No. 83-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY III, Attorney General
of the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,

Appellants,

vs.

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

Appellee.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NORTHWESTERN BELL TELEPHONE COMPANY AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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December 1, 1983

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MOTION OF NORTHWESTERN BELL TELEPHONE COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Northwestern Bell Telephone Company ("NWB") respectfully moves this Court, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of Appellants' Jurisdictional Statement.

NWB has developed and vigorously applies its Affirmative Action Program to secure equality between all its employees in the work environment. The State of Minnesota has enacted a comprehensive statute designed to eliminate discrimination by, *e.g.*, places of public accommodation such as the U.S. Jaycees.

The U.S. Jaycees relegates women members to a position different from and inferior to men. The sex-based membership policies of the U.S. Jaycees, a national business organization, thwart the efforts of both NWB and the State of Minnesota to eliminate discrimination in the total work environment. NWB will demonstrate to this Court that the U.S. Jaycees offers each full member an effective means to develop valuable business skills and contacts which add to and complement the training provided by NWB. Such enrichments facilitate the career development of NWB employees.

The instant appeal provides this Court with an opportunity to foster equal opportunity for career advancement. NWB, as an *amicus curiae*, can assist the Court in understanding the value of equal membership rights in the U.S. Jaycees and the need to eradicate discrimination in such places of public accommodation.

For so long as the U.S. Jaycees, an esteemed business organization, discriminates against women in its ranks, equal opportunity for positions of leadership and advancement in employment will not be achieved.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

Northwestern Bell Telephone Company ("NWB" or "Company") is an Iowa corporation authorized to and conducting the business of providing telecommunications services in five states, including the State of Minnesota. Many of its employees belong to local chapters of the U.S. Jaycees located throughout the State of Minnesota.

The U.S. Jaycees ("Jaycees") actively seeks women members, "but relegates them to inferior positions within the organization." *United States Jaycees v. McClure*, 709 F.2d 1560, 1580 (8th Cir. 1983) (dissenting opinion). As associate members, women may not hold office at the local, state and national levels, vote or receive awards. *Id.* In sharp contrast, men, ages 18 to 35, may be individual members with full membership rights. No limits are placed on an individual member's participation in the Jaycees.

In 1974, the Minneapolis and St. Paul chapters of the Jaycees rejected the Jaycees' sex-based membership distinction. These chapters permitted women to become individual members. Consequently, the Jaycees sought to revoke the charters of the Minneapolis and St. Paul chapters for failure to mirror its sex-based membership classifications. *United States Jaycees v. McClure*, 534 F. Supp 766 (D. Minn. 1982). Absent action by this Court, the Jaycees will be permitted to continue discrimination on the basis of sex within its membership because the Eighth Circuit Court of Appeals found that Minnesota's statute, designed to eliminate such discrimination by places of public accommodation, violated the Jaycees' constitutional right of association and was void for vagueness. 709 F.2d at 1561.

NWB's interest in this action is substantial. While this interest cannot be compellingly translated into a financial

stake, it represents a concern—the elimination of discrimination—which permeates NWB's fundamental tenets concerning the conduct of its business and improvement of its employees' quality of work life which have been carefully developed and assiduously applied.

NWB maintains and vigorously fosters its Affirmative Action Program. This program is designed to eliminate discrimination in the workplace and to promote uniformly the welfare and development of each individual to his or her maximum potential.

NWB recognizes, however, that many non-Company activities and entities can complement and add a different and positive dimension to its employees' growth. Consequently, it promotes membership of its employees in organizations such as the Jaycees.

As set forth on its own letterhead, the United States Jaycees is "a leadership training organization." This same principle is carried out at the state and local levels. The Minneapolis Jaycees' motto is "Individual Development through Community Service." "The central purpose [of the Jaycees] is . . . to learn the techniques and skills and to form the acquaintances that will serve as a basis for leadership positions today and tomorrow." *Id.* at 1583 (separate opinion). This purpose is accomplished by members' actively soliciting new members and chairing various activities. The latter requires managing and disbursing large amounts of money and overseeing and coordinating a substantial number of volunteers. To encourage active participation in its program, the Jaycees gives awards to its members who, *e.g.*, generate the most new members.

Such tangible benefits, however, are denied to women as associate members. Due to the Court of Appeals' holding,

women in Minnesota chapters will not be allowed to vote, hold office or receive awards. This will effectively deny them the right to reap many of the benefits heralded by the Jaycees.

That NWB values the benefits provided to its employees by membership in the Jaycees is underscored by the fact that NWB pays the dues for many of its employees in that organization.[1] A female NWB employee served as President of the Minneapolis Chapter of the Jaycees during the period June 1981 to June 1982. In this connection, NWB subsidized and encouraged her outside duties with the Jaycees by permitting her to devote approximately 50 percent of her time to Jaycees' activities. During her tenure, she received full pay, and NWB provided administrative and clerical support at a relatively substantial cost. Both NWB and its employee reaped significant benefits from her serving as President of the Minneapolis Jaycees. Because of holding that position, she automatically sat on the Board of Directors of three prominent Minneapolis concerns including the Chamber of Commerce. Such visibility and responsibility stimulated her management and leadership development, the benefits of which flowed directly to NWB.

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[1] It should be noted that the Office of Federal Contract Compliance Programs promulgated and published regulations which would severely restrict a contractor, including NWB, from paying membership dues or other expenses of its employees who participate in a private club or organization which bars, restricts or limits its membership on the basis of race, color, sex, religion or national origin. 41 C.F.R. § 60-1.11 (1981). The effective date of this regulation has been deferred until further notice. 46 *Fed. Reg.* 18951 (1981). However, the regulation clearly evidences that the concern about membershp discrimination in organizations such as the Jaycees exists at the federal level; Minnesota is merely on the leading edge of governmental bodies attempting to eliminate discrimination in such organizations.

THE ISSUES ARE SUBSTANTIAL

Elimination of discrimination in Minnesota represents a longstanding State goal as evidenced by its comprehensive discrimination statute, Minn. Stat. § 363.01, *et seq.* (1982). *United States Jaycees v. McClure*, 305 N.W.2d 764, 768 (Minn. 1981); 534 F.Supp. at 771. The Minnesota Supreme Court determined that the Jaycees constitute a place of public accommodation as defined in Minn. Stat. § 363.01(18) (1980). 305 N.W.2d at 774. As such, the District Court determined that the Jaycees could not discriminate on the basis of sex among its members. Further, application of the statute to the Jaycees would not impinge on its right of association. 534 F.Supp. at 772. The Court of Appeals' decision, however, makes the right of the Jaycees to treat women members differently from male members superior to the State's compelling interest in eliminating such sex discrimination.

In the past several decades, this nation has made great strides forward in eliminating all types of discrimination. Often in so doing, the Court has ruled that some constitutional rights, including the right of association, must defer to the greater right of equality under the law. *Runyon v. McCrary*, 427 U.S. 160 (1976); *Railway Mail Ass'n. v. Corsi*, 326 U.S. 88 (1945).

In its landmark case, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Court determined that segregated public schools could not be countenanced under the Fourteenth Amendment of the U.S. Constitution because they "generate a feeling of inferiority as to their [Black students'] status in the community that may affect their hearts and minds in a way unlikely to ever be undone." *Id.* at 494. The Jaycees' current membership practices do not

differ from other forms of segregation in form or substance. Relegation of women to an inferior status can have precisely the same effect. *See* MURRAY & EASTWOOD, *Jane Crow & the Law: Sex Discrimination & Title VII*, 34 *Geo. Wash. L. Rev.* 232 (1965).

The sections of Minnesota law at issue here, Minn. Stat. §§ 363.01(18) and 363.03(3) (1982), are designed to eliminate the invidious discrimination practiced by places of public accommodation such as the Jaycees. But, the lower court, after noting that the State's efforts to eliminate sex discrimination represented a public purpose of "the first magnitude", 709 F.2d at 1572, proceeded to decimate the State's effort to effect this purpose through its laws.[2] Failure of this Court to reverse the Court of Appeals' decision will give rise to the perverse result that a large and esteemed national organization, which solicits and markets membership without any threshold qualifications, may engage in sex discrimination among its members.

The Appellants, in their Jurisdictional Statement, have presented a full and accurate discussion of why the sections of the Minnesota statute challenged herein should apply to the U.S. Jaycees' conduct of its business in Minnesota and why

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[2] In considering how to dispose of this action, the Court should carefully consider that a majority of the lower court judges were dissatisfied with their decision. Chief Judge Lay delivered a powerful dissenting opinion in which he eschewed the rationale underlying and the impact of the decision. Likewise, Judge Heaney in a separate opinion recommended that the court rehear the case *en banc* (which had been denied by an equally divided court) because of the court's failure to adopt the findings of the Minnesota Supreme Court that the U.S. Jaycees were a place of public accommodation under Minn. Stat. § 363.01(18) (1980). He, too, expressed concern that the effect of the court's decision would be "to deprive the latter [women] of an equal opportunity for leadership positions." 709 F.2d at 1583 (separate opinion).

the statute is not void for vagueness. NWB fully supports the arguments advanced by Appellants. NWB's purpose in submitting this brief is to stress that preservation of Minnesota's compelling interest in eliminating discrimination overrides any allegation that application of Minnesota's anti-discrimination statute to the Jaycees will infringe on the Jaycees' constitutional right of association.

ARGUMENT

THE STATE'S COMPELLING INTEREST IN SECURING FOR WOMEN THE SAME BENEFITS AFFORDED TO MEN BY A PLACE OF PUBLIC ACCOMMODATION OUTWEIGHS ANY ALLEGATIONS THAT THE STATE'S STATUTE, DESIGNED TO FURTHER THIS GOAL, IMPERMISSIBLY INFRINGES ON CONSTITUTIONAL RIGHTS OF THE JAYCEES.

The Minnesota Supreme Court unequivocally determined that the U.S. Jaycees constitute a place of public accommodation within the meaning of Minn. Stat. § 363.01(18) (1980). 305 N.W.2d at 765. As it must, the lower court adopted this finding. 709 F.2d at 1566, *citing*, *Winters v. New York*, 333 U.S. 507 (1948). However, the lower court incorrectly determined that the statutory label placed on the Jaycees would not permit its constitutional right of association to be impinged by the Minnesota statute and that the State has no compelling interest that would supercede the statute's intrusion on the Jaycees' constitutional right of association. In reaching its incorrect decision, the lower court misconstrued and misapplied legal precedent.

Freedom of association is, by judicial interpretation, inextricably bound to freedoms extended under the First Amendment. *NAACP v. Button*, 371 U.S. 415 (1963); *United Mine*

Workers v. Illinois State Bar Ass'n., 389 U.S. 217 (1967); *Buckley v. Valeo*, 424 U.S. 1 (1976). The threshold inquiry, therefore, must address what, if any, First Amendment freedoms will be abridged by applying the Minnesota law at issue to the Jaycees. The answer clearly is none.

One of the *major* activities of the Jaycees is the recruitment of new members. 534 F. Supp. at 769. This endeavor is actively encouraged by the Jaycees and 50 percent of its achievement awards are extended for the best recruiting results. *Id.* Further, the Jaycees' recruitment practices are almost totally void of selection criteria. In fact, in Minnesota, "there has never been a rejection of *any* application for membership." 305 N.W.2d at 771. (Emphasis added.) Clearly, no First Amendment freedom is at stake in this primary endeavor of the Jaycees.

Likewise, the lower court noted that the Jaycees engages in social and civic projects. 507 F.2d at 1569. However, there is no attempt to characterize, and rightly so, such activities as expressions of First Amendment rights. *Id.*

The Court of Appeals found the elusive First Amendment rights, in terms of which the Jaycees' freedom of association is couched, in its political and ideological activities. *Id.* However, the District Court properly identified such activities as only being taken "from time to time." 354 F. Supp. at 769. It can scarcely be argued that such random and clearly secondary activity by the Jaycees goes to its fundamental purpose. It is, therefore, clearly distinguishable from political parties and other special interest groups whose central focus is the assertion and dissemination of beliefs and ideologies, a right clearly protected by the First Amendment.[3] *NAACP v. Button, supra*; *Buckley v. Valeo, supra.*

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[3] The lower court noted that the ideological activities are not an "insubstantial" part of what the Jaycees do. 709 F.2d at 1570. This conclusion is not supported by the record.

The lower court stated that no Supreme Court opinion had ever "limited the right of association to the context of political beliefs or expression." 709 F.2d at 1566. In fact, "[I]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. *Id.*, *citing*, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). To elevate a purely business organization to the same level as the NAACP or a political party is clearly inappropriate and, in doing so, to deny valuable rights to one class of individuals is unwarranted.

The lower court improperly protected the Jaycees' tenuous right of association on the mere chance that "some change in the Jaycees' philosophical cast can reasonably be expected [if women are afforded full membership status]." 709 F.2d at 1571. Mere speculation should not serve as the basis for elevating the Jaycees' amorphous right of association above the State's clear interest in promoting equality between the sexes. 709 F.2d at 1580, 1581 (dissenting opinion).

However, even assuming, *arguendo*, that the Jaycees does possess a freedom of association, that right is not absolute and may have to defer to a compelling state interest. *United Mine Workers v. Illinois State Bar Ass'n.*, *supra*. The facts herein represent just such an occasion.

Runyon v. McCrary, *supra*, provides compelling precedent to reverse the lower court. The Court of Appeals distinguished *Runyon* on the basis that the Jaycees is more like a private social club (which the Court declined to embrace in its decision; 427 U.S. at 167) than "a school that holds itself out as willing to sell its services to any member of the public." 709 F.2d at 1575. But the Jaycees is a place of public accommo-

dation, 305 N.W.2d at 774, and it publicly markets its memberships/training to the public. There really is no significant difference between the instant case and *Runyon*. Accordingly, *Runyon* should control and the alleged infringement of the Jaycees' freedom of association should defer to the greater need of the State to eliminate discrimination in places of public accommodation.[4]

Lastly, this Court must consider the nature of the right the State seeks to extend to women. It is the right to participate on an equal basis with men in an esteemed national and local organization, recognized for its management and leadership training. Membership in the Jaycees "gives them an edge in hiring for and promotion to leadership positions." 709 F.2d at 1583 (separate opinion). NWB places a premium on and supports active participation in the Jaycees by all of its employees and it is safe to assume that other corporations do not differ in this respect. Failure to reverse the Court of Appeals will clearly diminish the value of membership in the Jaycees to women in Minnesota, who, since 1974, have enjoyed and benefited from full participation in all the programs and other advantages extended by the Jaycees to its male members. It will have the perverse result of denying to women, on the basis of their sex alone, "an equal opportunity for leadership positions." *Id.*

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[4] The lower court escapes such compelling precedent by stating that "[O]ur decision is not controlled by precedent. We must look to principle and reason." 709 F.2d at 1576. The legal precedent is clearly on point and should control. The lower court's "principle and reason" merely leads it down the speculative and unsound path of reciting the potential and illusory effects of mandatory equality between male and female members of the Jaycees.

CONCLUSION

Northwestern Bell Telephone Company respectfully requests this Court to summarily reverse the decision of the lower court or to enter an order noting probable jurisdiction so that the substantial issues raised by this appeal can be fully examined.

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