No. 83-724

IN THE
Supreme Court of the United States

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,

v.

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

BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES AS AMICI CURIAE IN SUPPORT OF APPELLANTS

LAWRENCE R. VELVEL *
Chief Counsel
ELAINE D. KAPLAN
Attorney
State and Local Legal Center
444 North Capitol Street, NW
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel for the Amici Curiae

* Counsel of Record

QUESTION PRESENTED

Whether it is constitutional for a state to bar discrimination against women by a huge organization which exists to provide benefits and advantages of great aid in obtaining advancement in the business world.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 83-724

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,

v.

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

BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES AS AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations that represent governments located throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of such governments. This case presents an issue of great importance concerning the authority of these governments to enforce statutes that proscribe discrimination.

State and local governments have proscribed various forms of discriminatory conduct for over a century, long before the federal government's power to do so was firmly established by this Court. Today at least thirty-eight states and numerous localities have laws that proscribe various types of discrimination in places of public accommodation. These laws include proscriptions against the discriminatory denial by public entities of equal access to important tangible and intangible goods and important services. In many states and localities these goods and services include the benefits, privileges and advantages provided by large public organizations whose *raison d'etre* is to aid their members' advancement in business. Because a law providing for equal access to such goods and services has been struck down in this case, *amici* are submitting this brief to assist the Court in considering the issues raised by this litigation, issues which have broad implications for the power of state and local governments to prevent discrimination.[1]

STATEMENT OF THE CASE[2]

A. The Jaycees Is a Vast Organization Whose *Raison D'Etre* Is to Aid Its Members' Business Careers

The United States Jaycees is a vast national organization. It has approximately 386,000 members in 8800 local

---

[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

[2] References to the Appendix are noted as A-——.

chapters located throughout the 50 states and the District of Columbia. A-57; A-96. Its individual members are between 18 and 35 years of age. *Id.* at 58, 70, 96-97.

The *raison d'etre* of this huge organization is to aid its members in achieving success in business. To this end the Jaycees provides them with business contacts and leadership training, including training in organizational skills, public speaking, supervising large numbers of people and handling large amounts of money. A-57; A-79 to A-80; A-101 to A-103; A-120 to A-121.

In accordance with its *raison d'etre*, the Jaycees claims that membership will give an individual an advantage in the business world. A-57; A-79 to A-80. Testimony in this case establishes that the claim is true: the testimony shows that membership has enabled individuals to learn speaking skills, to learn how to plan and delegate, to learn how to manage people, and to obtain promotions and successful job interviews. *Id.* at 100-102; 120-121.

Because membership in the Jaycees aids their employees' business abilities, many corporations pay the employees' membership fees. This accords with the Jaycees' desire and request. A-79; A-105. Corporations also permit employees to do Jaycee work on company time and give employees logistical support for such work.[3]

B. The Jaycees Places Heavy Emphasis on Recruiting, and Recruits Unselectively

The Jaycees has grown to its present huge size by selling memberships indiscriminately. The national Jaycee organization discourages selectivity in favor of recruitment in quantity, and there is constant stress throughout the organization on selling ever more memberships. A-57 to A-58; A-83 to A-85; A-104. Thus, the national organization provides materials, contests, awards and per-

---

[3] See *Brief of Northwestern Bell Telephone Company as Amicus Curiae in Support of Appellants' Jurisdictional Statement*, at 4.

sonnel to encourage and assist the local chapters in selling memberships. *Id.* at 83-84; 104. More than 50 percent of all awards bestowed by the national organization involve recruiting. *Id.* at 84. The state president in Minnesota spends 80 percent of his time on matters related to recruitment and 90 percent of the conversations between the president of the Minneapolis chapter and the state president or other high officers concern recruitment. *Id.* at 58; 104. The emphasis on recruitment is so all-pervasive that officers of the Minneapolis and St. Paul chapters who testified in this case could not recall a single instance in which an applicant was ever turned down. *Id.* at 58; 119.

In recruiting members, the Jaycees uses commercial terms. Thus, instructional materials exhort recruiters to "sell" the "product", and the "product" is extolled as the "best value" obtainable. Potential members are called "customers" and are assured that membership will give them "an edge in life." A-78 to A-80.

C. The Jaycees Exclude One Group From the Benefits of Full Membership: Women

There is one group between 18 and 35 in American society which is denied the benefits of full membership in the Jaycees: women. Under the by-laws of the national organization, women cannot acquire individual memberships. A-58; A-70; A-98. They cannot become officers at any level of the Jaycees, cannot lead any projects, do not receive any of the leadership training or business contacts obtained by officers and leaders, cannot receive any awards, and are ineligible to vote. *Ibid.*

The only organizational opportunity permitted to women by the Jaycees is that they can become "associate members." In that capacity they can work as subordinates on Jaycees projects, but cannot acquire the benefits and privileges described above. A-58; A-70; A-98 to A-99. Thus they are allowed to be private foot soldiers

in the Jaycees army, but any higher rank is closed to them.

D. The Minnesota Department of Human Rights Found That the 386,000 Member Jaycees Is Not a Private Club and Had Violated a State Anti-Discrimination Statute

In 1974 the Minneapolis and St. Paul chapters of the Jaycees decided it was appropriate to provide women with the same leadership training, business contacts and opportunities for career advancement that are provided to men. These chapters therefore amended their by-laws to permit women to become individual members. A-59; A-70 to A-71; A-98 to A-99. The national organization thereupon imposed sanctions against these chapters from 1975 through June 1978. *Id.* at 59; 71; 99-100. In December, 1978, it threatened to revoke their charters. *Id.* at 59; 71; 100.

In mid-December, 1978, members of the Minneapolis and St. Paul chapters, including the chapter presidents, filed charges of sex discrimination against the national Jaycees. A-53; A-71; A-94. The charges, filed with the Minnesota Department of Human Rights, were brought under the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 3 (1982). This law bars discrimination in public accommodations, and broadly defines public accommodations to include conduct by which goods, services and advantages are offered.

At a hearing before the Department of Human Rights, the 386,000 member Jaycees claimed it was the equivalent of a private club. It said it therefore need not admit women as members. A-118.

The hearing examiner rejected the Jaycees' claim. He ruled the organization had none of the attributes of a private club such as selective admissions practices, control of membership, formal admissions procedures, or substantial dues. He further found the Jaycees has characteristics

of a business organization, and is a public accommodation within the meaning of the statute. A-119 to A-121. Based on his findings, the examiner ruled the Jaycees had violated the Minnesota law, and enjoined the Jaycees from discriminating against any member or applicant within the state on the basis of sex. *Id.* at 108-109.

E. The Minnesota Supreme Court Ruled That the Jaycees Constitutes a Public Accommodation Under the Special and Broad Definition Mandated by the State Legislature

The Jaycees thereafter filed suit in the United States District Court for the District of Minnesota under 42 U.S.C. (& Supp. V) § 1983. The organization sought a ruling that the public accommodations provision of the Minnesota Human Rights Act violated an asserted right of association, and requested that the Act's enforcement be enjoined. The district court certified to the Minnesota Supreme Court the question whether the Jaycees is a public accommodation within the meaning of the Minnesota law.

The Minnesota Supreme Court examined the history of the public accommodations law in a thorough and detailed opinion. It held that under this law, which originated in 1885, the Jaycees constitutes a "place of public accommodation" and is therefore prohibited from selling memberships, and offering services, on a discriminatory basis. A-69 to A-91.

The court pointed out that the Minnesota legislature had used a "special and unusually broad definition of the term 'place of public accommodation'," and had expressly mandated a broad construction of the term's coverage. A-72 to A-73. In examining the statute's historical expansion by the state legislature, the court noted that the public accommodations provision originally had concentrated upon the types of *sites* at which discrimination would be prohibited. But now, ruled the court, the statute

focuses upon the types of *conduct* in which discrimination is prohibited. *Id.* at 77.[4]

The court then ruled that, measured against the statutory standard established by the legislature, the Jaycees constitutes a public "business" and a public "business facility" within the meaning of the statute, and falls within the statutory definition of public accommodations. In this regard the court pointed out that the Jaycees offers "goods", "privileges" and "advantages," in the form of leadership training, business contacts, and enhanced opportunities for promotion. Also, it considers its members to be customers for a valuable product. And it lacks any element of selectivity that would denominate it a private organization. Rather than being selective, it indulges a continuous passion for growth. A-77 to A-91.

F. The United States District Court Upheld Minnesota's Right to Prevent the Jaycees From Discriminating Against Women, but Was Reversed by a Divided Panel of the Court of Appeals

After receiving the state supreme court's decision, the district court held the Minnesota public accommodations law does not deprive the Jaycees of a constitutionally guaranteed right of association and is not vague or overbroad. Accordingly, the court ruled that the Jaycees' discriminatory "practice of excluding women from equal benefits does not enjoy protection under the circumstances." A-61. In any event, held the court, Minnesota has a compelling and overriding interest in preventing discrimination in public accommodations. *Id.* at 61-63.

---

[4] The statute focuses upon conduct (i.e., upon activities) by providing that a " '[p]lace of 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." Minn. Stat. § 363.03, subd. 18 (1982).

A divided panel of the Eighth Circuit then reversed the decision of the district court. The majority purported to accept the Minnesota Supreme Court's holding that the Jaycees constitutes a public accommodation rather than a private social club under the Minnesota Human Rights Act, but Chief Judge Lay said in dissent that the majority's decision represents an implicit disagreement with the state court over the proper interpretation of the state's own statute. A-42 to A-43.

The majority said a constitutionally guaranteed right of association was violated by precluding the Jaycees from discriminating against women. The majority opinion was based on the fact that the Jaycees sometimes takes a position on political issues. The Jaycees does so in the course of providing leadership training to the members who participate in furthering its position. Because the Jaycees occasionally takes stands on political issues—as do businesses, labor unions and political parties—the majority felt the Jaycees has a right of association which enables it to discriminate against women. A-20 to A-23.

The majority was aware that a person's stand on a political issue has never been a criterion for initial or continuing Jaycee membership, and that there was no showing that an individual's stand on an issue is determined by sex. A-24 to A-25. Nevertheless, it said the Jaycees can exclude women because someday a political or internal issue might arise which *could* be determined by sex. *Ibid.*

The court further ruled that Minnesota does not have a compelling interest which would allow it to overcome the Jaycees' right to discriminate against women. A-27 to A-30. And though the state was not attempting to invoke a criminal penalty, the majority also held the statute unconstitutionally vague. In this regard it said the decision of the Minnesota Supreme Court does not enable one to distinguish the Jaycees from other organizations that assertedly would be immune from the statute, such as the Kiwanis. *Id.* at 37-40.

In dissent, Chief Judge Lay pointed out that the advantages offered by the Jaycees are as necessary and appropriate for young women as for young men, and that the majority's speculations are a highly insufficient basis for disabling the state "from enforcing its overpowering interest within this sphere of public accommodations." A-44; A-46. He also denied the law is unconstitutionally vague, saying that long "usage as well as common understanding provides well-defined contours to the public-private distinction the Minnesota court utilized." A-49.

After the decision, the state petitioned the Eighth Circuit for rehearing *en banc*. Half the judges of the court voted for rehearing, but under the rules this was an insufficient number. A-131 to A-133.

SUMMARY OF ARGUMENT

A. Discrimination is conduct which state and local governments historically possess the power to prevent. In barring discrimination, state and local jurisdictions carry out a vital governmental interest in assuring that citizens receive equal access to important goods, services, rights and benefits. Laws precluding discrimination in public accommodations have thus been enacted by many state and local governments.

Minnesota's public accommodations law, like the laws of numerous other states, incorporates a broad functional definition of public accommodations. Such definition encompasses conduct by which intangible goods and services are provided. It is entirely sensible and rational for a state to use such a definition. For the American economic system increasingly consists of activities which produce intangible goods and services, and access to these goods and services is at least as important as access to historical public accommodations such as restaurants and theatres.

The Minnesota legislature also acted rationally in providing that women, no less than men, shall have access to

vital goods and services, including those which greatly aid an individual's ability to advance in his or her business career. Women have the same interest as men in obtaining such items, and it is wholly reasonable for the state legislature to ensure the items will not be denied them.

Finally, in defining public accommodations in a functional manner, and in barring discrimination against women, the Minnesota legislature acted in a way that comports with the jurisprudence of this Court. Ever since Justice Brandeis' seminal dissent in *New State Ice Company v. Liebmann*, 285 U.S. 262, 311 (1932), this Court and individual Justices have recognized that state legislatures must be permitted to develop new solutions to meet the changing needs of the times. Minnesota's law is in this tradition, since the state has recognized the increasing role of intangible goods and services in the economy and the increasing role of women in economic affairs. The state's innovative efforts should not be stifled by the judiciary.

B. The Minnesota law does not infringe a constitutionally protected right of association. This Court has stated that, though "invidious private discrimination may be characterized as a form of exercising freedom of association . . . it has never been accorded affirmative constitutional protection". *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). The Court has also ruled that there is no protected right to discriminate in public accommodations. And it has held anti-discrimination laws applicable to organizations which, like the Jaycees, claimed to be private clubs.

Contrary to the Jaycees' claim, this Court's decisions in *NAACP v. Alabama*, 377 U.S. 288 (1964) and *Shelton v. Tucker*, 364 U.S. 479 (1960), do not support the organization's position. In those cases state laws were invalidated because they required disclosures which would have subjected members of unpopular groups to retaliation, thereby making it impossible for those individuals to as-

sociate with the groups and advocate the groups' positions. This case, by contrast, involves an enormously popular group with a powerful membership. The prospect of retaliation against the Jaycees' members if the organization complies with the Minnesota law is nonexistent, and the threat to the members' right to associate with the organization or advocate its positions is correspondingly nonexistent.

Furthermore, unlike this case, *NAACP v. Alabama* and *Shelton v. Tucker* did not involve invidious discrimination by those who operate a public accommodation. For this reason, too, those cases provide no succor for the Jaycees.

The possibility that the Jaycees' stand on political issues may be affected by the sexual composition of its membership cannot give the organization a right to discriminate on a sexual basis, lest government's ability to ban various forms of invidious discrimination be vitiated. Businesses, labor unions and other public entities often take stands on political and internal organizational issues. Under the Jaycees' argument, these groups would be able to engage in sexual discrimination because of the possibility that their stands could be affected by the groups' sexual composition. Moreover, the Jaycees' argument cannot be confined to sexual discrimination, but extends to and would legalize racial and religious discrimination. For the racial and religious composition of a group is at least as likely to affect its stands as its sexual composition.

Finally, contrary to the Jaycees' argument, other groups (such as those based on religious belief or ethnic origin) will not be barred from exercising selectivity in membership if the Jaycees cannot discriminate against women. Other groups will rarely constitute public accommodations because, unlike the Jaycees, they will not exist for the express purpose of providing services of great benefit in obtaining advancement in the business world, will not view themselves as selling a product to customers, will not have a huge and unlimited membership, and will not

recruit unselectively. Also, unlike the Jaycees, many of these groups will have members united by some unique characteristic, unshared by others. Nor will they admit all persons except one class, which is invidiously excluded.

C. Even if the Jaycees has an associational right to discriminate, Minnesota has a compelling interest which enables it to overcome that right and bar the discrimination. Ensuring equal access to important rights, goods, benefits and services is one of the crucial functions of government in today's world, and this case involves access to an important category of such benefits and services—it involves access to the tools of advancement in the business world. Obtaining access to such tools is at least as important to an individual as gaining entree to traditional public accommodations such as restaurants and inns, and the state, one of whose major functions is to guarantee equality, has a high interest in assuring that women are not disadvantaged in this regard.

Finally, the state's high interest cannot be elided by arguing that Minnesota lacks a compelling interest in barring discrimination unless it first shows that women cannot obtain the same benefits from membership in other organizations as from membership in the Jaycees. In discrimination cases there is no requirement that a victim must lack access to other similar facilities, in addition to the one he or she is being deprived of, before government can remedy the discrimination or possesses a compelling interest in doing so. Such a requirement, imposed by the court below, is simply the discredited concept of separate-but-equal facilities rejected by this Court thirty years ago in *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955). Its revival now would allow discrimination to flourish on the claim that the victim has alternatives and government therefore lacks a compelling interest in banning discrimination.

D. The decision of the Minnesota court did not render the statute unconstitutionally vague. Rather, the state

court applied criteria developed and commonly used by federal and state courts in determining whether a group is a public organization covered by a public accommodations law. Thus it examined factors such as the Jaycees' size, membership policy, interest in growth, and manner of recruitment, and also considered the types of benefits and advantages offered by the Jaycees. This Court itself has used some of these same criteria in determining whether a group is public or private. Use of such criteria does not render a statute vague. Instead it provides appropriate guidelines for measuring whether a group constitutes a public accommodation.

Moreover, the vagueness doctrine is inapplicable to this case. The doctrine protects constitutional rights against the danger of retroactive punishments based on unclear statutes directed at basic liberties. The doctrine has no applicability where, as here, the statute is a reform law which extends equality and the action sought is prospective. Reform statutes are not required to cover every aspect of the problem they address, but can confine themselves to the most acute portion of the problem. It is therefore irrelevant that the statute may conceivably cover the Jaycees but not the Kiwanis. Moreover, neither the Jaycees, Kiwanis, nor any other organization has any cause to fear claimed vagueness when the remedy is only prospective. For a prospective remedy does not force an organization to act at its peril. Rather, the organization need take action only after being adjudicated in violation of the law, and even then it need only conform itself to the law. Thus the retroactive danger against which the vagueness doctrine guards is wholly absent in this case.

ARGUMENT

I. STATE AND LOCAL GOVERNMENTS CAN PREVENT PUBLIC ACCOMMODATIONS FROM DISCRIMINATING AGAINST WOMEN

A. State and Local Governments Historically Possess and Have Exercised the Power to Bar Discrimination in Public Accommodations

Discrimination is conduct. It is, moreover, conduct which state and local governments historically have the power to prevent. Thus, the first state law barring discrimination in public accommodations preceded by a decade the first federal public accommodations law, the Civil Rights Act of 1875, Ch. 114, 48 Stat. 335 (1875). Today at least thirty-eight states and the District of Columbia have statutory provisions that prohibit various forms of invidious discrimination in public accommodations.[5]

The power of states to preclude discrimination was specifically recognized by this Court as long ago as the 1870's. Thus, in *United States v. Cruikshank*, 92 U.S. 542, 555 (1876), the Court declared:

> The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there.

Seven years later, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court reaffirmed that the states have the authority to prevent private discrimination in public accommodations. Notably, in that very same case, the Court invalidated the federal public accommodations law of 1875, pointing out that prevention of discrimination

---

[5] See Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. L. & Soc. Change 215, 292-293 (1978).

is properly left to state legislatures. It was not until the 1960's that the Court upheld the right of Congress to enact a federal public accommodations law. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

In barring discrimination, state and local jurisdictions carry out an important governmental interest in assuring that citizens receive equal access to important rights and benefits. Equal access is so crucial, indeed, that at times the Constitution *compels* government to assure it.

In carrying forward this governmental interest, state and local public accommodations laws vary in terms of the actors who are covered. Some states prohibit discrimination at specifically listed, fixed sites, such as restaurants, hotels, stores and theatres, while other states define public accommodations in a broad functional way that prevents discrimination by those engaged in various forms of conduct. State and local laws also differ in terms of the types of discrimination which are precluded. The prohibited types include discrimination based on race, color, national origin, ancestry, religion, creed, sex, marital status, physical handicap, mental handicap, and age. In this regard, state laws often are broader than the federal public accommodations law, which covers only discrimination on the basis of race, color, religion and national origin. 42 U.S.C. (& Supp. V) § 2000a. See Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U.L. & Soc. Change, 215, 290-293 (1978).

B. The Minnesota Law at Issue Is Sensible and Rational, and Comports With the Jurisprudence of This Court

Minnesota is one of the states whose anti-discrimination law incorporates a functional definition of public accommodations—a definition which includes conduct by which goods and services are provided. Minnesota is also

one of the states which bars discrimination based on sex. The state's law is sound, rational and entirely within the power of a legislature to enact.

As is well known, the American economic system increasingly consists of activities by which intangible goods and services are provided. In fact, it is widely thought the economy is becoming service oriented as financial services, insurance services, medical services, data processing services, and educational services expand to occupy a greater share of the gross national product. Because access to intangible goods and services is at least as crucial as access to historical public accommodations such as restaurants and theaters, it is entirely sensible for a state legislature to define "public accommodations" in a functional manner, in order to encompass an expanded range of goods and services.[6]

It is equally rational for a state legislature to determine that women, no less than men, shall have access to important goods and services. That, of course, is precisely what the Minnesota statute provides in this case, since it mandates that women too shall receive access to goods, services, advantages and privileges which are of great aid to an individual's business career.

That the Jaycees provides such services and advantages is both self proclaimed by the organization and beyond dispute. Like other business and professional organizations, the Jaycees provides members with access to a network of business contacts and influential persons. The Jaycees also teaches leadership and organizational skills, gives experience in managing large sums of money and large numbers of volunteers, and enables members to learn public speaking. And the testimony in this case specifically establishes that playing a leadership role in the Jaycees is extremely valuable to a person's business career.

---

[6] In addition to the services previously mentioned, intangible goods and services include telephone and utility services.

In defining public accommodations in a functional manner that covers important goods, services, privileges and advantages, and in barring discrimination against women in the provision of these items, the Minnesota legislature has acted in a manner that comports with the jurisprudence of this Court. Ever since the seminal dissent of Justice Brandeis in *New State Ice Company v. Liebmann*, 285 U.S. 262 (1932), the Court and individual Justices have recognized that state legislatures must be given leeway to adopt solutions that meet the changing needs of the times. See *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (O'Connor, J., concurring); *Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980). As Justice Brandeis himself said:

> There must be power in the states and the nation to remould through experimentation, our economic practices and institutions to meet changing social and economic needs.
>
> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidences of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. 285 U.S. at 331.

More recently, Justice O'Connor pointed out that the Brandeisian concept of allowing states to develop "new social, economic and political ideas" "is no judicial myth." *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in part, and dissenting in part). Justice O'Connor pointed out that Wyoming pioneered in permitting women to vote, Wisconsin pioneered in unemployment insurance, and Massachusetts pioneered in minimum wage laws for women and minors. *Id.* at 788-789. She added that states have enacted innovative and far-reaching statutes in the field of environmental protection, and one could also add

that states took the lead in insurance regulation. *Id.* at 789.

Minnesota's law is in this tradition. That state has recognized the increasing role of intangible goods and services in the economy, and the increasing role of women in economic affairs. It has taken steps to safeguard the access of all persons to goods and services, regardless of sex. The state's efforts should not be stifled by the judiciary. This is only the more true because, as will be discussed *infra*, this Court has repeatedly upheld laws which bar discrimination in access to vital public accommodations.

II. THE MINNESOTA STATUTE DOES NOT INFRINGE A CONSTITUTIONALLY PROTECTED RIGHT OF ASSOCIATION

A. This Court's Decisions Establish That There Is No Protected Right to Discriminate in Public Accommodations

Though Minnesota has the power to bar discrimination in public accommodations, the Jaycees claims the statute infringes a constitutionally protected right of association. However, this Court has stated that, although "invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protection." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). See also, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Railway Mail Association v. Corsi*, 326 U.S. 88, 93-94 (1945). The Court has also held, contrary to the Jaycees' position, that there is no protected right to discriminate in public accommodations. *Heart of Atlanta Motel v. United States*, *supra*, 379 U.S. at 240-241; see *Katzenbach v. McClung*, *supra*, 379 U.S. at 305; and *Bell v. Maryland*, 378 U.S. 226, 312 (1964) (Goldberg, J., concurring).

Finally, the Court has refused to allow discrimination by organizations which, like the Jaycees, claimed to be

private clubs but really were public groups. See *Tillman v. Wheaton-Haven Recreational Association, Inc.*, 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). As is true of the Jaycees, these organizations were open to all persons, with the exception that discrimination was practiced against a class of individuals which was excluded.

Thus the Court's cases establish that discrimination is unprotected conduct which is not saved by claims of a right of association.

B. Cases in Which the Court Protected the Right of Association do not Aid the Jaycees, Whose Argument Would Devastate Government's Power to Bar Invidious Discrimination

The Jaycees, however, claims immunity from regulation under such cases as *NAACP v. Alabama*, 377 U.S. 288 (1964): and *Shelton v. Tucker*, 364 U.S. 479 (1960). These decisions, it says, establish that a right of association for the advancement of beliefs takes precedence over the governmental regulation at issue here.

The *NAACP* and *Shelton* cases do not support the Jaycees' position, however. In those cases, members of unpopular groups were threatened with devastating retaliation if their names or affiliations were revealed pursuant to state law. Such retaliation would have made it impossible for the members to continue to associate with the groups or advocate the groups' beliefs. The Court therefore held the state law invalid.

The present case presents a far different situation. It does not deal with members of a politically unpopular group. Rather, it concerns an enormously *popular* group, which has a huge membership predominantly comprised of employees and leaders of the powerful American business community. The prospect that the regulation at issue will lead to retaliation against the Jaycees or its members is nil. The threat to a right to associate with the

group or advocate its positions is correspondingly nil. Thus, the state law is not invalid.[7]

Moreover, unlike the present case, *NAACP v. Alabama* and *Shelton v. Tucker* did not concern invidious discrimination by those who operate a public accommodation. For this reason, too, those cases give no succor to those who would discriminate under the guise of freedom of association.

The Jaycees' argument must also be rejected because it would devastate the ability of state, local and federal governments to ban discrimination of all types.

Businesses, labor unions and other public entities often take a stand on political issues or on internal organizational issues. Under the Jaycees' argument, the possibility that such a stand may be affected by the sexual composition of the organization's membership gives the organization a right to discriminate on a sexual basis, and precludes government from barring such discrimination. Moreover, the Jaycees' argument cannot be confined to sexual discrimination. The racial or religious composition of an organization is at least as likely to affect its stand on issues as its sexual composition. Thus, under the Jaycees' contention, the organization would have an associational right to discriminate on the basis of race or religion as well as on the basis of sex. The argument would therefore give businesses, unions and other public groups a protected right to discriminate on a variety of invidious bases, and would remove the power of government to bar such discrimination. Decades of recent history would thereby be nullified.

---

[7] The group's positions may change, of course, if it cannot discriminate. But, as developed *infra*, such potential for change cannot vitiate the statute, lest government be precluded from barring invidious discrimination by public groups.

C. A Decision Upholding the Minnesota Statute Will Not Prevent Private Groups From Exercising Selectivity in Membership

Finally, the Jaycees contends that, if it cannot discriminate against women, then other groups will be banned from exercising selectivity in membership. In this vein it says that "[p]rivate groups based on religious belief (such as B'nai B'rith or Knights of Columbus) or ethnic or national origin (such as Polish Women's Alliance, Columbus Squires or Sons of Norway) will be threatened." It also has claimed that such organizations as the Junior League and the Sweet Adelines will be threatened.

The Jaycees' argument is devoid of merit. Groups which do not constitute public accommodations will retain the ability to be selective in membership. For a host of reasons, there will be thousands of these groups. Indeed, it is likely to be only the rare group which will constitute a public accommodation and be forbidden to discriminate.

Some of the reasons why most groups will not constitute public accommodations are as follows: Unlike the Jaycees, most groups will not exist for the express purpose of providing services of great benefit in obtaining advancement in the business world. Most will not attempt to confine such vital benefits to half the population, while denying them to the other half even though it has the same interest in obtaining advancement.[8] Most will not view themselves as selling a product to customers. Most will not have hundreds of thousands of members. Most will not recruit on a totally unselective basis. Many will have limitations on overall membership. Many will have high dues. Many will have members who are united by a unique characteristic unshared by others: this is ex-

---

[8] As pointed out in dissent below by Judge Lay (A-44), women have the same interests in business advancement as men. The Jaycees' desire to confine business benefits to males subjugates women's interests to men's. The situation is no different than if the Jaycees said whites alone could obtain the benefits of membership, even though blacks have the same interests as whites.

emplified by the Jaycees' own examples of the B'nai B'rith, the Knights of Columbus, and the Sons of Norway, whose members share a religious or ancestral characteristic. Finally, groups which do share a unique characteristic will not admit all persons except one class which is individiously excluded, as the Jaycees does, but will allow membership only to those who share the characteristic.

D. Minnesota has a Compelling Interest in Prohibiting the Jaycees From Discriminating Against Women

Even if the Jaycees possesses an associational right to discriminate, Minnesota has a compelling interest which enables it to overcome that right and bar the discrimination.

Assuring that all citizens have equal and nondiscriminatory access to important rights, benefits, goods and services is one of the highly important powers and functions of government in today's world. This function is so crucial that federal, state and local governments have enacted scores of laws barring discrimination on a variety of invidious bases and by a broad spectrum of actors. It is so crucial that this Court has regularly held that governments are *compelled* to provide equal and nondiscriminatory access to rights and benefits which they supply. Thus government has been constitutionally compelled to provide women with benefits equal to men's. See, *e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

An important category of rights, benefits, services and advantages is at issue in this case. For women have as much interest as men in gaining advancement in the business world, and the Jaycees is a public organization which provides important tools for such advancement. Obtaining access to such tools is at least as important as gaining access to such traditional public accommodations as restaurants and inns; and the state, one of whose powers and functions is to assure equality, has a high

interest in assuring that women are not disadvantaged in access to the tools.[9]

The court below sought to circumvent the state's high interest by arguing that Minnesota had not shown it was impossible for women to obtain the same advantages from membership in other organizations as from memberships in the Jaycees. Absent such showing, it said, the state's interest could not be considered compelling.

The argument of the court below is drastically in error. In anti-discrimination cases there is no requirement that, for the situation to be remedied by government or court, the victim must lack access to other facilities in addition to the one he or she is being deprived of. There is no rule under which government lacks a compelling interest in rectifying invidious discrimination by one institution if the victim is not also denied access by some other institution.

Nor does this Court hold it is permissible for a public accommodation to invidiously discriminate if another public accommodation provides a similar facility or service. Such a holding—which is the holding of the court below—is simply the discredited concept of separate-but-equal rejected by this Court thirty years ago in *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1953). Were the holding of the court below to prevail, discrimination of all types would flourish on the claim that the victim has alternatives and government thus lacks a compelling interest in banning discrimination. The jurisprudence of three decades, and the extensive efforts of governments at all levels to remedy discrimination, would be undermined. The argument of the court below that Minnesota lacks a compelling interest must therefore be rejected.

---

[9] We doubt that anyone would argue the state does not have a compelling interest in assuring that women have equal access to schooling. Yet one of the recognized benefits of schools is that they give a person the tools to participate and succeed in the commercial world. The Jaycees does the same.

III. THE MINNESOTA PUBLIC ACCOMMODATIONS STATUTE IS NOT UNCONSTITUTIONALLY VAGUE. MOREOVER, THE VAGUENESS DOCTRINE IS INAPPLICABLE HERE

The court below also held that the state statute is unconstitutionally vague because the decision of the Minnesota Supreme Court provides no standard for distinguishing public accommodations from private clubs. In this regard the majority expressed concern that the state supreme court had provided no basis for distinguishing the Jaycees from the Kiwanis, which the state court indicated would be a private group.

The view of the court below is in error. Rather than rendering the statute unconstitutionally vague, the Minnesota Supreme Court applied criteria developed and commonly used by federal and state courts in determining whether a group is a public organization covered by public accommodations laws.[10] The state court thus considered the Jaycees' size, which is huge, its membership policy, which is unselective and uncontrolled by size, its interest in growth, which is continuous, its manner of recruitment, which applies commercial concepts, and the benefits it offers, which are expressly designed to aid in business. The use of criteria such as these, which are normally employed by courts, does not render a statute vague. Rather, it provides appropriate guidelines for measuring whether a group is a public or private organization.

---

[10] See *e.g.*, *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309 (4th Cir. 1980); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974); *Nesmith v. Young Men's Christian Association*, 397 F.2d 96 (4th Cir. 1968); *United States v. Trustees of F.O.E.*, 472 F.Supp. 1174 (E.D. Wisc. 1979); *United States v. Slidell Youth Football Association*, 387 F.Supp. 474 (E.D. La. 1974); *Wright v. Cork Club*, 315 F.Supp. 1143 (S.D. Texas 1970); *U.S. Power Squadrons, Inc. v. State Human Rights Appeal Board*, 59 N.Y. 2d 401 (1983); *National Organization for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 552, aff'd, 67 N.J. 320 (1974).

This Court itself has used some of the very same criteria in determining whether a membership organization is public or private. In *Sullivan v. Little Hunting Park*, for example, the Court determined that an organization was not truly private because it was not selective in membership. The Court said the group was "open to every white person within the geographic area, there being no selective element other than race." 396 U.S. at 236. See also, *Tillman v. Wheaton-Haven Recreational Assoc., Inc.*, *supra*, 410 U.S. at 438.

Moreover, contrary to the opinion of the court below, the vagueness doctrine is not even applicable to this case. That doctrine is properly employed to protect constitutional rights against the danger posed by retroactive punishments based on unclear statutes. It is thus used, for example, to bar criminal penalties, and damage awards, based on ambiguous laws directed against freedom of speech. It has no proper application where a statute is a reform law, and the action sought is only prospective. In such circumstances, which exist here, the doctrine is irrelevant, and asserted concerns that the statute covers the Jaycees but not the Kiwanis are totally misplaced.

Unlike the situation where a statute is directed against constitutional freedoms, a reform law such as Minnesota's does not threaten liberty, but extends the scope of equality. The Court has therefore ruled that such a statute " 'need not strike at all evils at the same time'," can address " 'itself to the phase of the problem which seems most acute'," and " 'is not invalid under the Constitution because it might have gone further than it did' " *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966), quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1929) and *Semler v. Dental Examiners*, 294 U.S. 608, 610 (1935). Thus, that the statute may cover the Jaycees but not the Kiwanis is no ground for invalidating it, a point which cannot be elided by asserting the statute is vague because it allegedly encompasses one group but not the other.

Moreover, neither the Jaycees, Kiwanis, nor any other organization has anything to fear from claimed vagueness when the remedy is prospective, as here. A prospective remedy does not force an organization to act at its peril, as does a retroactive penalty. When the remedy is prospective the organization need do nothing until it is adjudicated to be in violation of the law, and then it need only conform itself to the law. The retroactive danger against which the vagueness doctrine guards is wholly absent.[11]

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below, which held the state public accommodations law unconstitutional.

Respectfully submitted,

LAWRENCE R. VELVEL
Chief Counsel
ELAINE D. KAPLAN
Attorney
State and Local Legal Center
444 North Capitol Street, NW
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel for the Amici Curiae

Dated: February 1984

---

[11] If Minnesota were to bring criminal charges against the Kiwanis in some future case under the statute, then the Kiwanis could conceivably have a right to assert the vagueness doctrine. But the Jaycees has no right to assert the doctrine in this case.