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 TO AFFIRM

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MOTION TO AFFIRM

Appellee The United States Jaycees[1] moves the Court to affirm the judgment of the Court of Appeals on the ground that the judgment is manifestly correct.

The Question is Substantial: The Court should render a Dispositive Decision, Summarily or Otherwise.

[1]The United States Jaycees has no corporate subsidiaries or affiliates. Sup. Ct. Rule 28(1).

By this Motion to Affirm, The United States Jaycees (Jaycees) seek a dispositive decision which will hopefully end years of persistent and continuing litigation challenging the Jaycees all male membership policy. The earlier round of cases involved claims that the Jaycees, by accepting certain federal grants, had become subject to equal protection dictates of the Fifth Amendment, akin to state action under the Fourteenth. These challenges were successively rejected by three Courts of Appeals. *Junior Chamber of Commerce of Kansas City v. Missouri State Junior Chamber of Commerce,* 508 F.2d 1031 (8th Cir. 1975); *New York City Jaycees, Inc. v. United States Jaycees, Inc.,* 512 F.2d 856 (2nd Cir. 1975); *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees,* 495 F.2d 883 (10th Cir. 1974), *cert. den.* 419 U.S. 1026 (1974). The current round of attacks in Minnesota and elsewhere are based on expansive interpretations of state public accommodations laws. The Jaycees has successfully defended these attacks in Alaska and the District of Columbia[2], but faces litigation pending in California and Massachusetts and state administrative proceedings in Iowa and Pennsylvania.

In view of the adoption by thirty-three states of "public accommodation" statutes prohibiting discrimination on the basis of sex, enforcement by the Jaycees of its all male membership policy could embroil the organization in continuous multi-state litigation for at least the next decade.

The Jaycees do not question the substantiality of the constitutional issues presented. However, of the two grounds relied upon by the Court of Appeals, only one—freedom of

[2]United States Jaycees v. Richardet, et al., 666 P.2d 1008 (Alaska 1983); United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. App. 1981).

association—has a broad and dispositive impact upon all pending and threatened litigation in which state public accommodations laws have been invoked against the Jaycees. The additional ground of vagueness could arguably affect only Minnesota and have no impact upon similar litigation elsewhere.[3]

The practical problem faced by the Jaycees at this juncture arises from the fact that a summary affirmance of the Court of Appeals decision, without opinion by this Court, may be viewed by other state and federal courts as equivocal or non-dispositive of the basic issue. A summary affirmance without opinion acts on its face only to affirm the judgment below but not necessarily the reasoning by which it was reached. *Mandell v. Bradley*, 432 U.S. 173, 53 L.Ed.2d 199, 97 S.Ct. 2238 (1977). The Jaycees are forced to acknowledge the possibility that some other state and federal courts outside the Eighth Circuit may disagree with the Eighth Circuit.[4] Other courts which would disagree with the Eighth Circuit, if writing on a clean slate, may be tempted to view an unexplained summary affirmance as grounded only upon the narrow issue of vagueness peculiar to the Minnesota statute. The more basic issue of freedom of association, therefore, may remain subject to continuing litigation which

[3]As a practical matter, on the other hand, it may be difficult for any state court or legislature to avoid creating an impermissibly vague statute without colliding with other constitutional objections based on freedom of association, overbreadth, equal protection, or even the bill of attainder clause. As the Court of Appeals pointed out, the Minnesota Supreme Court undoubtedly ended up with an impermissibly vague statute in an effort to avoid other constitutional objections. A-38.

[4]The Jaycees remain firm in its belief of the validity of its position. This very case, however, is ample evidence of the potential for sharp conflict among judges and we cannot assume that these intense disagreements would be confined to Minnesota or the Eighth Circuit.

in turn may encourage other states to continue to invoke their public accommodation laws against the Jaycees and other organizations which confine their membership to persons of one gender, national gender, national origin, or religious denomination.

If this Court should grant the Motion to Affirm, the Jaycees request that the Court specify that it is doing so on both the freedom of association and vagueness grounds relied upon by the Court of Appeals. Unless the danger of an equivocal summary affirmance can be so avoided, the Jaycees request alternatively that the case be accepted for full review.

The overriding need for a dispositive result is not confined to the Jaycees. Similar public accommodation theories have been advanced against the Boy Scouts of America[5], the United States Power Squadrons[6], and Rotary International[7]. No all female organization has been challenged, but the principle involved is the same. Moreover state public accommodation laws typically bar discrimination on the grounds of national origin, race and religious belief in addition to sex. If a state, by the expedient of labeling an organization a

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[5]In Curran v. Mount Diablo Council of the Boy Scouts of America, the California Court of Appeal held that complaint stated cause of action under California public accommodation law which alleged that plaintiff was expelled from membership in the Boy Scouts of America on the basis of his homosexuality. 195 Cal. Reptr. 325 (1983).

[6]U.S. Power Squadron v. State Human R. App. Bd., 452 NE2d 1199 (N.Y. 1983) holding United States Power Squadrons, a membership organization, comprised of 650 local squadrons in the United States, is a place of "public accommodation" under New York law and must admit women to membership.

[7]In Rotary Club of Duarte, et al., v. Board of Directors of Rotary International, trial court held Rotary is not a "business establishment" under California public accommodation law. Case is now on appeal to the California Court of Appeal. Sup. Ct., Los Angeles, No. C244,253.

place of "public accommodation" as did Minnesota in this case, can forbid discrimination on such other grounds, the ability of B'nai Brith and the Knights of Columbus to confine their membership to persons of one religious persuasion must necessarily be in doubt. Likewise the hundreds of organizations confining their membership to persons of one national origin are likewise in peril[8].

The historically accepted domain of public accomodation statutes has been confined to restaurants, hotels, movie theaters and the like which involve no significant private associational issues. If states like Minnesota choose to expand these statutes beyond their historical scope, the same statutes will now threaten the heretofore unchallenged and fundamental freedom to choose one's companions in a private membership organization.

The Jaycees, therefore, presents its motion to affirm in the hopes that this basic issue, by summary affirmance, may be finally resolved and that this threat to a fundamental right may be ended.

STATEMENT

The United States Jaycees is a tax-exempt, non-profit Missouri corporation headquartered in Tulsa, Oklahoma. It was founded in St. Louis, Missouri, in 1920, under the name United States Junior Chamber of Commerce. It continued to operate under that name until 1965, when its name was changed to The United States Jaycees. It is a private (in the sense of non-governmental) membership organization. It derives income primarily from membership dues and private sponsors. It receives no federal or state funds.

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[8]For a compilation and description of such organizations, see 1 Encyclopedia of Associations, 16th Ed., Detroit, Gale Research Co., 1981.

Article 2 of the Jaycees' By-laws sets out the organization's purpose:

"A. This Corporation shall be a non-profit 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 national, 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 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 By-laws 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) . . .". The category of Associate Individual Member is reserved for those, including women, who do not qualify for regular membership. This category does not have the right to vote or serve as officers. The By-laws 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. At the time of the trial before the District Court in August of 1981, the Jaycees had about 295,000 regular members in 7,400 local chapters.

The subject of full membership for women has been a matter of debate and discussion within the Jaycees. In 1975 the national Jaycees convention voted by a margin of approximately 90 percent to 10 percent against changing the By-laws to allow local chapters to admit women as regular members. The 1978 national convention voted 78 percent to 22 percent to reject the admission of women on a local option basis. In a national referendum in September of 1981, Individual Members of the Jaycees defeated another proposed local option amendment by a vote of 67 percent to 33 percent.

From its inception in 1920, the Jaycees has adopted and implemented thousands of programs to carry out the purpose for which it was organized. A sample of recent programs includes efforts to assist children afflicted with dia-

betes; shooting education; fund raising for treatment for Muscular Dystrophy; Junior Athletics; and programs to encourage participation in government. In addition the Jaycees has taken public positions on a variety of national issues. For example, 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; and supported the withdrawal of American combat forces from Southeast Asia.

Where appropriate, the Jaycees has adopted specific programs to implement its position of national issues. For example, in 1981, the Jaycees adopted and implemented the program "Enough is Enough" designed to assist the current administration in its efforts to carry out its economic policy. The "Enough is Enough" Program has been distributed to all local chapters of the Jaycees. The Jaycees publicly supported and actively sought statehood for Alaska and Hawaii and publicly urged the implementation of the Hoover Commission Recommendations.

The Jaycees believes in leadership training for young men. It believes that its objectives can best be accomplished by involving young men in the main stream of American social action and political thought. State and Local Organization

Members, in carrying out and implementing leadership training of young men, 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 worked on numerous projects which speak out on public issues. These include participation by thousands of local organizations in the Jaycees "Enough is Enough" Program which supports the current administration's economic policy. State Jaycees organizations in many states have adopted programs to urge the legislatures of their respective states to call for an amendment to the United States Constitution to require a balanced Federal Budget. Local and state projects number in the thousands and include, to name a few, the action of the Montana Jaycees in working with the Montana Civil Liberties Union for the successful passage of legislation dealing with employment restrictions for ex-offenders; the action of the Annandale Virginia Jaycees in working for passage of increased benefits for low-income families; the action of the Maryland Jaycees in 1973 in pushing for the adoption of a law that would permit full voting rights for ex-offenders; the action in May of 1964 of the Atlanta Jaycees in filing suit against the State of Georgia in Federal District Court on reapportionment of congressional districts.

The Jaycees publishes a magazine called "Future", which is sent to every Jaycee in the U.S.A. The editors of "Future" have made it a practice to include articles on issues of public concern. "Future" offers an opportunity for the Jaycees to speak out on controversial issues of national importance. "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; and articles supporting national tax reform.

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 by-laws 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 Minnesota's 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.

ARGUMENT

I.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT APPLICATION OF MINNESOTA'S PUBLIC ACCOMMODATION LAW TO THE JAYCEES DIRECTLY INTERFERES WITH THE JAYCEES' FIRST AMENDMENT 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 Jaycees be accurately defined. Article 2 of the Jaycees' By-Laws defines that purpose as follows:

> A. This Corporation shall be a non-profit 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 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 is, therefore, to provide *young men* with the benefits of participation in organizational activities directed to civic purposes. By definition, that purpose requires that membership be limited to young men.

The root issue is whether a volunteer membership organization may, without government interference, confine its purpose to serving a limited segment of society defined by gender, race, national origin, etc., and limit its membership accordingly. The case must be viewed in the same light as if the State attempted to prevent the formation of associations composed solely of black persons, Jews, women, Norwegians or Vietnamese for the purpose of improving the lot of those persons.

The activities of the Jaycees are multifold, and range from the simple pleasures of personal association, to participation in internal decision making, to the development of socal consciousness through community service projects and the formulation of Jaycee positions on issues of social and political concern. All of these activities are expressions of young men, by acts and by words, in furtherance of the Jaycees' core purpose to serve young men. By limiting its membersip accordingly, the members have thereby expressed their fundamental belief that young men deserve this opportunity.

The Court of Appeals correctly rejected the State's sterile view of the Jaycees as a leadership training school. The fact that such skills are important and may be developed by participation as a full member is obvious but misses the point. The Jaycees hardly holds a monopoly on such opportunities. Those same opportunities are immediately available to women in a bewildering variety of non-gender restricted organizations such as local churches, political parties, and business oriented groups such as the National Society of Fund Raising Executives. Likewise, the development of such skills naturally flow from membership in all-female organizations such as the National Federation of

Business and Professional Women's Clubs, the National Association for Female Executives and the Junior League. The core purpose of those women's organizations is the advancement of women's interest as they perceive those interests to be, and the achievement of that purpose begins necessarily with restriction of their membership to women. The Jaycees, by restricting membership to young men, likewise seeks to preserve its ability to achieve its core purpose of serving young men.

The power sought by the State is alarming. If the State can, by expansive statutory interpretations, affix the label of "place of public accommodation" where it wishes, hundreds of organizations with restrictive membership policies are in jeopardy. Private groups based on religious belief (such as B'Nai Brith or Knights of Columbus) or ethnic or national origin (such as Polish Women's Alliance, Columbia Squires or Sons of Norway) will be threatened. This follows because, once the "public accommodation" label is affixed, it automatically invokes the Minnesota law's prohibition against discrimination by reason of national origin and religious belief in addition to sex.

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 will be forced to serve the interests of men, all black groups will be compelled to take on the burden of serving the special interests of white people, and ethnic groups will be prevented from confining their membership to the only persons who would have an interest in the unique traditions of those groups.

In a superficial sense, it may be true that many Jaycee activities would be ostensibly unaffected by the forced inclusion of women, but this misses the point. The State has

dictated, by use of a penal statute, that Jaycees may no longer confine its core belief and the central reason for its existence to the advancement of the interests of young male members but must also serve the interests of young women. Insofar as the interests of young men and young women may conflict (a near certainty in light of current sociological trends), the 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.

This door to State power should be closed before further damage is done. This contretemps may not have attracted overwhelming public sympathy for the Jaycees, but the principle involved is fundamental. The use of a State penal statute to force a change in the Jaycees' purpose and perspective threatens the fundamental liberties of everyone.

b. The Constitutional Right of Freedom of Association.

The right to form and belong to an almost infinite variety of membership organizations has been enjoyed by Americans since early in the 19th Century. Americans are "joiners", and they join in ways which reflect their individual viewpoints and desires. It has not been until very recently that the right of an organization to determine its own membership has been questioned. Alexis de Toqueville, in his commentary on early 19th Century America, observed:

> ". . . Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general

> or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. . . ." (Democracy in America, Alexis de Toqueville)

The Encyclopedia of Associations[9], lists thousands of organizations, many founded early in the 19th Century, which limit their membership to a single sex, or to persons of one religious denomination or ethnic origin.

Although the right or freedom of association is not expressly mentioned in the First Amendment or any other provision of the Constitution, the decisions of this Court establish with unmistakeable clarity that the freedom of an individual to associate is protected by the First and Fourteenth Amendments, both as an expression in itself and as a means of enhancing the protection given to the express guarantees.

In *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958), this Court said:

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." (Citations omitted.)

In *Shelton v. Tucker,* 364 U.S. 479 and 486 (1960), this Court characterized the right of free association as a

[9]16th Ed., Detroit, Gale Research Co., 1981.

". . . right which, like free speech, lies at the foundation of a free society." And in *Griswold v. Connecticut,* 381 U.S. 479 and 483, the Court said:

> "The right of 'association', like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."

Justice Stewart confirmed the breadth of the right of association when in *Abood v. Detroit Board of Education,* 431 U.S. 209, at 231 (1977), he stated:

> ". . . our cases have never suggested that expression *about philosophical, social, artistic, economic, literary or ethical matters—to take a nonexhaustive list of labels*—is not entitled to full First Amendment protection. (Emphasis supplied.)
>
> ". . . Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can properly be attached to those beliefs the critical constitutional inquiry."

The State does not deny that the right of association is entitled to constitutional protection. Since 1920 the Jaycees has exercised that right by fostering the development of young men's organizations; its membership policy is the expression of its belief that young men deserve such an organization. The right to continue that expression cannot be encroached upon by the State absent a showing of compelling interest.

c. 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.* . . . (Emphasis supplied.)

Thus the burden falls squarely on the State of Minnesota to justify its encroachment on the Jaycees freedom of asso-

ciation 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 interest. *Larson v. Valente,* 456 U.S. 228 (1982).[10]

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 affiix the label "public accommodation" to any of the hundreds of membership organizations in Minnesota and, by

[10]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).

such a device, compress them into the same mold as restaurants and 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 America 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 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 membership 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 accommodation 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.

The State has not demonstrated that its actions have been closely fitted in furtherance of a compelling governmental interest.

II.
THE COURT OF APPEALS WAS CORRECT IN HOLDING THE STATUTE VOID FOR VAGUENESS AS APPLIED

For purposes of vagueness analysis, the Minnesota Supreme Court's opinion became the words of the statute, as if the Legislature itself had so stated. *NAACP v. Button,* 371 U.S. 415, 432 (1963); *Winters v. New York,* 333 U.S. 507, 514 (1948). The Minnesota court found itself in the dilemma of avoiding, on the one hand, an overly broad opinion encompassing too many organizations and, on the other hand, finding some basis on which to outlaw the Jaycees' membership policy. The Court developed, as a result, its "public" versus "private" dichotomy, labeling the Jaycees as "public." The criteria used were an amorphous combination of size, recruiting technique, and selectivity, but no workable standards of size, recruiting or selectivity were provided by which to determine when a "private" organization becomes "public". The Minnesota court sought rather to do by example what it failed to do by reasoned explanation. The example of what it meant by a "private" membership organization free to exclude women was the Kiwanis International.[11] The Jaycees and Kiwanis are indistinguishable

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[11]The Minnesota Court said:

> Private associations and organizations—those, for example, that are selective in membership—are unaffected by Minn. Stat. §363.01(18) (1980). Any suggestion that our decision today will affect such groups is unfounded.
>
> We, therefore, reject the [Jaycees] national organization's suggestion that it be viewed analogously to private organizations such as the Kiwanis International Organization.

305 N.W.2d at 771.

for these purposes, and the State makes no effort to suggest any distinction. The Court of Appeals correctly observed:

> [T]he state Supreme Court has left us without any discernible standard by which to distinguish "public" from "private." The opinion does not say what it is about the Kiwanis that makes it "private."

709 F.2d at 1577.

The Court of Appeals thereupon held the statute as applied and interpreted to be void for vagueness. Its discussion is as concise an argument in support of the Jaycees' position as could be stated here. The Court of Appeals applied the established principle that a penal statute must advise persons of common intelligence whether they are or are not within the affected class of persons. A greater degree of precision is necessary when fundamental liberties are at stake. *Grayned v. City of Rockford,* 408 U.S. 104 (1972); *United States v. Cardiff,* 344 U.S. at 174, 176 (1952); *Winters v. New York,* 333 U.S. 507, 515-516 (1948); *Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971); *Smith v. Goguen,* 415 U.S. 566, 573 (1974).

The State contends that the Minnesota court's "public-private" categorization is merely an effort to create a "private club" exception to the statute,[12] and that the concept of a "private club" is well defined in the decisional law. It is clear, however, that the Minnesota court created a much

[12]The Minnesota statute does not contain the "private club" exception found in other public accommodation laws. See Minn. Stat. §363.01(18). The Minnesota court was not deciding that the Jaycees were not a "private club" because that issue was irrelevant to the statutory scheme. Rather, it was determining whether the Jaycees was a public or private "association or organization" (See 305 N.W.2d at 774, A-83), a substantially broader concept.

broader class of exempt membership organizations beyond the classic "private club." It specifically identified this class as "private organizations such as the Kiwanis International Organization" 503 N.W.2d at 771. The Kiwanis is no more or less a "club" in the accepted sense of that term than is the Jaycees.

Finally, the State does not attempt to distinguish the Jaycees from the Kiwanis for these purposes, nor could it do so. Rather, it seeks to avoid the issue by claiming the Minnesota court's reference to Kiwanis as "private" was "off hand" and meaningless (Jur. St. pp. 11 and 19). For purposes of vagueness analysis, the court's opinion is the statute, however, and every expression contained therein is the equivalent of a legislative enactment. *Winters v. New York*, 333 U.S. 507, 515-516 (1948). Every one of hundreds of membership organizations which are all-male or all-female are necessarily compelled to read that opinion to determine whether they can safely continue to exclude women or men or, like the Jaycees, safely change their organizational characteristics in some fashion so as to insure their "private" (and exempt) status.

The opinion compels all of them to wrestle with the impossible task of determining what makes the Jaycees "public" and the Kiwanis "private" with penal consequences awaiting them if they guess wrong.[13] Even the Jaycees is presumably free to change its organizational characteristics in some fashion so as to become "private" like the Kiwanis and lawfully continue as an all-male organization. But, the

[13]A violation of the Minnesota Statute is a misdemeanor, Minn. Stat. §383.101, and exposes the violator to civil punitive damages, §363.071 Subd. 2, and the usual civil contempt penalties if an injunction is issued, as here, §363.071 Subd. 2 and §363.091.

Jaycees do not know what it is about the Kiwanis that justifies the disparate treatment afforded the two associations and the Jaycees would incur substantial risks if they failed to divine the Sphinx riddle posed by the Minnesota court.

The Court of Appeals was clearly correct in holding the statute vague as interpreted and applied. An affirmance on this ground alone is justified.

III.

OVERBREADTH

The Court of Appeals did not reach the issue of overbreadth, being unnecessary in view of its disposition of the case on other grounds. The issue remains, however, because of the threatened impact of Minnesota's interpretation of its statutory phrase "place of public accommodation" upon other organizations. The Minnesota law's prohibitory provisions fall equally upon discrimination by reason of creed, race, ethnicity, and religious belief, once the label of "public accommodation" is attached. Given the indefinite criteria employed by the Minnesota court and, in particular, its exemption of the Kiwanis, an organization based upon an ethnic tradition, such as The Sons of Norway, or religious affiliation such as B'Nai Brith or Knights of Columbus must necessarily be in doubt of its legality, not to mention the restraint imposed on those that would otherwise form new associations devoted to the peaceful advancement of groups defined by race, creed, ethnic background, or religious belief.

Minnesota's actions threaten to open a Pandora's box. Affirmance on this grounds alone is justified.

IV.

EQUAL PROTECTION

While not treated by the Court of Appeals, the equal protection issue is starkly presented by the inexplicably disparate treatment rendered the Jaycees and the Kiwanis.

The irony of this case is that, while it was pending before the Court of Appeals, the Kiwanis International held its national convention in Minneapolis in June of 1982 and voted overwhelmigly to continue its all-male membership policy. This occurred virtually on the doorsteps of the Minnesota Supreme Court which had exempted Kiwanis for reasons which remain unexplained. Equal protection concepts speak to the cause of uniform and non-arbitrary law enforcement—a cause which has been mocked in this case.

V.

CONCLUSION

The Court of Appeals was correct on all counts and could well have added overbreadth and equal protection as additional grounds.

The need to end this continuing litigation, which is now virtually national in scope, is paramount. The Jaycees pray, therefore, that any order granting this Motion specify this Court's affirmance of both grounds relied upon by the

Court of Appeals. Failing such specificity, the Jaycees request that the case be docketed for full review.

Respectfully submitted,

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