No. 83-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KATHRYN R. ROBERTS, Acting Commissioner, Department of Human Rights; HUBERT H. HUMPHREY III, Attorney General of the State of Minnesota; and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,

Appellants,

vs.

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of itself and its qualified members,

Appellee.

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

BRIEF OF APPELLEE, THE UNITED STATES JAYCEES

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QUESTIONS PRESENTED

1. Whether application of Minnesota's public accommodation law to the Jaycees interferes with the Jaycees' constitutional right of association without a sufficient showing of compelling state interest.

2. Whether the Minnesota public accommodation law is void for vagueness as applied.

3. Whether the Minnesota public accommodation law is void for overbreadth as applied.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Explanation of Record References

References to the appellant State's Appendix filed with its Jurisdictional Statement are, e.g. A-83. References to the supplementary Joint Appendix are, e.g. JA-10.

Transcript references are noted herein as *Tr. I*, p. ——, referring to the transcript of testimony before the state hearing examiner in April of 1979. References to *Tr. II*, p. ——, are to the testimony taken before the district court in August 1981.

The Jaycees' exhibits in the state hearing examiner's hearing are by letter (Exhs. A through J). Jaycee exhibits introduced in the district court are by number (Pl. Exhs. 1 through 26).

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STATEMENT OF THE CASE

The United States Jaycees ("Jaycees") is a tax-exempt nonprofit, Missouri corporation, headquartered in Tulsa, Oklahoma. It was founded in St. Louis, Missouri, in 1920, under the name United States Junior Chamber of Commerce. Its name was changed to The United States Jaycees in 1965. It is a private (in the sense of nongovernmental) membership organization (Exh. H, I, J, Tr. I 8, 36). It derives income primarily from membership dues and private sponsors. It receives no federal or state funds (Pl. Exh. 20, Tr. II 42-45). Article 2 of the Jaycees' Bylaws (Pl. Exh. 1, Tr. II 10) sets out the organization's purpose:

> A. This Corporation shall be a nonprofit corporation, organized for such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.
>
> B. Towards these ends, this Corporation shall adopt the following as its Creed:
>
> We believe
>
> That faith in God gives meaning and purpose to human life;
>
> That the brotherhood of man transcends the sovereignty of nations;

That economic justice can best be won by free men through free enterprise;

That government should be of laws rather than of men;

That earth's great treasure lies in human personality;

And that service to humanity is the best work of life.

Article 4 of the Bylaws creates seven classes of membership, including Individual Members, also known as regular members, Associate Individual Members, Local Organization Members (local chapters), and State Organization Members (State chapters such as Minnesota, Alaska, etc.).

Individual Membership is equivalent to full or regular membership and is defined as "young men between the ages of eighteen (18) and thirty-five (35) . . . ." (Pl. Exh. 1, Bylaws 4-2). The category of Associate Individual Member is reserved for those, including women, who do not qualify for regular membership (Pl. Exh. 1, Bylaw 4-3). This category does not have the right to vote or serve as officers. The Bylaws require that local chapters be "young men's organizations of good repute . . . organized for purposes similar to and consistent with those" of the national organization (Pl. Exh. 1, Bylaw 4-4). At the time of trial in August 1981, the Jaycees had about 295,000 regular members in 7,400 local chapters. Associate Members of all types numbered only 11,915 (Pl. Exh. 21, Tr. II 45).

The subject of full membership for women has been a matter of intense debate and discussion within the Jaycees. The national Jaycees convention voted in 1975 by a margin of about 90% to 10% against changing the Bylaws to allow local chapters to admit women as regular members. The 1978 national convention rejected the admission of women on a local option basis 78% to 22% (See Beck's Finding No. 13, A-99).

In a national referendum in September of 1981, Individual Members of the Jaycees defeated another proposed local option amendment by a vote of 67% to 33% (Pl. Exh. 26).

From its inception in 1920, the Jaycees has adopted and implemented thousands of programs to carry out the purposes for which it was organized (Tr. II, p. 37). A sample of these include efforts to assist children afflicted with diabetes (Pl. Exh. 18, Tr. II 37); shooting education (Pl. Exh. 17, Tr. II 35); fundraising for treatment for muscular dystrophy (Pl. Exh. 17, Tr. II 35); Junior Athletics (Pl. Exh. 18, Tr. II 37); and programs to encourage participation in government (Pl. Exh. 12, Tr. I 31). In addition, the Jaycees has taken public positions on a variety of national issues. It has favored the right to vote for citizens of the District of Columbia; urged revision of AAU standards; supported congressional legislation to change the method of computing pay for members of the armed forces; supported the Uniform Vehicle Code; endorsed the Mutual Security Program which gave assistance to underdeveloped nations to develop economic and social stability; urged federal tax reform and corresponding economy in government; urged repeal of the excise tax on telephone service; urged preservation of wilderness areas for use in recreational and scientific purposes; urged electoral college reform; opposed legislation introduced favoring socialized medicine; supported the right of 18-year-olds to vote; supported the withdrawal of American combat forces from Southeast Asia. Where appropriate, the Jaycees has adopted specific programs to implement its position on national issues. For example, in 1981, the Jaycees adopted and implemented its program "Enough is Enough" designed to assist the current administration's economic policy (Pl. Exh. 6, Tr. II 23). The "Enough is Enough" program has been distributed to all lo-

cal chapters of the Jaycees. The Jaycees supported and actively sought statehood for Alaska and Hawaii, and publicly urged the implementation of the Hoover Commission recommendations (Pl. Exh. 3, Tr. II 13-17, 23, 37, 40).

The Jaycees believes in leadership training for young men. It believes that its objectives can best be accomplished by involving young men in the mainstream of American social action and political thought. State and Local Organization Members, consistent with these policies, have likewise adopted the philosophy that the training of young men includes involvement in controversial public issues of the times. As a consequence, Local and State Organization Members of the Jaycees have urged the legislatures of their respective states to call for an amendment to the United States Constitution to require a balanced federal budget (Pl. Exh. 7, Tr. II 24). The Montana Jaycees and the Montana Civil Liberties Union successfully sought passage of legislation dealing with employment restrictions for ex-offenders. The Annandale, Virginia, Jaycees worked for passage of increased benefits for low-income families; the Maryland Jaycees in 1973 pushed for a law permitting full voting rights for ex-offenders; in 1964, the Atlanta Jaycees filed suit against the State of Georgia in Federal District Court challenging the reapportionment of congressional districts (Tr. II 28; Pl. Exh. 19).

The Jaycees publishes a magazine called "Future," which is furnished to every Jaycees member (Tr. II 12). The editors of "Future" have made it a practice to include articles on issues of public concern. The magazine offers an opportunity for the Jaycees to speak out on controversial issues of national importance (Tr. II 21). "Future" articles include the January 1980 article on the Jaycees' stand on socialized medicine; coverage in June of 1964 of a national Jaycees officer's testimony

before a congressional committee on the Herlong-Baker Tax Reform Bill; an article supporting national tax reform (Pl. Exhs. 4 and 22).

The Jaycees is therefore a multi-faceted organization engaged in a variety of internally and externally directed programs, including a significant involvement in the development of collective organizational positions on matters of national concern, some of them highly controversial, such as the "school prayer" amendment (Pl. Exh. 3, p. 4). All of this activity, external and internal, springs from the core purpose of the Jaycees, which is to advance the interests of young men only, through participation in the internal affairs of the organization and in the affairs of their communities. It is in a real sense a representative voice of young men in America.

Minnesota law forbids discrimination on the basis of sex, race, religion, etc. in "places of public accommodation." (Minn. Stat. § 363.01, Subd. 18 and § 363.03, Subd. 3). The Supreme Court of Minnesota interpreted this statutory phrase to apply to the Jaycees thereby effectively affirming the State Hearing Examiner's injunction prohibiting the Jaycees from enforcing its membership bylaws in Minnesota. (See *The United States Jaycees v. McClure, et al.*, 305 N.W.2d 764 (1981), reprinted at A-69, and order of hearing examiner at A-93). The Court of Appeals concluded that the application of the Minnesota statute to the Jaycees was invalid on two alternative and independent grounds:

1. It directly interfered with the Jaycees First Amendment right of association without a sufficient showing of compelling governmental interest, and

2. The Minnesota statute was void for vagueness as interpreted and applied, because it provided no ascertainable standard for determining whether an organization was exempted as "private" or included as "public." (A-41.)

The labels pinned on the Jaycees by the State are misleading and if not recognized for what they are, serve only to obscure the constitutional analysis called for by the facts of this case.

The assertions that the Jaycees "sell" a "product" for a "fee" are applicable to every membership organization in America, all of which have something of value to "sell" or they would cease to exist and all charge a "fee" (dues) to cover their expenses of operation. The Jaycees is but one of several civic oriented organizations which are similarly organized and which have membership restrictions based on gender. (Beck Finding No. 24, A-105). A few examples are the Rotary, Lions, Kiwanis, and Optimists, which restrict their membership to men, and the Junior League and PEO Sisterhood which restrict their membership to women. (Jaycees' Exhs. A, B, C, D, E, F, and G, Tr. I 66; Pl. Exh. 24.) *The Encyclopedia of Associations* (Pl. Exh. 25) lists a staggering number of membership organizations having membership restrictions based on sex, national origin, or religious affiliation, or a combination thereof. Minn. Stat. § 363.03(3) prohibits discrimination by reason of "race, color, creed, religion, disability, national origin or sex" *if* an entity should be designated a "place of public accommodation" pursuant to § 363.01, Subd. 18. All of these organizations could be as accurately, or inaccurately, described as "selling" memberships. That description does nothing to facilitate the analysis of the constitutional issues presented.

In this connection the Jaycees has also been described as "generally open to the public" (see Brief of amici California). As the Court of Appeals noted, this is an overstatement. The Jaycees is not ". . . a cross section of the community, even of the young male community" (A-26). People tend to associate with people of like interests and common background. Each of the thousands of local chapters of all of the major volunteer

associations—male and female—necessarily develops its own character and composition. For example, the St. Paul Jaycees Chapter, which recently withdrew from the Jaycees, now calls itself "Community Business Leaders" (it has filed an amicus brief).

As the Court of Appeals stated: "The Jaycees is a genuine membership organization, whose members govern its affairs and decide its policies, not just a vehicle for the delivery of commercial goods and services" (A-25). Its constitutional rights and those of its members must be adjudged in that light rather than in the light of loose terminology appropriate only to restaurants, hotels and department stores.

SUMMARY OF ARGUMENT

The United States Jaycees is a nonprofit organization which limits its voting members to young men. Its purpose is to provide young men with an opportunity for personal development and achievement through participation in the affairs of their community, state and nation. It serves as a spokesman for young men and speaks out on controversial issues.

The State of Minnesota by applying its public accommodation law to the Jaycees would effectively destroy the Jaycees' ability to achieve its core purpose, namely, furthering the interest of young men. The Jaycees would no longer be able to confine the central reason for its existence to the advancement of the interest of young men, but must also serve the interests of young women.

The State's action in ordering the Jaycees to admit women in contravention of its by-laws directly interferes with the Jaycees' constitutional right of association. This Court's decisions have made it clear 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; that the right to associate is more than the right to attend a meeting, and that it includes the right to express one's attitudes by membership in a group organization for an almost infinite number of purposes. The decisions of this Court have never limited the right of association to private clubs, small groups or associations with selection membership.

The right of association is a basic constitutional freedom. If the State is to infringe upon the Jaycees' freedom to choose its associates, it must demonstrate a compelling interest in prohibiting the Jaycees from confining its voting member-

ship to young men. The State has not met its burden in this case. It cannot satisfy that burden by affixing the label "public accommodation" to the Jaycees.

Nothing in the record or common experience demonstrates that voting membership in the Jaycees is essential for the professional or business success of men or women.

The Minnesota Supreme Court's decision that the Minnesota public accommodation law will apply to "public" organizations like the Jaycees but not to "private" organizations like the Kiwanis renders the statute so vague and overbroad that no person of ordinary intelligence would have a clue whether a given organization is or is not a "public accommodation" subject to the civil and penal sanctions of the Minnesota law.

The Court of Appeals was correct in holding that the Minnesota public accommodation law is unconstitutional on two alternative and independent grounds:

1. It directly interferes with the Jaycees' constitutional right of association without a sufficient showing of compelling governmental interest, and

2. The Minnesota statute is void for vagueness as interpreted and applied, because it provides no ascertainable standard for determining whether an organization is exempted as "private" or included as "public" (A-41).

ARGUMENT

I. THE APPLICATION OF MINNESOTA'S PUBLIC ACCOMMODATION LAW TO THE JAYCEES INTERFERES WITH THE JAYCEES' CONSTITUTIONAL RIGHT OF ASSOCIATION.

a. The State's Action Would Destroy the Jaycees' Ability to Achieve its Purpose.

At the outset, it is essential that the purpose of the United States Jaycees be re-emphasized. Article 2 of the Jaycees' By-laws (Pl. Exh. 1) defines that purpose as follows:

> A. This Corporation shall be a nonprofit Corporation organized for such educational and charitable purposes as will promote and foster the growth and development of *young mens* civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplemental educational institution to provide *them* with opportunity for personal development and achievement and an avenue for intelligent participation by *young men* in the affairs of their community, state and nation, and to develop true friendship and understanding among *young men* of all nations.

(Emphasis supplied.)

The core purpose of the Jaycees, therefore, is to provide *young men* only with the benefits of participation in organizational activities directed to civic purposes. That purpose by definition requires that membership be restricted to young men, the only effective expression of the underlying belief that young men, as a class, need or deserve such an organization.

The limited service purpose of the Jaycees equates precisely with the purposes of hundreds of organizations, including a number of opposing amici.[1] Some allow membership to those outside of the target class, although probably only on a token basis, but most do not.

The vast majority of private associations are formed, not to serve the interests of all, but to concentrate on the perceived special interests of a limited class. Most have decided that their purpose is best served by confining their membership to persons of that class—most frequently defined by sex, race, national origin, religious belief or age, combinations thereof.

The fact that full participation in the Jaycees' affairs provides benefits is undeniable but irrelevant. Those same benefits are available to women in a myriad of organizations. The real issue is whether a membership organization composed of private persons may, without government interference, confine its purpose to providing beneficial service to something less than the whole of society, defined by gender, race, national origin, etc. and by limiting its membership accordingly. The case must necessarily be viewed in the same light as if the State attempted to prevent the formation of an organization composed solely of Black persons or Jews or women or Norwegians or Vietnamese for the purpose of improving the lot of those individuals. The issue must be framed this broadly because once an organization is labeled a "place of public accommodation" under Minnesota law, its membership restrictions based on race, national origin, creed, religion, or sex are equally con-

[1] See, for example, amici brief of N.O.W. and 14 other organizations confining their purposes to matters of concern to women and in two cases to Black lawyers and to Jews. Most of these groups also confine their memberships accordingly.

demned. See Minn. Stat. § 363.03, Subd. 3. The law of the State of Minnesota as it presently stands means that, if the State chooses to affix the label "place of public accommodation", all-female groups may be forced to serve the interests of men, all-Black groups may be compelled to take on the burden of serving the special interests of white people, and ethnic groups may be prevented from confining their membership to the only persons who would have an interest in the unique traditions of those groups—depending only on the whims of the State. In short, the lawful core purposes of those groups are in jeopardy for no defensible reason.

It may be true that many activities of the Jaycees would be ostensibly unaffected by the forced inclusion of women, but this avoids the real issue. The State has dictated by a penal statute that the Jaycees must abandon its lawful core purpose by also serving the interests of young women. Insofar as the interests of young men and young women may conflict (a not unlikely event in light of current sociological trends), the internal damage to the organization would become apparent. In principle, the State's assumption of this power is no different than if it dictated to the NAACP that it must also devote its energies to those matters of particular interest to white people as a group separate from Black people.

The external differences between a purely young mens association and an association composed of both young men and young women may be subtle or dramatic, but there is undeniably a difference, and that difference must inevitably reflect itself in the priorities of that organization in the development of its programs and public stances. The power to change the membership of a bona fide private association is unavoidably the power to change its purpose, its programs, its ideology, and its collective voice.

The American propensity to form private associations for a bewildering variety of purposes, important or otherwise, is unique and reflects a pluralistic society. In the early 19th Century, Alexis de Toqueville observed:

> Americans of all ages, all stations in life, and all types of dispositions are forever forming associations . . . of a thousand different types, religious, moral, serious, futile, very general and very limited, immensely large and very minute.

Democracy in America, de Toqueville, p. 485 (Lawrence Translation, Harper & Row, 1966). The State seeks a rule of constitutional law which would stifle this pluralism in the name of a misbegotten concept of egalitarianism. Most women do not care about the Jaycees all-male policy; most women would be seriously disturbed to find that their women's associations may not, at the fiat of the states, be able to continue as all-female. The same is true of racially, religiously and ethnically restricted associations which constitute another pluralistic dimension. Where the purposes of these organizations are linked to their membership composition, the power sought by the State is the power to destroy those purposes. The root question presented here is whether this culturally rich society is to be subjected to this threat.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court had no difficulty in preventing a state from stifling the purpose of the NAACP by forced disclosure of its membership. This indirect use of state power to reduce active NAACP membership by intimidation, and by doing so, to cripple its lawful purpose, could not be sustained. Minnesota has not proceeded so subtly; it has bluntly ordered the Jaycees to abandon its otherwise lawful purpose.

The fact that the Jaycees' central purpose may not, in this period of history, appear as important as that of the NAACP provides no invitation to state power. Justice Harlan stated in *NAACP v. Alabama*, supra, that the nature of the beliefs sought to be advanced by association was "immaterial", 357 U.S. at 460. Expression by association is fully protected whether it involves "philosophical, social, artistic, economic, literary or ethical matters—to take a nonexhaustive list of labels." *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) (Stewart J.).

Sprinkled throughout the opposing briefs are references to "invidious discrimination" as applied to the Jaycees' all-male policy. The term is used in such cases as *Runyon v. McCrary*, 427 U.S. 160 (1976), and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), against a backdrop of racial discrimination. The use of this term is apparently intended to suggest that the Jaycees' all-male membership policy is somehow immoral and unsavory and therefore not entitled to protection against the State's police powers.

The Jaycees have not quibbled about the term "discrimination" as a description of its all-male policy. In a mechanical sense, the exclusion of women, men over 35, and children under 18 from voting membership is discriminatory, although not from mean-spiritedness toward those excluded groups. The hordes of private associations which have determined to advance the interests of their favored groups are "discriminatory" in this sense although hardly "invidious." If by "invidious" is meant a certain ugly state of mind by the in-group to demean or humiliate the excluded groups, the Jaycees' policy is no more invidious as to women than it is as to the older men or children who are also excluded. The fact that a few activists do not like the policy does not convert a benign exclusion into an invidious discrimination.

The policy of the Jaycees is not so much exclusionary or discriminatory as it is a desire to focus its thrust upon the interests of young men. The P.E.O. Sisterhood's and Junior League's all-female restrictions (Pl. Exh. 25, p. 549, 747) are likewise borne of the same benign intention, as are the so-called "discriminatory" policies enforced by hundreds of worthwhile associations. Attempts to tar the Jaycees with the brush of "individious discrimination" appears to have originated in a racial discrimination context and then only if the all-white policy is state-sponsored or is perpetrated in the unique circumstances involved in *Runyon*, supra. It has no application here, and the degree of constitutional protection afforded the Jaycees' benign policy cannot be diminished by such labels. There is nothing immoral or unsavory about an organization which limits its membership to all women, all Blacks, all Norwegians, all Irish, or all men. *Gilmore v. City of Montgomery*, supra, at 575. See also Justice Douglas' concurring opinion in *Gibson v. Florida Investigation Committee*, 372 U.S. 539 at 559.

b. The Constitutional Nature and Basis of the Right of Association.

At the heart of the State's argument is the assertion that the right of association exists only as a subordinated right to the express guarantees of freedom of speech, religion, assembly and petition and that the Jaycees are obligated to prove that its voice would be changed if women were granted full membership. Thus the State argues that the Jaycees, as an organizational entity, is as physically capable of exercising those express guarantees with the presence of women as full voting members as it is in its all-male composition. In a strictly mechanical sense, it is possible that the Jaycees his-

torically could have developed the same programs and the same positions on matters of public and political concern as a mixed young peoples organization rather than as a purely male association, but this misses the point. This view also misconstrues the prior decisions of this Court and betrays a lack of understanding of the inseparable nexus between the right of association and the exercise of the expressly guaranteed rights.

It must be taken as a given that the power to change the membership composition of an organization is also the power to change the way in which that organization collectively speaks, prays, assembles or petitions government. The exercise of these express freedoms is by people, and the differences in people and their perspectives are often products of their differences in sex, race, religion and ethnicity.

This court has acknowledged that the right of association and its necessary corollary—the right of non-association—is in itself a fundamental liberty. In *Shelton v. Tucker*, 364 U.S. 479, 486 (1960), the Court characterized the right of free association as a "right which, like free speech, lies at the foundation of a free society." In *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), the right of association was referred to as "among our most precious freedoms." In *NAACP v. Alabama*, 357 U.S. 449 at 460, Justice Harlan stated that it was "beyond debate that the freedom to engage in association is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech." In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-580 (1980), the Court declared that a body of fundamental rights, including freedom of association, are shared "in *common* with explicit guarantees." (*Id.* at 580.) The fundamental nature of the unfettered right to associate

was recognized by this court to produce the "diversity of opinion that oils the machinery of democratic government" in *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974).

The lead and concurring opinions in *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678, acknowledge that the right of association and the other non-enumerated fundamental liberties exist on a par with the expressly guaranteed rights and are neither denigrated nor subordinated by the fact that they are not specified in the written Constitution itself. The Court acknowledged that these fundamental rights spring from a more basic body of principles grounded in human freedom and their existence is evidenced, not diminished, by the express provisions of the Bill of Rights. The Ninth Amendment alone is direct evidence of that principle. The State's argument that one of these non-enumerated fundamental liberties—association—is not protected in the absence of a proven direct invasion of one of the express guarantees—speech, assembly, etc.—is untenable.

The unexpressed fundamental liberties are protected for their own sake. The point is illustrated by *Pierce v. Society of Sisters*, 268 U.S. 510 (1924) and *Meyer v. Nebraska*, 262 U.S. 390 (1922), among other cases, in which the right to educate one's children as one chooses and the right to study the German language in a private school were afforded Constitutional protection for their own sake even though the exercise of neither right had anything to do with speech, assembly, prayer, or petition.

Similarly, *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1972) rested upon the non-enumerated right to privacy even though a woman's decision to terminate pregnancy is not even arguably the exercise of any of the express freedoms.

It is submitted that this Court has consistently viewed the Constitution as a document which simply exposes a more fundamental body of liberties. See Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961). The State's view of the Constitution and the Bill of Rights as a freedom-limiting document permitting governmental intrusion short of clear proof of direct infringement of the express guarantees is in error.

c. Rights of Association and Rights of Expression and Assembly are Inseparable in Concept and in Practice.

This case does not present the extreme example of the exercise of a fundamental liberty having no overt connection to the exercise of an express guaranty. Nor did the Court of Appeals find it necessary to fully explore the theoretical nature of the right of association. As a general matter the nexus between the right of association and the rights of speech and assembly is inherent in the nature of those rights. The power of the state to change the membership of an organization is inevitably the power to change the way in which it speaks. In this specific case, the right of the Jaycees to decide its own membership is inseparable from its ability to freely express itself.

The act of association itself is a "form of expression of opinion," *Griswold v. Connecticut*, 381 U.S. at 483. The Jaycees' stated core purpose—to advance the interests of young men alone—springs from a belief that young men need or deserve such an organization. That belief finds meaning only upon its expression in the formation of an association confined to young men. Just as the State cannot act as a judge of the validity or importance of any belief, it cannot do so indirectly by thwarting the only effective and otherwise law-

ful expression of that belief. The State presumably would not claim the right to force N.O.W. or NAACP to abandon their core purpose and belief by concerning themselves with the separate concerns of men or white persons, and if N.O.W. and NAACP chose to confine their membership to women or Blacks to enhance the internal loyalty to their cause, the State likewise could not interfere with that selective process.[2]

The expressive aspects of the Jaycees, however, are not confined to the act of organizing in itself. The Jaycees is a major organized voice of young men in the United States, just as N.O.W. serves as an effective voice on behalf of women. This is not to say that the Jaycees is as intense an advocacy organization as N.O.W. or NAACP. The Jaycees does more than advocate positions on public issues but it unquestionably does that much, and when it does, it speaks from a segment of society that has its own special concerns. For example, no group is as impacted by military conscription as young men between 18 and 35. The organized voice of young men on the draft is unquestionably of a different nature than the expression of women or older men and that voice has the right to be effectively expressed from a platform confined to young men.

It is true that most of the public stances taken by the Jaycees in the past have had no overt gender content, i.e. men and women, would arguably be unlikely to divide along gender lines in addressing many of those questions. But even such apparently non-gender related issues as President Reagan's economic policies (supported by the Jaycees) has recently found

[2] In principle, there is no distinction between an organization, such as N.O.W., whose externally directed activities are confined to one sex, one racial or ethnic group or one religious group and an organization, such as the Jaycees, which expresses its desire to aid one of these groups by limiting its membership accordingly.

measurably less acceptance among women than among men—known as the "gender gap"—explainable only by sex-related differences in perspective. Current sociological trends, and the emergence of powerful women's organizations, have acted to encourage women to view public issues from the special perspective of their sex, and it is to be expected that men and women will diverge even on issues that have no gender content on their surface.

There are at least three explosive issues extant today which are blatantly gender related: ERA, abortion, and the very issue in this case. These issues do not necessarily divide all men from all women, but men and women are compelled by their very gender to view the issues from radically different perspectives.[3]

The Jaycees have not yet spoken on ERA or abortion, yet its decision to remain silent and avoid these divisive issues may well be impacted by the presence of women voting members. The basic issue in this case has been litigated by the Jaycees in numerous courts over the past decade at considerable expense; the presence of women voting members and officers would clearly have hindered the Jaycees' ability to devote its resources to this constitutionally protected advocacy.[4]

According to the State the test ought to be whether an association has in the past—or will in the future—take public positions on issues which would be different if an unwanted

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[3] Consider the political impact if the Jaycees as a purely young men's association, supported ERA. As a mixed young adult association, its support of ERA would probably be of only passing interest.

Substantial numbers of women joined the Jaycees' Minneapolis and St. Paul Jaycees chapters during the effective period of the State's injunction. Each chapter had women presidents. Those two chapters would have shouted down the use of Jaycees' funds to finance this litigation.

class of persons defined by gender, race, religion, or ethnicity, were forced in by use of the State's police power. Failing such proof, it is said, the State's police power must prevail. A variation of this argument is found in one of the dissents below wherein it is observed that the Jaycees is not primarily an advocacy organization, 709 F.2d at 1583 (A-132). These views suggest that the fundamental liberty to select one's own organizational companions for the purpose of enhancing their ability to achieve lawful purposes, including effective expressions on important public issues, is to be left to a case-by-case analysis in which the courts will be required to determine such subtleties as the impact of new members on the existing group in the future and to draw impossibly fine distinctions between advocacy groups and those whose advocacy is only a part of their activity. If anything would be left to the fundamental nature of the right of association, it would be quickly destroyed in the continued and expensive warfare invited by these approaches.

In summary, the right of the Jaycees to select its own membership as it sees fit is well within the protection of the Constitution both as a right in itself and because the failure to protect that right unavoidably infringes the Jaycees' freedom of expression and assembly. The right of free association is no more subject to invasion by the State than the exercise of the express guarantees.

d. The Jaycees Associate Member Status.

There are 11,915 nonvoting Associate Members in the Jaycees (Pl. Exh. 21, Tr. II 45), a number which includes older men, women, and organizations who do not qualify for full individual or chapter membership. This is a tiny fraction of

the regular membership of 295,000.[5] Insofar as this status is claimed to be discriminatory as to women *within* the organization (see ACLU amicus brief), the status is purely voluntary and no woman need join at all if she is offended.

For the purposes of this case, the existence of the Associate Member category is irrelevant.[6] Some have argued that the fact that the availability of that limited status to women somehow diminishes the Jaycees' claim to associational rights. If this were so, the Jaycees will simply bar women altogether,[7] and the fundamental issue will remain unresolved.

The Jaycees' basic argument is that it has the right to decide for itself whether women shall be members in any status without interference by the State. If the Jaycees choose to permit women a limited status, this is its choice, but by making that choice, it would be absurd to suggest that the Jaycees are compelled to open the doors all the way. More importantly, voting and holding office are the means by which the qualified male members determine the programs and public positions of the Jaycees. The Associate Member category denies to women and older men any decision-making influence within the Jaycees, and it is precisely that influence which the Jaycees claim it has the right to share or not share as it sees fit without state interference.

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[5] It is not possible to determine from Jaycee records the number of women Associate Members. There were 311 in Minnesota in 1981 (Pl. Exh. 21).

[6] Insofar as the State's case rests on the opportunity to make valuable personal contacts in the Jaycees, that opportunity is fully available to women in an Associate Member status. The Jaycees does *not*, however, rest its case on that fact; the existence of the Associate Member category neither supports nor detracts from the Jaycees' argument.

[7] The Associate Member category was originally conceived to permit other organizations to have a relationship with the Jaycees. The fact that individual women literally fall within its definition is a happenstance. The Bylaw can be, and would be, promptly amended if necessary.

e. The Right of Association is not Limited to Organizations with Selective Membership Policies.

The opposing briefs either expressly or by implication argue that the Jaycees do not enjoy the constitutional right of association because its membership is not selective. Some of the amici even argue that freedom of association is limited to private clubs. This limited view of the right of association finds no support, however, in the decisions of this Court. The right of association (and the necessary correlative right of non-association) has never been limited to organizations with "selective" membership policies. The Jaycees" limitation of full membership to men between the ages of 18 and 35 is far more selective than the membership requirements of the NAACP and the Students for Democratic Society which have received freedom of association protection in *NAACP v. Alabama*, supra, and *Healy v. James*, 408 U.S. 169 (1972). The NAACP admits men and women of all religious creeds and races who agree with the purpose of the organization (Pl. Exh. 25, p. 9771). Likewise, the Democratic Party which was the beneficiary of this Court's right of association decision in *Cousins v. Wigoda*, 419 U.S. 477 (1975), is an organization with an unselective membership. Indeed, the Kiwanis, which is hardly more selective than the Jaycees, has been exempted by Minnesota from the reach of its statute.

A substantial number of all male and all female organizations limit membership only by the fact that the person must be a man or woman of good moral character, and yet few would question that these organizations have the right of association (see Jaycees' Exhs. A, B, C, D, E, F, and G, Tr. I 66; Pl. Exhs. 24 and 25, Tr. II 55).

f. The Court's Decisions in Norwood and Runyon are Inapposite.

The State relies on *Norwood v. Harrison,* 413 U.S. 455 (1973) and *Runyon v. McCrary,* 427 U.S. 160 (1976). Both decisions are inapplicable. In *Norwood,* the court was faced with the constitutionality of the State of Mississippi's action in loaning state-owned textbooks to children attending racially segregated private schools. This Court held that such state action was unconstitutional. *Norwood,* therefore, involved state action, not private action as was made clear in *Gilmore v. City of Montgomery,* 417 U.S. at 575. In *Junior Chamber of Commerce of K.C., Mo. v. Missouri St. J. C. of C.,* 508 F.2d 1031 (8th Cir. 1976), the court flatly rejected the same (i.e. "official action") argument as applied to the Jaycees holding that nothing in the Constitution prevented the Jaycees, a private association, from choosing its membership as it saw fit.

Runyon involved only the application of 42 U.S.C. § 1981 to the refusal of a private school to admit Black children solely because of their race. The decision is narrowly drawn so as to achieve the special purpose of § 1981 which was, in turn, based on Section 2 of the Thirteenth Amendment giving Congress the power to define and eliminate "badges of slavery," 427 U.S. at 170. This Court made it clear that the case did not involve the right of a private social organization to limit its membership on racial or any other grounds or the right of a private school to engage in sex or religious discrimination in its admissions policy "since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity." 427 U.S. at 167.

The narrow grounds upon which *Norwood* and *Runyon* were decided render them of no value in this case.

II. THE STATE HAS FAILED TO DEMONSTRATE A COMPELLING GOVERNMENTAL INTEREST.

In *Buckley v. Valeo*, 424 U.S. 1 (1976) at 25, this Court reiterated the standard of judicial review to be applied to cases challenging "state action" infringing upon basic constitutional rights:

> The Court's decisions involving associational freedoms establish that *the right of association is a "basic constitutional freedom,"* . . . , that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." . . . In view of the *fundamental nature of the right to associate,* governmental "action which may have the effect of curtailing the freedom to associate is subject to the *closest scrutiny.*"

(Emphasis supplied.)

In *Elrod v. Burns*, 427 U.S. 347 (1976) at 362-363, this Court again set forth the standard of review which must be applied in this case:

> It is firmly established that a significant impairment of First Amendment rights must survive *exacting scrutiny.* —"This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct." . . . *Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest."* The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. . . .

Thus the burden falls squarely on the State of Minnesota to justify its encroachment on the Jaycees' freedom of association by advancing and showing an interest which is of paramount and of vital importance.

In addition, the State's action must be "closely fitted" to the furtherance of the alleged compelling governmental interests. *Larson v. Valente*, 456 U.S. 228 (1982).[8]

The State makes no effort to demonstrate anything more than a desire to prevent the Jaycees from excluding women; no "compelling" interest is claimed as to membership organizations generally. The State argues sophistically that it has a compelling interest in prohibiting sex discrimination in "public accommodations." This argument begs the question and substitutes the use of labels for reasoned analysis. The issue before the Court is not whether the State has demonstrated a vital interest in preventing discrimination within the general category of "public accommodations." The issue is far more precise, i.e., whether the State has demonstrated a compelling interest in prohibiting the Jaycees from confining its Individual Memberships to young men. The State cannot by virtue of affixing the label "public accommodation" to the Jaycees, avoid the "strict scrutiny" which the Constitution requires or predetermine the constitutional issues. "A state cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

If the law were otherwise, the State of Minnesota could affix the label "public accommodation" to any of the hundreds of membership organizations in Minnesota and, by such a devise, compress them into the same mold as restaurants and

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[8] This case does not present the narrow "time, place, and manner restriction" upheld in *Heffron v. Int'l. Soc. For Krishna Consc., Inc.*, 452 U.S. 640 (1981).

hotels as to which the applicability of public accommodation laws is unquestioned. The State could, for example, affix the label "public accommodation" to the Girl Scouts and require that organization to admit boys. It could also affix the "public accommodation" label to the Sweet Adelines and the PEO Sisterhood and require those organizations to admit men. The examples are legion and would include all male civic organizations such as Rotary, Optimists, and Lions; such religiously affiliated organizations as the Knights of Columbus; and ethnic organizations such as The Sons of Norway.

If the State is to dictate the composition of private membership organizations, it must prove a great deal more than it has. Its burden is particularly heavy because of the proliferation not only of gender-limited groups but also groups defined by national origin, religious affiliation and race. These private groupings are healthy manifestations of a culturally rich pluralistic society; the State has yet to justify its potential threat to this unique American asset.

The question of the admission of women to theaters, restaurants and hotels is radically different and involves none of the private associational characteristics which are inherent in the question of who shall and shall not be granted membership in a voluntary membership organization. The sale of a plate of food is an ordinary commercial transaction having no significant associational consequences; public accommodation laws do not require a restaurant owner to have dinner with his customer or share in the ownership and direction of the restaurant's affairs. The women seeking membership, with the coercive aid of the State, are seeking no less than a share of the ownership and policy making functions of the Jaycees—a significantly different matter than the purchase of goods or services in commerce. The State, if it is to justify its actions

in dictating the membership policy of the Jaycees and other similar organizations, must advance and demonstrate the existence of an interest which is "compelling" (*Elrod v. Burns, supra,* at 362) and of an entirely different nature than that applicable to restaurants, hotels and the like. The State has not done so in this case.

The State argues that requiring full memberships for women would not compel the Jaycees to abandon its purpose of providing leadership training, self improvement and community involvement to young men. This argument, however, overlooks the fact that by dictating full membership for women, the State has thwarted the Jaycees' fundamental and express purpose to serve only young men.

It is arguable that the male members of the Jaycees might benefit in some respects from the forced inclusion of women as full members. But this is no justification for the State's action, nor is it the business of government to make such determinations. Stated in its starkest terms, the right the Jaycees seek to vindicate is the right to decide for themselves whether the admission of women will be beneficial or not. Their decision may be wrong, offensive, or lacking in logic, but no government or its courts has the right to substitute its judgment for that of the members of the Jaycees absent demonstration by the State of a "compelling interest" for doing so.

The exercise of any First Amendment right, such as the right of freedom of speech, for example, may be actually destructive of the immediate best interests of the person exercising that right. But the Constitution does not grant government the power to prevent the exercise of that right even if misguided.

Finally, it should be noted that the Minnesota Supreme Court, in attempting to limit the application of its public ac-

commodation law to only so-called "public" membership organizations, declared that organizations "such as" the Kiwanis may freely exclude women. The Minnesota court stated:

> We therefore reject the national organization's suggestion that it be viewed analogously to private organizations such as the Kiwanis International organization.

(A-83.)

This statement, which is an integral part of the Minnesota Court's interpretation of the statute, makes a mockery of any claim by the State of a "compelling" state interest. The Kiwanis is approximately the same size as the Jaycees (about 300,000 and has solicited new members with no less success than the Jaycees. The Kiwanis, if anything, is less selective than the Jaycees, for it extends membership to *all* men, not just those between 18 and 35. The two organizations are, for these purposes, legally indistinguishable and they both exclude women.

If the desire of the older men of the Kiwanis to remain an all-male organization is not thought by Minnesota to pose any threat to the common good, it can hardly be argued that the identical policy of the younger men of the Jaycees menaces the peace of that state or justifies the use of its police power.

In addition, the wholesale exclusion of indistinguishable organizations "such as" the Kiwanis from the penal impact of the state statute hardly bespeaks a statute which is "closely fitted" to the furtherance of the State's alleged compelling interest. *Larson v. Valente, supra.* The exclusion of the Kiwanis, rather, betrays a haphazard and discriminatory approach to law enforcement.

A common theme advanced in opposing briefs is the notion that the Jaycees represent power and influence and that voting

membership in the Jaycees is essential if a woman is to succeed in business and professional life.[9] No evidence of record remotely suggests that the Jaycees occupy this alleged exalted status in the power structure of American society, nor did the State's evidentiary efforts even aim in this direction. The State proved only that a few women members of the Minneapolis and St. Paul Jaycees considered their experience enjoyable and helpful to them in pursuing their regular occupations. There is no evidence from which to conclude that Jaycee membership is the *sine qua non* of employment, promotion or ability to make potentially useful business contacts by men or women.

Beyond the confines of the record, moreover, common experience refutes this pervasive myth. Whatever influence and power a man or woman may have is not vested in them by membership in a volunteer membership association of the type involved here. They obtain that influence, if at all, in their regular occupations. The only influence such an organization has is over its own organizational affairs and, even within the same association the relative impact of its various local chapters varies dramatically from community to community—some chapters being moribund, others being very active. A formal organizational structure does provide a better platform for the expression of ideas common to that group but the First Amendment dictates that this collective speech influence mitigate against State invasion of their right to associate as they please, rather than suggesting an enhancement of State power.

The ability of women to make valuable personal contacts with other men and women either individually or in some

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[9] The rhetorical expression "old boy's network" is commonly used in this connection. Whatever else may be said about the accuracy of that expression, it is difficult to conceive of the Jaycees, composed of men under 36, as part of an "old boys network."

formal association context is virtually unlimited. The ability of young women to learn the techniques of organizational leadership outside of their regular employment hours likewise has few bounds. In Minneapolis and St. Paul these opportunities exist in settings ranging from local churches, non-gender restricted civically oriented groups, and political parties, to a variety of influential all-female organizations. The suggestion that the Jaycees in Minneapolis, for example, is particularly influential would come as a surprise to any knowledgeable Minneapolitan. The all-female Minneapolis Junior League, confined to women under 40, has been a potent force in the community for decades, far surpassing the Jaycees in this connection. The notion that women do not have influence either locally or nationally and that this influence is denied them by the existence of all-male associations is simply untrue. The female dominated opposing amicus N.O.W. is a supreme example having recently lent its considerable influence to a very grateful major presidential candidate.

Undoubtedly, men have formed commercially valuable relationships as a result of their membership in restricted private mens clubs[10] and the larger mens organizations such as Kiwanis, Rotary, Jaycees, etc., but it is a distortion to suggest that men spend their regular business hours waiting to attend the Jaycees and Lions meetings where the "real" decisions are made. If men have a tendency to gather privately as men, outside of working hours, and discuss matters of importance to them, so be it. But if they wish to do so without the presence of women, the public golf courses, the duck blinds, the monthly

[10] It seems to be uniformly conceded that the classic private mens club clearly has the right to remain all-male. Yet the pervasive rhetoric insists that it is precisely those private clubs where the "real power" lies.

poker games, or, for that matter, the exempted Kiwanis, can and do provide ample opportunity.

The United States Jaycees is justifiably proud of itself and the benefits that it provides to its members. Reality suggests, on the other hand, that those benefits vary among the various local chapters, depending on the quality of local leadership and the characteristics of their communities. The national organization can only persuade and provide the raw materials for the success of a local chapter. The same can be said for every private association. Much of the State's case rests upon the existence of these benefits and the claim that women are deprived of them. Yet the State's injunction would fall as heavily upon a poorly organized Jaycee local chapter which did nothing more than have an occasional beer party as it would upon a well led chapter which had taken advantage of all of the opportunities provided by the national organization. Moreover, the State's argument implicitly reserves the State to unilateral power to decide when an organization provides enough benefits of the right kind to be of value to the excluded group; once this magic line is reached, the State assumes the power to force the excluded group in regardless of the wishes of its members. This, in turn, would have the right of association, free of State interference, depend on the degree of success attained by each association to be measured by impossibly arbitrary standards.

Even if the Jaycees' chapters were uniformly active and successful, nothing would be left of the right of free association under the State's proposal. "Association" has no meaning except as a mutual decision to association. "Freedom of association" necessarily involves the unilateral right of either party to reject the proffered association.

The State has not met its burden of demonstrating a compelling State interest or that its actions have been closely fitted to the achievement of any such interest.

III. VAGUENESS AND OVERBREADTH.

Preface.

In their purest form, issues of vagueness and overbreadth assume the existence of the basic power of state to reach the subject matter involved; each of those doctrines addresses itself only to the manner in which the state has exercised its power. In this case the Jaycees does not concede the State has any power to dictate its membership composition. These issues are argued in part because they have clearly emerged. They are also argued in part because they illustrate the broader Constitutional morass into which a state descends, almost inevitably, when it assumes to itself the basic power to interfere with an association's choice of its own members. If a state seeks to avoid vagueness, it could do so by outlawing all discriminatory membership policies in all bona fide private associations, but would promptly encounter overbreadth problems. To avoid overbreadth, a state must inevitably risk vagueness problems. Minnesota was unable to avoid any of these defects.

We know of no case which better presents the basic freedom of association issue. If the Court should rely solely on vagueness or overbreadth, the basic issue will remain unresolved although it will inevitably reach this Court in some other case.

The outpouring of amici in this case illustrates the need to firmly resolve the basic issue, adding such holdings on these subsidiary questions as the Court deems fit.

a. The Minnesota Statute is Unconstitutionally Vague.

The Minnesota Human Rights Act imposes criminal and civil punitive sanctions including the penal consequences inherent with injunctions. Minn. Stat. §§ 363.071(2), 363.091 and 363.101.

The doctrine of vagueness addresses itself to three considerations, to-wit: (1) are persons of ordinary intelligence provided fair warning of the penal consequences of their behavior; (2) do those charged with enforcement have sufficiently explicatory standards imposed upon them to avoid arbitrary and discriminatory enforcement; and (3) in the case of basic First Amendment freedoms, does the statute serve by its vagueness to inhibit their exercise. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The requirement of non-vagueness applies to statutes defining the class of persons subject to the law to the same extent as it does to statutes defining the prohibited conduct. *United States v. Cardiff*, 344 U.S. 174, 176 (1952); *Winters v. New York*, 333 U.S. 507, 515-516 (1948).

For purposes of vagueness analysis the Minnesota Supreme Court decision must be taken as the words of the statute and every expression contained as the equivalent of a legislative enactment. *Winters v. New York*, supra.

The Court of Appeals held the Minnesota statute void as vague primarily because of the Minnesota Court's reference to the Kiwanis International as a "private"—and therefore exempt—association within its public-private dichotomy. The Minnesota Court said, in articulating its interpretation of the statute:

> We therefore reject the national organizations [Jaycees'] suggestion that it be viewed analogously to private organizations such as the Kiwanis International organization.

305 N.W.2d at 771. (A-83)

Applying the general tests alluded to by that court, the Kiwanis is approximately the same size as the Jaycees—about 300,000 members nationally with 7750 local chapters[11]—and has recruited its members with equal success. If anything, the Kiwanis is less selective than the Jaycees for it holds out membership to all adult males, not just those 35 or under.

Kiwanis and Jaycees are indistinguishable for these purposes and the State has never claimed any distinction justifying this disparate treatment. Rather the State has lamely suggested that its court's reference to Kiwanis was off-hand and meaningless, or was merely a rhetorical device used to respond to a Jaycees argument before that court. The Minnesota Court's decision is, however, the equivalent of the statute and every expression therein must be taken as Minnesota's authoritative pronouncement of the intent of its legislature. *Winters v. New York*, supra. All membership organizations are compelled to view that decision as the statute and all are faced with the impossible task of determining whether they are more like the Jaycees or the Kiwanis.

Having labeled the Kiwanis as "private" and exempt, the Minnesota Court left the statute in a quagmire of vagueness. The Jaycees have no idea why the Kiwanis may lawfully exclude women while the Jaycees are subject to criminal and civil penal sanctions for precisely the same act. A myriad of

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[11] Gales, Encyclopedia of Associations, p. 748 (Pl. Exh. 25). The Jaycees has 295,000 members with 7400 local chapters, as of August 1981. (Pl. Exh. 21, Tr. II, p. 56).

gender-restricted organizations are left to guess whether they are "public" like the Jaycees or "private" like the Kiwanis without any ascertainable standards.

The dissent in the Court of Appeals gratuitously offers a distinction based on a Kiwanis bylaw which provides that chapter membership shall consist of men in "business, vocation, agriculture, institutional or professional life" but no more than 20% in each category. (See Kiwanis rule stated in full at A-39.)

> The dissent states:
>
> Such a restriction circumscribes membership boundaries and would serve *in itself* to make the Kiwanis "private," unlike the Jaycees which has no limiting requirements except for age and sex.

(Emphasis added) (A-48).

There are two fatal defects in the dissent's view. First, neither the Minnesota court nor its attorney general has ever stated what it is that made the Kiwanis "private." There is no assurance that if the Jaycees adopted a similar rule the Minnesota Court would consider that sufficient in itself to convert the Jaycees to a "private" association and thereby continue to lawfully exclude women. Moreover, the Minnesota court's generalized criteria of size, recruiting technique and selectivity were used, as to the Jaycees, in some unspecified admixture of which the ingredient proportions were not stated. The 20% rule, according to the dissent, relates only to selectivity and it is impossible to believe that this single cosmetic change[12] by

[12] As a practical matter, the 20% rule cannot be enforced literally. A big city chapter could not expect to receive 20% of its members from agriculture and would necessarily have a greater percentage in one or more of the other categories. At best, this "rule" is only a statement of general policy.

the Jaycees would tilt the balance in its favor, particularly in light of the intensity of the Minnesota Court's determination to outlaw the Jaycees' all-male policy. It is, after all, the Minnesota Court which is responsible for applying and interpreting its own statute, not the Federal judges, and it would be perilous for the Jaycees to rely on this thin reed. The Jaycees cannot safely assume that any single structural change will suffice.

Secondly, the Kiwanis 20% rule is *not* a limitation on Kiwanis membership; the dissent below misread the rule. Those five occupational categories, one of which is "vocation," embrace every known occupation. Contrary to the dissent's view, the rule is an effort to *avoid* a type of selectivity by hopefully ensuring that no one occupational group will dominate a Kiwanis chapter. Significantly, it is precisely this type of de facto selectivity that has in fact characterized the Minneapolis and St. Paul Jaycee chapters, both of which are dominated by persons from business and corporate management (Tr. I, 148, 183-184). Those two chapters are distinctly unrepresentative of the otherwise eligible 18-35 male group in the Twin Cities. Clearly, some informal selective criteria has been used by those chapters.[13]

It would be simple enough for the Jaycees to adopt a similar 20% rule, which would serve only as a statement of policy encouraging chapters to be more representative of the larger eligible population group. But the thrust of the rule would be clearly towards increased nonselectivity and would hardly be a safe route to the exempt "private" status created by the Minnesota court.

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[13] Significantly, the St. Paul Jaycee chapter recently withdrew from any Jaycee affiliation and now calls itself "Community Business Leaders." It has filed an amicus brief. The narrow selectivity of that group has now become overt.

The dissent also argues that the Jaycees lack standing to challenge the statute for vagueness as to other "hypothetical" organizations not before the court. 709 F.2d at 1582 (A-66). This view misconstrues the Jaycees challenge. The Minnesota Court did *not* hold that sex discrimination in membership associations was illegal in itself. Rather it held that it became illegal only when enforced by a "public" membership organization. The question of whether the Jaycees was "public" or "private" revolved around factors of size, recruiting techniques and selectivity, all unrelated to the Jaycees' all-male policy itself. In other words, the test according to Minnesota has to do with certain organizational structural characteristics other than the particular form of exclusionary policy.[14] The Jaycees is free today in Minnesota to change its organizational characteristics in some unknown fashion so as to become "private" like the Kiwanis and continue to exclude women. The problem, therefore, continues to face the Jaycees—what do the Jaycees do to become like the Kiwanis? The Jaycees face a more perilous predicament because of the existence of the State's injunction (currently rendered ineffective by the district court's injunction mandated by the Court of Appeals). If the Jaycees guess wrong in solving the Sphinx riddle posed by the Minnesota Court, the consequences would be dire. The vagueness issue cannot be so easily avoided by spurious standing arguments.

Vagueness analysis is simplified by the Minnesota Court's inexplicable reference to the Kiwanis as "private." Even without that reference, however, the problem is acute. The Minnesota court uncritically borrowed its general criteria for determining the "public" or "private" nature of a bona fide

[14] The Jaycees was not labeled "public" because it excluded women. If that had been the test not even the Kiwanis would have survived.

membership association from a very different body of law involving the "private club" issue arising under the Civil Rights Act of 1964, 42 U.S.C. § 2000a(e).[15] Those cases concerned racial discrimination and the essential question was whether the claimed "private club" status was a sham to avoid the Act. The Minnesota statute contains no "private club" exception and that question was not before the court.[16] Nor was the Jaycees either accused or found to be engaged in a sham or subterfuge; the Jaycees is conceded to be a bona fide membership association.

Vagueness is not a serious issue when an otherwise public restaurant seeks to maintain its all-white customer restriction by artificial attempts to call itself a private club—nor does such a case threaten legitimate efforts to exercise the constitutional right of association. But when the same generalized criteria are used unanalytically in the context of bona fide private associations, the matter becomes critical. Consider the practical dilemma facing the Jaycees and its attorneys if the Court of Appeals is reversed. What structural changes can be safely made in the Jaycees so as to become "private" and continue to remain all-male, without destroying its otherwise lawful purpose? Does the Jaycees limit its size and, if so, what

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[15] *Nesmith v. YMCA*, 397 F.2d 96 (4 Cir. 1968); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (Conn. 1974); *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex 1970). *Nesmith* also involved a physical facility, part of which was concededly open to the public. Of those three cases, only *Cornelius* involved significant private associational issues and the court ruled in favor of the Elks.

[16] The Minnesota court was deciding whether the Jaycees was a public or private "association or organization," 305 N.W.2d at 771 (A-83), a substantially broader concept than "private club." This is made clear by the fact that it exempted the Kiwanis as "private" although the Kiwanis is no more or less a private club than is the Jaycees.

size will qualify? Does it reprint its recruiting literature to avoid the exuberant use of marketing lingo? What types of "selectivity" does it adopt without destroying itself? If the age limitation is not enough, does it bar non-high school graduates, blue collar workers, government employees? No standards have been provided by the Minnesota court and, by labelling the Kiwanis as "private," it destroyed any semblance of standards.

The State's Attorney General states in his brief (App. Br. 29) that:

> the standard which emerges from the [Minnesota court] opinion is that an organization which sells goods and privileges in exchange for membership fees, which solicits and recruits its members on an unselective basis from the public at large and which does so at various sites within Minnesota is a "public accommodation."

This "standard" applies with full force to the multi-million member Boy Scouts (3,200,000, Pl. Exh. 25, p. 683) and Girl Scouts (2,400,000, Pl. Exh. 25, p. 710). This "standard" applies equally to the four million member National Council of Negro Women (Pl. Exh. 25, p. 979), the Junior League (130,000, Pl. Exh. 25, p. 747), the PEO Sisterhood (212,000, Pl. Exh. 25, p. 549), the Sons of Norway (105,000, Pl. Exh. 25, p. 1008), and the B'nai Brith (500,000, Pl. Exh. 25, p. 979), all of which are "discriminatory." Are they condemned like the Jaycees or sanctified like the Kiwanis? What changes do they make to preserve their historical character? Not even the State can tell them.

Arbitrary and discriminatory law enforcement has already been the rule in Minnesota and the Minnesota court's opinion openly invites further selective prosecutions. No investiga-

tions have been made of women's associations or others which exclude by reason of race, ethnicity or religious belief;[17] political considerations have and will continue to be the determining factor. Prior to the Court of Appeals decision, the Kiwanis' Minneapolis convention in 1982 voted overwhelmingly to continue its all-male policy in the State's back yard, yet the State did nothing. The cause of even-handed justice in Minnesota has been mocked.

Vagueness is especially condemned when basic Constitutional liberties are at stake. The Minnesota statute fails to meet the enhanced standards of precision applicable in this context. *Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971); *Smith v. Goguen,* 415 U.S. 566, 573 (1974).

Finally, the State proposes an astounding proposition in answer to the vagueness argument. It observes that "it is not clear that the Jaycees would be a public accommodation for the purpose of enforcing the provision of the Human Rights Act which makes it a misdemeanor to discriminate in that area on the basis of sex. Minn. Stat. § 363.101 (1982)." (Appellant's brief, p. 29, fn. 26.)

Since the Jaycees cannot be imprisoned and the maximum misdemeanor fine is only $500, Minn. Stat. § 609.02, Subd. 3, a misdemeanor charge is substantially less penal than the civil enforcement provisions. The statute permits civil punitive damages up to $6,000, Minn. Stat. § 363.071, Subd. 2, and the civil injunction process necessarily implies the power to

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[17] The Commissioner of Human Rights has the statutory power to initiate complaints on her own authority, Minn. Stat. § 363.06, Subd. 2, and the power to conduct general or specific investigations with the power of subpoena, § 363.05, Subd. 1(10). The Commissioner also has the power to promulgate interpretative rules to provide administrative guidelines to potentially affected associations. None of these powers have been used with respect to private association membership policies.

levy onerous fines for contempt. Vagueness, moreover, is as much a vice with civil penal statutes as in criminal statutes. See Annotation, *Vagueness-Noncriminal Statutes*, 40 L.Ed.2d 823.

If, to use the State's words, it is "not clear" that even the Jaycees would be a "place of public accommodation" in an innocuous criminal enforcement proceeding, how could the Jaycees in 1978, have conceivably guessed it would be facing the far more onerous penalties of civil enforcement? Since the choice of civil or criminal prosecution is solely the State's choice, the fate of a gender-restricted association in Minnesota apparently lies in which option the State chooses. Few better examples of arbitrary power created by a vague statute could be found.

b. The Minnesota Statute is Impermissibly Overbroad.

The Minnesota statute had no apparent overbreadth problems until the Minnesota court added its novel "gloss." See *Brown v. Hartlage*, 456 U.S. 45 (1982).

Overbreadth analysis in its purest form addresses itself to the impact of the statute upon the Constitutionally protected rights of those other than the persons before the Court. The doctrine acknowledges that the mere existence of a statute, with such "gloss" as the state courts have added to it, may constitute a chilling effect upon others, and for that reason the named litigant has standing to assert overbreadth even though the particular application in his case may not offend Constitutional principles. *Broaderick v. Oklahoma*, 413 U.S. 601 (1973); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Brown v. Hartlage*, supra. The impact upon others must necessarily include an assessment of the governmental interest involved, which must be compelling, and of whether the statutory

scheme is "closely-fitted" to the accomplishment of that objective. *Elrod v. Burns*, 427 U.S. 347, 362-363 (1976); *Larson v. Valente*, 456 U.S. 228 (1982).

Unlike other cases, the overbreadth issue arises here from a statute defining the class of entities forbidden to engage in that conduct, rather than a law defining the prohibited conduct itself. It is sophistry to suggest[18] that an organization can avoid the whole problem by eliminating its exclusionary membership policy; the same Minnesota court has deliberately created a category of exempt "private" associations providing another option. In one respect, the overbreadth problem is more severe in this context. An otherwise overbroad law defining prohibited conduct or speech may well have a proper but narrower application grounded in a clearly recognizable and worthwhile public policy. See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972). In this case, the unexplained exemption of Kiwanis makes it impossible to detect what public policy is being advanced. The problem is intensified by the fact that, unlike *Gooding v. Wilson*, supra, the state's high court had its chance to authoritatively limit the statute but did so in a way which exempted only Kiwanis and otherwise provided no safely discernible limits to its reach.

The Minnesota Court's decision has a facially prohibitory impact upon the freedom of other existing and future organizations to select their members as they see fit. The effort of that court to restrict the sweep of its decision through its "public-private dichotomy" is only illusory. If that Court's generalized criteria of size, recruiting technique, and selectivity could be said to have any value in this connection, that value disappeared when the Court gave the Kiwanis as its example of an exempt "private" organization.

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[18] See, e.g., Minnesota court's statement, 305 N.W.2d at 771. (A-83)

The Kiwanis is the only organization which is presently immunized by name, leaving a myriad of organizations which confine their membership to persons of one "race, color, creed, religion, disability, national origin or sex"—the prohibited categories applicable to "places of public accommodation" as set forth in Minn. Stat. § 363.03, subd. 3. It must be emphasized that all of these prohibited categories of discrimination or exclusion are equally condemned once the statutory label of "place of public accommodation," § 363.01, subd. 18, is affixed.

Beyond the limited exclusions noted above, therefore, all private membership associations in Minnesota are impacted. The chilling impact is not confined to existing associations. Americans and Minnesotans have a pronounced tendency to continually form new associations in the private sector for a bewildering variety of reasons. Those in Minnesota who desire to form in the future a limited interest group confined to members of one gender, race, religion or creed are necessarily affected. If that association should aggressively seek new members, should become popular within their restricted groups and should otherwise be relatively nonselective, the problems would be acute. The Minnesota Court's decision is equivalent to a declaration to prospective new associations that they had best remain unsuccessful and small or they may be outlawed if they seek to enhance their voice by adding new members.

The Court of Appeals alludes to only one of the clear examples of a protected organization—a single issue political party devoted to the passage or defeat of the Equal Rights Amendment, 709 F.2d at 1560 (A-37-38). The Minnesota Court's decision could well condemn the all-male or all-female restriction in such a group and, by doing so, impact seriously upon the ability of that group to advocate its cause. The decision reaches even farther, however.

Associations Confined to Persons of One "Creed".

A particularly dangerous potential application of the statute as interpreted is to those organizations which restrict their membership to persons holding to a single "creed"[19]—a prohibited category of discrimination in places of public accommodation, see Minn. Stat. § 363.03, Subd. 3. The First Amendment, if nothing else, protects "creed" based associations from State imposed invasion by those of differing or hostile creeds or beliefs.

Women's Associations.

A statute which condemns all-male associations must necessarily condemn all-female associations to the same extent, for other constitutional reasons. We assume the State would quickly concede as much. Therein lies a paradox, unaddressed by the State.

Neither the State nor the amici have even suggested any "compelling state interest" for condemning the all-female association. Their claims rather are narrowly based attacks only on men's associations as representing an allegedly adverse element in society justifying the use of the state's police power. Overbreadth doctrines command that the innocent baby not be thrown out with the bathwater, yet a constitutional doctrine which permitted women to freely associate at will, while condemning precisely the same behavior by men, would be a nightmare.

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[19] "Creed" in this sense must mean something other than "religion," since "religion" is a separately stated prohibited category of exclusion.

Ethnic Associations.

The impact of the statute upon ethnic organizations is also apparent, assuming they cannot survive the "private" test. Ethnic groups reflect another rich American phenomenon—the desire to preserve some of the unique traditions of their country of origin. Probably no ethnic group is without some formal organization and some of these groups have been large, active and potent influences in their communities. (See Gales *Encyclopedia of Associations*, section 10, p. 989, Pl. Exh. 25) Of necessity they restrict membership—or "discriminate" in the State's terminology—to persons of one ethnic stock. Yet the Minnesota Court's opinion clearly threatens such an organization if it is of sufficient relative size, actively recruits among its fellow Norwegians or Swedes, and is otherwise "nonselective".

Private Associations Based on Religious Belief.

Private groups restricted to persons of one religious faith, such as B'nai Brith, Knights of Columbus and others,[20] cannot escape the threat. The B'nai Brith International is about 500,000 strong (Gales *Encyc.*, p. 1055, Pl. Exh. 25) and has an influence far beyond its numbers. It excludes or "discriminates against" non-Jews—both an ethnic and religious restriction. If the Jaycees is a "public accommodation" in Minnesota because it is relatively large within its relevant community, recruits intensively, and is otherwise nonselective, then so is the B'nai Brith or the Knights of Columbus which has over 1,300,-

[20] Including, significantly, the opposing Amici, the American Jewish Committee.

000 members, is confined to Catholic men (Gales, Pl. Exh. 25 at p. 993), and in some Minnesota communities may be very influential (e.g. St. Paul and St. Cloud).

Political expedience will undoubtedly dictate that Minnesota would not proceed against the Junior League, the Sons of Norway, or the B'nai Brith, but an overly-broad statute cannot be rendered valid because of political whims. Nor can the issue of overbreadth be avoided by a misguided faith in the case-by-case approach.

The Jaycees do not concede that any justification can be found in support of the State's action. The basic invalidity of Minnesota's actions merely becomes more apparent in the light of its indiscriminate impact upon other associations whose right to select their own members is clearly protected.

The Pandora's box opened by Minnesota is not confined to that state. For example, California's Unruh Civil Rights Act, Cal. Civ. Code §51, has been interpreted to apply to the Boy Scouts[21], even though the Boy Scouts is not a "business establishment" (California's equivalent of "public accommodation") in the accepted sense so as to force the Boy Scouts to accept homosexuals as scout leaders. The California Supreme Court has described it as an Act which prohibits "any form of *arbitrary* discrimination". (emphasis added) *O'Connor v. Village Green Owner's Assn.*, 33 Cal. 3d 790, 662 P.2d 427 (1983). The far more limited statutory categories of prohibited discrimination are considered to be "illustrative rather than restrictive" *O'Connor*, 662 P.2d at 429. The tendency of some state courts to vastly extend the reach of their statutes into the realm of private associational decisions, without apparent limits, is

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[21] *Curran v. Mt. Diablo Council of Boy Scouts*, 147 Cal. App. 3d. 712, 195 Cal. Rptr. 325 (1983), pet. for hearing denied by California Supreme Court, Jan. 6, 1984, 4 Adv. Cal. 29. Juris. Stet. filed U.S. Sup. Ct. 3/14/84.

constitutionally alarming and needs to be halted now. Minnesota is only one example.

Overbreadth invalidity is strong medicine, *Gooding v. Wilson*, supra, but in this case the statute itself need not be invalidated. The Jaycees ask only that the statute be declared invalid only as it is applied to the choice of one's associates in a private membership organization, leaving the actual statute intact for its proper purposes.

CONCLUSION

Few cases in this Court's history have so deeply involved the shape and character of the private sector. Even Alexis de Toqueville would be astounded at modern Americans' phenomenal propensity to continually form private associations for a bewildering variety of purposes. Paradoxically, many of the amici associations opposing the Jaycees are themselves products of this manifestation of human freedom. This phenomenon is precisely what has created a culturally rich and pluralistic society, now under threat of an artificial egalitarianism which subordinates individual freedom to the dictates of the state.

The studied refusal of the State and the opposing amici to acknowledge the broad consequences of the power asserted by the State is alarming. Only the tenor of the times has made the Jaycees the favored target rather than a women's association or one restricted on the basis of race, religious belief or ethnicity.

The arguments of the Jaycees' opponents are uniquely uncritical exercises in rhetoric and descriptive terms designed only to justify predetermined conclusions. No one, however,

has been able to devise a means of reversing the Court of Appeals which would not destroy an American asset—the right of the people to decide for themselves who shall be their friends and associational companions.

The Court of Appeals should be affirmed in all respects.

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Respectfully submitted,

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