in the community. Members do not use the Jaycees as a vehicle for taking positions on public issues, except as such incidental activity may lead to visible public projects. The value of the Jaycees' leadership training services was summarized by the Department of Human Rights' Hearing Examiner:

> The women who testified in this proceeding ... gave vivid examples of the way that regular membership and participation at the officer or director level in the Jaycees directly benefited their business career

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promotion interviews. DHR Findings No. 18, at A-102.

> [sic]. The record shows that not only have these women benefited generally from the skills that they acquired in the Jaycees, but participation has also led to promotion.

DHR Memorandum, at A-120 to A-121. The same perception was stated more succinctly by John Kendrick, President of the Boston Jaycees: "My own value in the marketplace has increased dramatically by my Jaycees experience." Simpson, Jaycees Challenged on 'Men Only' Rule, supra, at 68.

B. Membership in the Jaycees enhances members' career opportunities by providing affiliation with a network of upwardly mobile peers and access to the leaders of the community.

One of the most important services provided by the Jaycees to its members is affiliation with a network of upwardly mobile peers and access to the business and civic leaders of the community. Although not formally advertised in any Jaycees Handbook, the value of this service is well recognized. It provides members with an entree to the "Old Boys Network."

The Old Boys Network is that series of linkages with influential elders, ambitious peers and younger men on their way up which men develop as they move through school, work, professional and community service organizations, and private clubs. It provides men with knowledgeable allies who help them to advance in their careers, teach them who the cast of characters is and how to behave in a new position, and assist them in getting the earliest news of job openings, business opportunities and financial grants.

The importance of access to such a network cannot be overestimated.[9/] The Detroit Free Press has

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9/ Members of these networks are fond of denying their importance, and even their existence, but trenchant observers of American society have no doubt of their existence, their importance, or where the best places are to join them. In John O'Hara's From the Terrace, the first conversation between the protagonist and his industrialist father after the former's return from World War II begins with a discussion of what clubs the young man should join and at what point in his career. J. O'Hara, From the Terrace, 328 (Popular Library ed. 1958). See also Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum
(footnote continued)

described the Old Boys Network as "where the power really is . . . the mechanism that gives men a chance to push the right buttons and meet the right people at the right time." O'Brien, Women Helping Women, Detroit Free Press, Nov. 13, 1978. The Washington, D.C. Old Boys Network has been characterized as "a power source men have used since the beginning here, the who-do-you-know pipeline. . . . The 'Old Boys Network' that runs the capital, irrespective of political creed. . . ." Causey, Old Girl Network Growing, Washington Post, Oct. 5, 1978. According to Meryl James-Gray, international public relations director of Avon Products, "networking is one essential way in which the corporate system works." Moses, Networking, Black Enterprise, Sept. 1980, at 29, 30. Promotions and high-level jobs are often based on the kind of personal relationships that are forged in the Old Boys Network. The Bureau of

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and the Myth of Full Equality, 18 Harv. C.R.-C.L. L. Rev. 321, 334 (1983) ("few assets are as valuable as membership in the right men's club for climbing the professional ladder").

Labor Statistics reported that almost one third of all jobs held by males comes through personal contacts. U.S. Bureau of Labor Statistics, Bull. No. 1886, Job Seeking Methods Used by American Workers, Table 3 (1972). Most people believe that the percentage is even higher for high-level jobs. C. Kleiman, Women's Networks 2 (1980).

Women are as much in need of access to career enhancing networks as are men. The numerous studies of college students that have been conducted over the past fifteen years have demonstrated a growing convergence in men's and women's career and family goals. See, e.g., Johnson, For Students a Dramatic Shift in "Goals", N.Y. Times, Feb. 28, 1983, at B5, col. 2; Devanna, Male/Female Careers, The First Decade, Columbia University Graduate School of Business, Center for Research in Career Development (1984) (the "Columbia Study"). Ninety percent of both men and women college students plan to obtain graduate degrees, and one-third of both women and men expect their

careers to be their highest priority in 15 to 20 years. The Columbia Study of male and female graduates of the classes of 1969-1972 revealed that men and women graduates chose the same types of jobs upon graduation. Further, there was no evidence that women work fewer hours or drop out of the labor force due to marriage or childbirth, explanations often given for the small representation of women in the ranks of management. The study also revealed a strong correlation between mentoring and success for women. In fact 72% of the women without mentors were in the low success group (as defined by salary). In a recent study of male and female managers in two unnamed companies, researchers found that women and men both had high power and achievement drives, and strong motivation to manage. Harlan & Weiss, Moving Up: Women in Managerial Careers, Final Report, Wellesley College Center for Research on Women (1981).

Aspirations and drive, however, are not enough for women seeking to equal the professional

achievements of their male counterparts. "[W]ho knows whom...is important [in career advancement]. In this regard, women suffer because men tend to socialize in activities which exclude women." Bartlett, Poulton-Callahan, Somers, What's Holding Women Back, Management Weekly, November 8, 1982. Women need the contacts, networking, and professional support provided by organizations like the Jaycees.

Members of the Jaycees automatically become a part of an extensive and influential network of current Jaycees. Because the Jaycees is a national organization with more than 300,000 members in 9,000 local chapters, this network reaches far beyond an individual member's chapter to provide ties to Jaycees members throughout the country. Locally, the Jaycees' program provides many opportunities for each Jaycees member to know and work with peers in the community. These individuals are in the early stages of their careers

and share aspirations for career advancement.[10/] At the same time there is enough range in the organization's age parameters to allow the senior members to provide the juniors with advice, contacts, and a wide variety of business opportunity and employment. An Alaska insurance broker who participates in several professional groups has stated that no group matched the Jaycees for making professional contacts and that many of her clients had been referred to her by other Jaycees. Simpson, Jaycees Challenged on 'Men Only' Rule, supra at 65.

Every Jaycee is also part of a network which encompasses all past members of the Jaycees. Many of these alumni hold influential positions in the

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10/ Although Jaycee membership is open to any male between the ages of 18 and 35, many Jaycees are young business and professional men who aspire to leadership roles. "The evidence shows in this case over 50% of the membership in St. Paul and Minneapolis Jaycees chapters are in business management occupations . . . . " Brief of the United States Jaycees at 9, United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981).

business and civic arenas, locally and across the country. It is these direct connections with the sources of community power, the decision makers of the business and civic worlds, that are so critical for future advancement.

The Jaycees network provides its members with access to local community leaders not only through links to Jaycees "graduates" but also through the many community service projects sponsored by the local chapters. The projects range from providing free holiday dinners to CPR training.[11/] In the course of carrying out these projects, Jaycees members meet and work

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11/ DHR Findings No. 19 and 20, at A-102 to 104. Projects prepared by the U.S. Jaycees include a CPR training program which is open to the public and a program in governmental affairs. DHR Findings No. 19, at A-103. In Minnesota locally developed projects include an annual free Christmas dinner and the Patty Berg golf clinic. DHR Findings No. 20, at A-103 to A-104. Other local projects across the nation include the Canton, Ohio chapter's development of a new income tax which financed the construction of a new expressway and city hall and spurred housing renewal. Service to Humanity, supra, at 8.

closely with the business and civic leaders of their communities, individuals whom it is doubtful these young Jaycees would otherwise have the opportunity to meet and who may well have a major impact on their lives. Serving as an officer of the Jaycees, which women, as associate members, may not do, further enhances this opportunity to make contacts among community leaders. For example, the president of the St. Paul Jaycees sits on the St. Paul Chamber of Commerce as an ex-officio member. Transcript of Apr. 23-24, 1979, at 179, Minnesota v. United States Jaycees, (Minn. Dep't of Human Rights Oct. 9, 1979).

The Jaycees is able to provide its members with access to the business and civic leaders of the community because of the recognition and respect the organization enjoys in the community.12/ A Jaycees

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12/ The Department of Human Rights found that "[a] local chapter whose charter is revoked would suffer loss of the substantial goodwill and name recognition of the title 'Jaycees'." DHR Findings No. 25, at A-106.

recruitment brochure boasts "In Canton, Ohio, being a Jaycee is important. Industry considers it important. City officials and news media consider it important." Service to Humanity, supra, at 8. And a Jaycees chapter president has said, "There's a lot of validity to the Jaycees' motto 'Build Tomorrow's Leaders Today'....Corporate doors open when you say you're from the Boston Jaycees." Simpson, Jaycees Challenged on 'Men Only' Rule, supra, at 68.

Affiliation with a network of past and present members and access to community leaders is not simply an incidental aspect of Jaycees membership. The Jaycees advertises its ability to plug a new member into the community quickly and at the highest levels. Indeed, one Jaycees recruitment publication tells the story of "an average Jaycee," a thirty-year old man transferred to a new town, uneasy because he knows no one and encouraged by his boss to join the Jaycees. After attending his first meeting, this "average Jaycee" is approached by a committee chairman and asked for

his opinions and suggestions about the previous night's discussion, joins the committee, assumes "a position of leadership," and in short order finds himself "confronting community officials with the key problems that the citizens had cited which the Jaycees could do something about." Service to Humanity, supra, at 3-4.

Denying women the right to exercise membership privileges such as voting, holding office or receiving awards creates a "together but unequal" environment with many serious disadvantages to the second-class participants. Relegating women to such secondary citizenship in organizations such as the Jaycees denies them the substantially greater leadership training and contacts development afforded those who serve as officers and directors, creates feelings of inferiority in women, and reinforces the handmaiden mentality in men — the notion that women are always the Women's Auxiliary, there to serve without praise or pay. Moreover, to deny women leadership positions and awards in an organization like the Jaycees, which

focuses so intensely on competition and honors to spur members' achievement, is to deny women recognition in every sense of the word.

II

THE FIRST AMENDMENT DOES NOT PREVENT THE STATE OF MINNESOTA FROM COMPELLING THE JAYCEES TO COMPLY WITH STATE LAW BANNING SEX DISCRIMINATION

In ruling the application of the Minnesota Human Rights Act to the membership practices of the Jaycees unconstitutional, the Eighth Circuit has essentially precluded the State of Minnesota from effectuating its important policy of eradicating sex discrimination in businesses and marketplaces within the State. Minnesota has been ordered to condone the discriminatory practices of the Jaycees and ignore an administrative and trial record that demonstrate the deleterious effect that this will have on the ability of women to compete for career opportunities in the State. The Court of Appeals' decision mischaracterizes the factual record with respect to the operation of the Jaycees in Minnesota and rests on freedom of asso-

ciation and First Amendment doctrine inconsistent with this Court's jurisprudence.

The Eighth Circuit stands alone, among the courts that have considered this case, in invalidating the application of the Minnesota Human Rights Act to the Jaycees. The Minnesota Supreme Court confirmed that the Jaycees was a place of public accommodation within the meaning of the State's anti-discrimination statute because of the organization's vigorous but non-selective recruitment policies and the organization's emphasis on leadership and management training programs.13/ Addressing the constitutionality of the Human Rights Act as applied to the Jaycees, the district court

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13/ Like the tribunals in Minnesota, the Massachusetts Commission Against Discrimination has held the Jaycees subject to public accommodations laws in that state. See Fletcher v. U.S. Jaycees, Nos. 78-BPA-0058-0081 (Mass. Comm'n Against Discrimination Jan. 27, 1981). A contrary result was reached in U.S. Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983) (reversing lower court); U.S. Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. 1981) (reversing lower court).

declared, "Minnesota's interest in prohibiting public business facilities from sex discrimination outweighs any protected right of freedom of association the Jaycees may have." 534 F. Supp. at 774. The decision of the Eighth Circuit overturning these decisions should be reversed, lest it signal to sister states a backward trend in the national move towards equal opportunities for both sexes.

A. The discriminatory policies of the Jaycees are not constitutionally protected by a right of freedom of association.

In seeking to protect the Jaycees from the reach of the State's anti-discrimination laws, the Eighth Circuit has relied upon an unusually broad and amorphous concept of freedom of association. Stating that the Circuit's "own cases have recognized a right of association in ... broad terms" and that both its opinions and those of this Court have not restricted rights of association "to groups whose activities fall clearly

within the specific guarantees of the First Amendment," 709 F.2d at 1568, the lower court has held in substance that the discriminatory practices of the Jaycees are constitutionally protected because they are practiced by a group rather than by individuals. Group practice of discrimination, however, is a greater evil than diffuse and unconnected bias exhibited by individuals. Women are disadvantaged by exclusion from full membership in the Jaycees precisely because they cannot benefit from the full range of contacts, leadership experience, and organizational work that the Jaycees has to offer.

Review of the Court's pronouncements on freedom of association reveals that the Court has extended constitutional protection to association that is tied to the textually explicit First Amendment rights of freedom of speech, petition, and assembly. Protection of beliefs lies behind many of the Court's cases. Thus, the Court has held on numerous occasions that a state cannot compel disclosure of affiliation with groups organized to advance particular, usually unpopular,

beliefs, because to do so would stifle freedom of speech. See, e.g., Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 103 S. Ct. 416, 419-20 (1982) ("The Constitution protects against compelled disclosure of political association and beliefs."); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960) ("to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech"); NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.") Freedom of association has been invoked to forbid states from depriving educational forums to groups solely because of the beliefs they espouse, Widmar v. Vincent, 454 U.S. 263, 269 (1981); Healy v. James, 408 U.S. 169, 181 (1972), or forcing a union member to contribute in support of causes foreign to his

beliefs. Abood v. Detroit Board of Education, 431 U.S. 209, 233 (1977).

Similarly, it has been held that government may not infringe on the right to associate in political parties, a right clearly related to freedom of expression. See, e.g., Democratic Party v. Wisconsin, 450 U.S. 107, 121 (1981) ("First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State"); Buckley v. Valeo, 424 U.S. 1, 22 (1976) ("associations ... effectively amplifying the voice of their adherents [is] the original basis for the recognition of First Amendment protection of the freedom of association"); Kusper v. Pontikes, 414 U.S. 51, 57 (1973) ("The right to associate with the political party of one's choice is an integral part of . . . basic constitutional freedom"). Associational rights have also been implicated when government has sought to curtail "collective activity undertaken to obtain meaningful access to the courts," In re Primus, 436 U.S. 412, 426

(1978) quoting United Transportation Union v. Michigan Bar, 401 U.S. 576, 585 (1971), a freedom related to "the right to assemble peaceably and to petition for redress of grievances." See United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 222 (1967). See also NAACP v. Button, 371 U.S. 415, 430-31 (1963) ("the First and Fourteenth Amendments protect certain forms of orderly group activity ... association for litigation may be the most effective form of political expression").

These cases illustrate the contours of the right of association. The Court has not established a constitutional right of group association that turns only on the fact that individuals have chosen to pursue collectively interests otherwise not entitled to constitutional protection. For group activity to be protected it must embody appropriate First Amendment content. The Jaycees does not enjoy a constitutional shield for its discriminatory practices simply because its members have joined together to hone their career

skills, provide themselves with civic exposure, and enhance their opportunities in the business world.

B. State insistance upon compliance with its anti-discrimination law does not infringe upon the Jaycees' freedom of speech, petition and assembly.

The Eighth Circuit has also relied upon traditional freedom of association principles connected with First Amendment exercise to prohibit application of the Minnesota Human Rights Act to the Jaycees. Contrary to every other tribunal that has considered this case, the Eighth Circuit has concluded that the Jaycees are entitled to First Amendment protection as an organization devoted to the espousal of political beliefs and social ideology. In this regard the Eighth Circuit has committed errors of fact and law and should be reversed.

The district court, relying in part on the testimony of Arthur W. Bouliette, Executive Vice

President of the Jaycees and the organization's historian, arrived at the following factual description of the Jaycees:

> The Jaycees considers itself to be a young men's leadership training organization, serving the goals of individual development, community development, and development of management ability. It claims that the training it offers gives members an advantage in business and civic advancement, and businesses are in fact sometimes requested to pay the dues for individual members ... In addition, the Jaycees from time to time issues various policy statements on political and social issues ....

534 F. Supp. at 769 (footnote omitted).

Rule 52(a) of the Federal Rules of Civil Procedure provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." As this Court has recently observed, "Because of the deference due the trial judge, unless an appellate court is left with the 'definite and firm conviction that a mistake has been

committed,' United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), it must accept the trial court's findings." Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855 (1982) (footnote omitted). Failing to heed the direction of the Federal Rules and this Court, the Eighth Circuit has improperly subsituted its own factual characterization of the Jaycees for that of the district court.

The trial court and other tribunals justifiably found the political and ideological pronouncements of the Jaycees to be only occasional and peripheral to the Jaycees' principal business activities of recruitment and training. As the record demonstrates, members do not join the Jaycees in order to engage in political advocacy, nor do corporations sponsor their employees' membership in order to promote political ends. The Jaycees stresses training and exposure, not opportunity for political expression, in its recruitment of new members. Indeed, in its brief before the Minnesota Supreme Court, the Jaycees did not make the slightest reference

to its political pronouncements. Brief of the United States Jaycees, at 28-35, United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981).

The Eighth Circuit, acting as if it were a court of first instance, exaggerated the Jaycees' political posturing beyond all reasonable bounds, characterizing it as a major focus of the Jaycees' endeavors. The appellate court made the further factual finding that "all of [the Jaycees'] doings are colored by the adoption and recitation at meetings of the Jaycee 'Creed' ... which espouses 'faith in God' and 'free enterprise' and declares that 'the brotherhood of man transcends the sovereignty of nations.'" 709 F.2d at 1570. The hollowness of this conclusion is readily appreciated when the Jaycee 'Creed' is juxtaposed with the Jaycees recruitment literature which loudly announces "JAYCEES, THE PRODUCT you are selling, is outstanding from any angle. Jaycees is the 'best value' you can get." United States Jaycees v. McClure, 305 N.W.2d 764, 769 (Minn. 1981), quoting The Jaycees

Recruitment Manual (emphasis in original). As the record clearly demonstrates, the Court of Appeals' "conception of the Jaycees is based upon factual error." 709 F.2d at 1579-80 (Lay, C.J., dissenting).

The quantum of First Amendment activity in which the Jaycees does engage is not infringed upon by the application of the Minnesota Human Rights Act. An economically and socially oriented entity cannot, by occasional political pronouncement, insulate itself from the reach of anti-discrimination laws. Otherwise, virtually all anti-discrimination laws, both state and federal, could be evaded by issuing a few statements on public affairs.

Even groups that are primarily engaged in First Amendment activities must conform their conduct to laws of general application that do not impinge on any First Amendment exercise. "The [First] Amendment does not forbid [a] regulation which ends in no restraint upon expression or in any other evil outlawed

by its terms and purposes." Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 193 (1946). Thus press organizations are subject to the National Labor Relations Act, the Fair Labor Standards Act, the Sherman Act and general nondiscriminatory tax legislation. See Branzburg v. Hayes, 408 U.S. 665, 682-83 (1972). Similarly, the right to associate for political purposes is not infringed upon by state regulation of political parties that does not in fact burden the exercise of any political rights. See Marchioro v. Chaney, 442 U.S. 191 (1979).

The State of Minnesota does not seek to interfere with the Jaycees' occasional political pronouncements or dictate its ideologies. The political positions of the Jaycees cited by the Eighth Circuit in support of its ruling — support for the draft, the FBI, the United Nations, corporate income tax, the Hoover Commission, the vote for 18-year-olds and citizens of the District of Columbia — are striking for their gender

neutrality. See 709 F.2d at 1570. The "Jaycee Creed," heavily emphasized by the Eighth Circuit, 709 F.2d at 1570, contains nothing that espouses discrimination on the basis of sex. Women are presently admitted as associate members, presumably engaging in exchange of ideas with their male counterparts. The Eighth Circuit's mere speculation that full participation by women would alter the "philosophical cast [of the Jaycees]", 709 F.2d at 1571, is an insufficient basis upon which to preclude the State from applying its anti-discrimination law to the Jaycees.

C. Membership organizations such as the Jaycees do not enjoy a per se exemption from the application of anti-discrimination laws.

The Jaycees has sought to invoke constitutional protection of its discriminatory practices with the argument that it is a private membership organization whose forced admission of women would portend government interference with practices and policies of

all private groups. The Jaycees' contention rests on the erroneous premises that a group qualifies as a private organization merely because it chooses to characterize itself as such and that the courts are precluded from or incapable of distinguishing between groups that are truly private and those that are not. Both the federal and state courts have refused to accept these premises. A membership group, such as the Jaycees, is not exempt from the application of anti-discrimination laws unless the group exhibits identifiable features of exclusivity.

Criteria have been developed in the federal courts for determining whether a group is truly private. Among the criteria are selectivity of the group in the admission of members, Tillman v. Wheaton - Haven Recreation Association, 410 U.S. 431, 438 (1973); Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969); existence of limits on the size of membership, Nesmith v. YMCA, 397 F.2d 96, 102 (4th Cir. 1968); formality of membership procedures, Cornelius v. Benevolent Order of Elks, 382 F. Supp. 1182, 1203 (D. Conn. 1974); Wright

v. Cork Club, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970); attributes of self-government and member ownership, Daniel v. Paul, 395 U.S. 298, 301 (1969); and the absence of advertising directed to non-members, Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976). See also, Brown v. Loudoun Golf & Country Club Inc., 573 F. Supp. 399, 402-03 (E.D. Va. 1983) ("In determining whether an establishment is a truly private club . . . [t]he key factor is whether the club's membership is truly selective.").

Employing these criteria, the Minnesota Supreme Court found the Jaycees to be a public membership organization. This conclusion was amply supported by the record. Members are referred to as "customers," and membership in the organization is referred to in the organization's published material as "the product" or "the goods." Moreover, the sale of memberships occupies a tremendous amount of officers' time, and recruitment achievement is recognized in the organization's awards system, more than half of which deals with "record breaking performance in selling

memberships." United States Jaycees v. McClure, 305 N.W.2d 764, 771 (Minn. 1981). There are no published criteria by which members are selected, and no evidence in the record that any applicant for membership has ever been rejected — except women applying for "full" membership rather than "associate" membership. See 534 F. Supp. at 769.

Various other state courts have rejected the claims of open membership organizations that they were private groups immune from the states' public accommodations laws. A recent unanimous decision of the New York Court of Appeals, United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 465 N.Y.S.2d 871 (1983), relied upon many of the factors just enumerated to find an organization of power-boating enthusiasts subject to the state's laws against sex discrimination. Like the Jaycees, the Power Squadrons offered social, civic, and educational programs. The court noted that the group had "no plan or purpose of exclusivity other than sexual discrimination

... encourage[d] and solicit[ed] public participation in their programs, courses and membership ... [and did not] direct publicity exclusively and only to the members ...." 59 N.Y.2d at 413, 465 N.Y.S.2d at 877. A challenge to the constitutionality of the state civil rights law as applied to the Power Squadrons was summarily dismissed with the observation that " 'the constitution places no value on [private discrimination].' " 59 N.Y.2d at 414, 465 N.Y.S.2d at 877, quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973). Compare Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 717, 195 Cal. Rptr. 325 (1983) (Boy Scouts is a "business establishment" forbidden under California law from discriminating on the basis of sexual preference); National Organization for Women, Essex County Chapter v. Little League Baseball Inc., 127 N.J. Super. 522, 318 A.2d 33 (App. Div.), aff'd, 67 N.J. 320, 338 A.2d 198 (1974) (Little League held a "place of public accommodation" forbidden under New Jersey law from discriminating against girls); Shepherdstown

Volunteer Fire Department v. Swain, Nos. 15467, 15749 (W. Va. Sup. Ct. App. Nov. 10, 1983) (volunteer fire departments held not to be private clubs and thus to have violated West Virginia Human Rights Act prohibiting sex discrimination in places of public accommodation); Pollard v. Quinnipac Council, Boy Scouts of America, No. PA-SEX-37-3 (Conn. Comm'n Human Rights Jan. 4, 1984) (Boy Scouts, as a place of public accommodation, is forbidden from discriminating against applicant for scoutmaster on the basis of sex).

The Jaycees seeks to upset this established jurisprudence by presenting the Court with the specter of Minnesota's invading all kinds of membership organizations, from B'nai Brith to the Polish Women's Alliance. See Appellee's Motion to Affirm at 13. The records of neither these nor any other organizations are before the Court. The constitutional and statutory rights of each organization can only be determined after a detailed examination of the organization's practices

and policies, as the Minnesota tribunals and the district court have done with respect to the Jaycees.

The Jaycees' attempt to compare itself to other organizations is flawed for yet another reason. The Jaycees is not in fact the men's organization that it purports to be. The Jaycees does admit women to its ranks, albeit as associate members without the right to vote, hold office or obtain awards, but with the right to participate in all of the organization's activities. 534 F. Supp. at 769. Moreover, nothing that the Jaycees does — not its recruitment and training, not its internal decisionmaking, not its community projects, not its occassional political expression — is uniquely related to the interests of men. It is only by affixing to itself the label of a young men's group that the Jaycees defends its discriminatory policies. The State has done no more than insist that the Jaycees eliminate women's second class status within the organization. This is hardly a demand that drastically alters the nature of the organization, threatens the identity of other truly

homogeneous groups or rises to constitutional significance.

The judgment of the State embodied in the Minnesota Human Rights Act is entitled to a good deal more credit than the Jaycees allows. Minnesota has brought businesses like the Jaycees within the ambit of its discrimination laws because the State has correctly determined that such groups are commercially oriented entities which, like traditional places of public accommodation such as hotels and restaurants, have a significant public impact. It is absurd to posit that, if the decision of the Minnesota Supreme Court is allowed to stand, the State will blindly undertake to erase all ethnic, religious, and political pluralism within its jurisdiction.

The decision of the Minnesota Supreme Court applying the State's public accommodation law to the Jaycees is consistent with the proposition that the constitution provides no safe harbor against the applica-

tion of civil rights laws for enterprises operating in the public domain. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), a case upholding the constitutionality of the federal public accommodation statute, 42 U.S.C. § 2000a, the Court noted:

> [N]o case has been cited to us where the attack on a state [public accommodation] statute has been successful, either in federal or state courts .... [T]he constitutionality of such state statutes stands unquestioned.

379 U.S. at 260. These statutes remained unchallenged until the decision in this case, the first instance in which a federal court has found a state public accommodation statute unconstitutional.

D. The Eighth Circuit has impaired the ability of the State of Minnesota to function in an area of vital local concern.

Amici agree with the finding of the district court that "Minnesota's interest in preventing discrimination in public accommodations is compelling." That

interest is succinctly embodied in Minn. Stat. Ann. § 363.12(1)(3) (West 1966 & Supp. 1983) which declares, "It is the public policy of this state to secure for persons in this state, freedom from discrimination ... [i]n public accommodations because of ... sex ...." Discrimination against women in business and career advancement is not only repugnant to social and moral sensitivities, it also deprives the State of the full potential contribution of women to the State's economic growth and development.

This Court has long been sensitive to those aspects of our federal system which require the national government to tread carefully when called upon to interfere with state functions. See Railroad Commission v. Pullman Co., 312 U.S. 496, 498 (1941) (recognizing "sensitive area[s] of social policy upon which the federal courts ought not to enter" absent pressing exigency); Younger v. Harris, 401 U.S. 37, 44 (1971) (emphasizing "the notion of comity, that is a proper respect for state functions"). Just last term, in City of

Los Angeles v. Lyons, 103 S. Ct. 1660 (1983), the Court refused to sanction the issuance of an injunction against state law enforcement officials out of consideration of "normal principles of equity, comity, and federalism" and " '[t]he special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.' " 103 S. Ct. at 1670, quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

This is not an instance in which a state has chosen to flout overriding federal law or policy. Congress has forbidden discrimination on the bases of race, religion, color, and national origin in places of public accommodations, 42 U.S.C. §§ 2000a to 2000a-6, and discrimination, including sex discrimination, in places of employment, 42 U.S.C. §§ 2000e to 2000e-17. Many states, however, have chosen to go further. At least thirty-eight states and the District of Columbia have public accommodation laws and more than half of these prohibit sex discrimination. Project, Discrimination in Access to Public Places: A Survey of State and

Federal Public Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215, 292-93 (1978).

The wisdom of allowing the states a free hand to legislate where national policy has not crystalized has been captured in the oft-quoted remarks of Justice Brandeis:

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also Whalen v. Roe, 429 U.S. 589, 597 & n.20 (1977) ("[W]e have frequently recognized that individual states have broad latitude in experimenting with possible solutions to problems of vital local concern."). The lower federal court should not be permitted to prevent the State of Minnesota from implementing its statutory solution to the

persistent problem of women's inability to compete effectively with men for career opportunity and advancement.

III.

THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE MINNESOTA HUMAN RIGHTS ACT AS INTERPRETED BY THE STATE'S HIGHEST COURT IS UNCONSTITUTIONALLY VAGUE

The Eighth Circuit has also invalidated the Minnesota Human Rights Act as applied to the Jaycees because, in its view, the state court "introduced such an element of uncertainty [into the statute] as to make it impossible for people of common intelligence to know whether their organizations are subject to the law or not." 709 F.2d at 1577. This vagueness analysis erroneously invalidated an otherwise unobjectionable statute, disregarding detailed statutory definitions, the reasoned interpretation of the statute by the State's highest court, and the judicial consensus sustaining substantially similar statutes.

The Minnesota Supreme Court articulated clear standards for determining whether a civic organization falls within the State's Human Rights Act.

The Minnesota Human Rights Act, which forbids sex discrimination in places of public accommodation defines public accommodation to include "a business ... facility of any kind ... whose goods ... [and] privileges ... are ... sold, or otherwise made available to the public." Minn. Stat. Ann. §§ 363.01(18), .03(3) (West 1966 & Supp. 1983). The Minnesota Supreme Court determined that the Jaycees organization is a business "in that it sells goods and extends privileges in exchange for annual membership dues"; that it is a public business in that it "solicits and recruits dues paying members but is unselective in admitting them"; and that it is a public business facility "in that it continuously recruits and sells memberships at sites within the State of Minnesota." United States Jaycees v. McClure, 305 N.W.2d 764, 768 (Minn. 1981). In its decision the Minnesota Supreme Court focused on the panoply of

training programs offered by the Jaycees to its members in order to enhance the members' professional prospects and on the organization's aggressive, non-selective recruitment practices.

The Minnesota Human Rights Act, as applied by the State's highest court to the Jaycees, readily passes muster under the criteria for evaluating vagueness formulated by this Court. As announced in Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) those criteria are:

> First ... laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. (Footnotes omitted)

By imposing a notice requirement, the vagueness doctrine allows the public to distinguish between acts that are permissible and those that are not. Here, the Jaycees cannot claim failure to warn.

As construed by the district court, the order of the Minnesota Department of Human Rights is one of prospective reach only. "The purpose of the order was to require the Jaycees to do business in compliance with Minnesota law, if at all." 534 F. Supp. at 772. Accord 709 F.2d at 1580 n.4 (Lay, C.J., dissenting). The Jaycees has been told in precise and explicit detail how in the future it must conduct itself in Minnesota in order to comply with state law.

As to the second element of the vagueness doctrine, the carefully reasoned opinion of the Minnesota Supreme Court convincingly demonstrates that the court has not arbitrarily brought the Jaycees within the scope of the Minnesota Human Rights Act. Rather the court has rendered an interpretation of the statute consistent with the intent of the statutory framers and within the mainstream of Minnesota civil rights law. Given the court's detailed discussion of the Jaycees' aggressive recruitment practices, the non-selectivity of its membership criteria, and the organiza-

tion's business-like orientation towards its membership and the services offered to them, the court's decision is anything but "vague and standardless." Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966).

Of course there may be lingering uncertainties concerning the future application of the statute to other groups. This court has repeatedly stated, however, that marginal imprecision does not render a statute defective. See Coates v. City of Cincinnati, 402 U.S. 611, 613-14 (1971). "Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.' " Rose v. Locke, 423 U.S. 48, 49-50 (1975), citing Robinson v. United States, 324 U.S. 282, 286 (1945). See also Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 578-79 (1973) ("there are limitations in the English language with respect to being both specific and manageably brief"). The Eighth Circuit has itself upheld the retrospective application of a criminal statute, even while conceding that the statute's "application to every

future situation is not clear on the face of the words." Knutson v. Brewer, 619 F.2d 747, 750 (8th Cir. 1980). The Eighth Circuit remarked that this infirmity was "true of all, or at any rate of most, criminal statutes." Id.

The application of the Minnesota Human Rights Act does not collide with the Jaycees' exercise of any First Amendment rights, so that the statute and its application need not be subjected to an especially rigorous vagueness test. See Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982). On the contrary, this Court has concurred in the perception that "[i]n applying the rule against vagueness . . . something . . . should depend on the moral quality of the conduct." Bouie v. City of Columbia, 378 U.S. 347, 362 n.9 (1964), quoting Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 540 (1951). Since the Jaycees' discrimination against women is devoid of any positive moral content, the state statute at issue should be construed with great deference. Moreover, because

the statute as applied threatens no First Amendment right, the Jaycees does not have standing to raise the possible vagueness of the statute as it might be applied to other groups. See Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. at 495 n.7.

In its vagueness attack, the Eighth Circuit has focused on a single off-handed dictum in the state court opinion purporting to distinguish the Jaycees and another organization that was not before the Court. Without explanation, the Minnesota Supreme Court stated that the Jaycees was not "analogous[] to private organizations such as Kiwanis International Organization." United States Jaycees v. McClure, 305 N.W.2d 764, 771 (Minn. 1981). On this basis alone, the Eighth Circuit has found the application of the Minnesota public accommodation statute to the Jaycees fatally vague.

The answer to this challenge has been adequately presented by the district court. "There is

insufficient evidence in the record pertaining to the activities of [the Kiwanis Organization and other] groups to allow any determination whether the statute would apply to them and whether the groups engage in protected First Admendment activity. The record as to the Jaycees is, however, well developed." 534 F. Supp. at 773. The Eighth Circuit, without the benefit of a lower court record, has erroneously attempted to draw a profile of the Kiwanis Club and compare it with the record developed for the Jaycees. 709 F.2d at 757-78. A determination of whether the Kiwanis Club is in violation of the Minnesota Human Rights Act cannot be accomplished in this manner. As to the Jaycees, however, the Minnesota court has given a clear and unequivocal ruling based on a comprehensive record. There being no vagueness infirmity in the state court's ruling, the decision of the court of appeals should be reversed.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeals.

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