LPF & NOW LPF #14

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of its qualified members,	)	
Plaintiff-Appellant,	)	
vs.	)	No. 82-1493-MN
MARILYN E. McCLURE, Commissioner, Minnesota Department of Human Rights, WARREN SPANNAUS, Attorney General of the State of Minnesota, and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,	)	
Defendants-Appellees.	)	

BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN, MINNESOTA STATE CHAPTER, AS AMICUS CURIAE

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SUMMARY

The Minnesota State Chapter of the National Organization for Women ("Minnesota NOW") submits this brief as amicus curiae in support of the affirmance of the decision below and in opposition to the position of plaintiff-appellant, The United States Jaycees ("U.S. Jaycees"), suing on behalf of its "qualified members."

Minnesota NOW is a membership organization with 3,100 members in twenty-seven chapters throughout the State, dedicated to assuring equal economic, social and political opportunity for all women. This Court granted leave for Minnesota NOW to participate as amicus curiae by order dated June 24, 1982.

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PRELIMINARY STATEMENT

This is an appeal from a memorandum opinion and order for judgment entered on March 25, 1982 by United States District Judge Diana E. Murphy. The opinion is reported at 534 F. Supp. 766. Appellant invoked the jurisdiction of the United States District Court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1332 and 1343. Appellant's notice of appeal was filed April 20, 1982, pursuant to 28 U.S.C. § 1291.

On March 30, 1980 the following question was certified by the District Court to the Minnesota Supreme Court by agreement of the parties: "Is the United States Jaycees 'a place of public accommodation' within the meaning of Minn. Stat. § 363.01 Subdivision 18?" On May 8, 1981 the Minnesota Supreme Court answered the certified question in the affirmative. United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981).

STATEMENT OF ISSUES

1. Do the U.S. Jaycees enjoy a constitutionally protected right under the First Amendment to the United States Constitution to operate and do business in the State of Minnesota in violation of the statutory prohibition on sex discrimination contained in the Minnesota Human Rights Act, Minn. Stat. §§ 363.01(18), 363.03(3), (6) and (7)? The court below correctly held that the U.S. Jaycees cannot justify a concededly discriminatory membership policy on the ground that they are a private membership group, given the stipulated fact findings about their functioning and the binding interpretation of the Minnesota Human Rights Act by the Supreme Court of Minnesota.*

Runyon v. McCrary, 427 U.S. 160 (1976).

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

2. Does the Minnesota Human Rights Act violate the First and Fourteenth Amendments to the United States Constitution, on the grounds that the term "place of public accommodation" is unconstitutionally "vague" or "overbroad"? The court below summarily rejected these due process arguments in light of the statutory definition supplied by the Minnesota legislature, the U.S. Jaycees' failure to demonstrate the Human Rights Act's inhibiting effect on any constitutionally protected activity and the limiting construction of the relevant language supplied by the Minnesota Supreme Court.**

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* This issue is addressed in Point I, infra, at pp. 1-11.

** These due process arguments are addressed in Point II, infra, at pp. 11-16.

Horn v. Burns and Row, 536 F.2d 251 (8th Cir. 1976)

3. Have the U.S. Jaycees been deprived of the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution, by being characterized as a "place of public accommodation" under the Minnesota Human Rights Act? The court below concluded that the U.S. Jaycees had waived any claim under the Equal Protection Clause because that issue, although raised in appellant's complaint, was not briefed or argued to the District Court.*

* The equal protection issue is addressed in Point II, infra, at pp. 17-18.

INTRODUCTORY STATEMENT

This case will determine whether the State of Minnesota can prohibit discrimination by the U.S. Jaycees, a national organization that operates as a public business. When women are not offered equal access, when they are not welcomed as full members of such organizations, they are deprived of the advantages provided by the traditional avenues of self-development, economic and political opportunity and advancement. Recent actions of several governmental bodies* and organizations** reflect the growing public awareness of the importance of these clubs and service organizations to women's career advancement and full participation in the business and public life of the country.

This importance is seen clearly in the operations of the U.S. Jaycees. The U.S. Jaycees focus upon leadership skills, development and "serving the goals of individual development, community development and development of management ability." 534 F. Supp. at 769. Course offer-

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* See, e.g., 410 Federal Personnel Manual 47 (1977) (federal personnel shall not participate in meetings held at facilities that discriminate on the basis of sex); Memorandum of the Governor of State of New York (July 18, 1980) (state officials barred from conducting official business in sex discriminatory facilities); Philadelphia Code § 20-307 (1981) (no funds from Philadelphia Treasury may be used for business expenses arising from use of discriminatory facility).

** Organizations that have adopted policy statements prohibiting meetings at clubs with discriminatory membership policies include the American Bar Association (approved by its Board of Governors in October 1978); Association of the Bar of the City of N. Y. (approved April 9, 1981); American Jewish Congress (approved June 2, 1982).

ings reflect this organizational objective. Local chapters are provided with program materials including public speaking programs, personal dynamics programs, athletic championships and leadership training materials. Id. In addition, the U.S. Jaycees maintain a strong public image by taking public positions on various contemporary social and political issues. Id. The U.S. Jaycees' credibility and general respect in communities across the country derive from the competence and prominence of the members, a public position fostered by the organization's emphasis on training and leadership.

Women seek full membership in the U.S. Jaycees because of "the network of business contacts and opportunities that the Jaycees offer."* Every man who joins the U.S. Jaycees automatically becomes a member of an extensive and influential network which includes current members, alumni of the organization and non-member civic leaders who work closely with the U.S. Jaycees on community projects. Contacts are a major source of productive job placement leads.** Entree into the "Old Boys' Network" — that series of linkages with influential elders, ambitious peers and younger men on their way up which men develop as they move

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* Schweich, No Women Wanted, McCalls, May 1980, at 65. See also Simpson, Jaycees Challenged on "Men Only" Rule, Working Woman, Sept. 1979, at 6.

** According to the United States Bureau of Labor Statistics, almost one-third of all jobs held by males come through personal contacts. Job Seeking Methods Used by American Workers, Bull No. 1886, U.S. Bureau of Labor Statistics, Table 3 (1972). Many people believe the percentage is actually higher for high-level jobs. C. Kleiman, Women's Networks 2 (1980). See also, Kiechel, The Care and Feeding of Contacts, Fortune, February 8, 1982, at 119.

through school, work, professional and community service organizations and private clubs -- provides men with knowledgeable allies who help them advance in their careers.*

The U.S. Jaycees choose to accord women "associate member" status rather than to bar them entirely. This in no way ameliorates the harm women suffer. Denied full membership privileges -- the right to run for office, vote in elections or receive awards -- women members are branded as second-class citizens and treated accordingly.** No matter how competent and active in the organization, the female U.S. Jaycee is deprived of an equal opportunity to improve her leadership skills, to distinguish herself, to develop necessary contacts, and to reap equally the rewards of organization, participation and involvement.

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* For example, a corporation vice president in Minnesota, after a long peroration on how little contacts meant to him and his associates, said "Well, of course, it is true that in 15 minutes in the lobby of the Minneapolis Club you can see everybody you need to talk to in a week." Kiechel, The Care and Feeding of Contacts, Fortune, February 8, 1982, at 119. See O'Brien, Women Helping Women, Detroit Free Press, Nov. 13, 1978; Causey, Old Girl Network Growing, Washington Post, October 5, 1978.

** A recent article reported that the president of the U.S. Jaycees began an address to the organization by asking, "Would the woman please leave. I can't teach leadership to a woman." McLellan, We're Going to be Right Again, Savvy Magazine, July 1982, at 54.

ARGUMENT

POINT 1

THE U.S. JAYCEES HAVE NO FIRST AMENDMENT PRIVILEGE THAT INSULATES THEM FROM THE IMPACT OF ANTI-DISCRIMINATION LAWS IN STATES WHERE THEY CHOOSE TO SET UP LOCAL CHAPTERS AND SOLICIT MEMBERSHIPS AT WILL.

The U.S. Jaycees argue that application of the Minnesota Human Rights Act to their "private" organization violates their "constitutionally protected right to associate" and prevents them from performing their "core purpose" of providing young men with the "benefits of participation in organizational activities directed to civic purposes."[1] Analogizing themselves to every membership group in the country -- the Polish Women's Alliance, Ku Klux Klan, NAACP, Junior League and Gay Lib organizations -- the U.S. Jaycees assert that any organization listed in the Encyclopedia of Associations is endangered and may be forced to advocate causes that are inconsistent with their raison d'etre.

This parade of horrors misperceives and misstates the holding and impact of the decisions of the Minnesota Supreme Court and the court below, the nature of the issue actually involved here and, most importantly, the meaning of the constitutionally protected freedom of association. No right of a truly private membership organization to

1 Brief of Appellant The United States Jaycees at 16 [hereinafter cited as "U.S. Jaycees Brief"].

choose its own members, select its own agenda or advocate its own causes is at issue. The only question, and not a novel one, is whether the discriminatory membership policy of a non-private club may be afforded affirmative constitutional protection. 534 F. Supp. at 772. Here, the U.S. Jaycees have been given an option by Minnesota either to stop offering women inferior membership status or to discontinue their operations in that State. There is no court decision or statute requiring the U.S. Jaycees to espouse a particular view or to alter the range of programs offered to members.

This Court should affirm the court below and flatly reject a First Amendment claim that ignores the governing Supreme Court decisions prohibiting the assertion of a freedom to associate in order to discriminate and that disregards decades of experience under the public accommodations laws.

A. The U.S. Jaycees have no judicially enforceable freedom to associate, absent a First Amendment claim that rights of speech, assembly, petition or advocacy are being infringed.

Numerous commentators have pointed out that the Supreme Court has not recognized an independent right of association. One writer has described freedom of association as "little more than a shorthand phrase used by the Court to protect traditional first amendment rights of speech and petition as exercised by individuals in groups." Raggi, An Independent Right to Freedom of Association, 12 Harv. C.R.-C.L. L. Rev. 1 (1977). See also, Tribe, American Constitutional Law, 701-703 (1978); Young &

Herbert, Political Association under the Burger Court: Fading Protection, 15 U. Cal. Davis L. Rev. 53, 54 n.4 (1981). Although individual justices have tried to articulate a general notion of freedom of association independently deserving constitutional protection,[2] the Court as a whole has been unwilling to recognize freedom of association unless tied to some underlying First Amendment right. That trend has continued in the most recent pronouncements of the Supreme Court[3] and this Court.[4]

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2 See, e.g., Justice Marshall's dissent in Village of Belle Terre v. Boraas, 416 U.S. 1, 15-18 (1974) and Justice Douglas's concurrence in United States Department of Agriculture v. Moreno, 413 U.S. 528, 540-45 (1973).

3 See, e.g., Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, __ U.S. __, 102 S. Ct. 434 (1981) (city ordinance placing limits on expenditures and contributions in campaigns on ballot measures violated citizens' groups' rights of political speech and association); Widmar v. Vincent, __ U.S. __, 102 S. Ct. 269 (1981) (if university makes facilities generally available to registered student groups, it may not discriminate on basis of content of speech against groups wishing to use facilities for religious worship and discussion).

4 In the Eighth Circuit cases cited by the U.S. Jaycees, whatever associational interest was protected by this Court clearly derived from the guaranteed rights of speech, expression and assembly. See Savola v. Webster, 644 F.2d 743 (8th Cir. 1981) (discovery demand seeking names of all state Communist Party members and sympathizers overbroad); Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080 (1978) (state university could not withhold recognition of student organization whose basic purpose was to discuss homosexuality and advocate repeal of state sodomy laws); American Federation of State, County and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969) (public employees have right to join labor union and have right of action under federal civil rights act for retaliatory discharge); Greminger v. Seaborne, 584 F.2d 275 (8th Cir. 1978) (plaintiffs could not be discharged for speaking publicly about teacher salaries and advocating membership in a rival teachers' association). Indeed, in Norbeck v. Davenport Community School District, 545 F.2d 63 (8th Cir. 1976), cert. denied, 431 U.S. 917 (1977), this Court rejected a First Amendment claim, holding that a school board's discharge of a principal who was also chief negotiator for the teachers' union did not violate constitutional rights.

Even when the federal courts have recognized a freedom of association for the purpose of expressing or advocating beliefs, they have denied any unrestricted right to act on those beliefs. This principle, recognized as early as NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449, 465 (1958), was recently reaffirmed in Runyon v. McCrary, 427 U.S. 160, 176 (1976) — a case that dictates the outcome here. In Runyon the Supreme Court held that requiring a private school, committed to the promotion of racial segregation, to admit black children did not infringe any freedom of association enjoyed by the school, the parents or the children. The school had solicited enrollments through the yellow pages and direct-mail advertising and denied admission solely on the basis of race. As Justice Stewart wrote, the school's discriminatory practice could not be rationalized as a form of freedom of association because a legally mandated open admissions policy would not affect the content of what was taught:

> "[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in Norwood v. Harrison, 413 U.S. 455, 'the Constitution . . . places no value on discrimination,' id., at 469, and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections. . . .' In any event, as the Court of Appeals noted, 'there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.'. . ." 427 U.S. at 176.

Appellant's assertion that Runyon is "of no value in this case" is flatly wrong. Although the jurisdictional basis in Runyon (42 U.S.C. § 1981) was not the same as the jurisdictional basis here (42 U.S.C. § 1983), Runyon involved precisely the issue of law that is before this Court: is it a violation of the First Amendment to apply an antidiscrimination statute to a commercial but non-profit organization. The Court rejected the associational claim in Runyon for precisely the reason that it should be rejected here: no right or ability to advocate any point of view is infringed when a discriminatory membership policy is invalidated. 427 U.S. at 175-76.

In sum, the U.S. Jaycees fantasize a constitutional right that does not exist and ignore the judicially defined contours of the freedom of association that does exist.

B. Freedom of association does not protect discrimination in places of public accommodation.

This case does not present an issue of first impression, and the U.S. Jaycees totally fail to address authority at the state and federal levels holding that no freedom of association is infringed by state regulation of a public club or organization. See Note, Association, Privacy and the Private Club: The Constitutional Conflict, 5 Harv. C.R.-C.L. L. Rev. 460, 471 (1970). While members of a truly private group might have a constitutionally protected right to restrict membership, members of a club or organization deemed "public" have no such right. As Justice Goldberg wrote in his concurring opinion in Bell v. Maryland,

> "[A] claim of equal access to public accommodations . . . is not a claim which significantly impinges upon personal associational interests; nor is it a claim infringing upon the control of private property not dedicated to public use . . . . 'The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.'" 378 U.S. 226, 313-14 (1964) (quoting Marsh v. Alabama, 326 U.S. 501, 506 (1946)).

See also Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431 (1973).

At least thirty-eight states and the District of Columbia have public accommodations statutes,[5] and no constitutional challenge to any such statute has ever been sustained. As the Supreme Court noted in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), a case upholding the constitutionality of the federal public accommodations statute, 42 U.S.C. § 2000a:

> "[N]o case has been cited to us where the attack on a state [public accommodations] statute has been successful, either in federal or state courts. . . . [T]he constitutionality of such statutes stands unquestioned." 379 U.S. at 260 (emphasis added).

Under these statutes, courts use various criteria to determine whether an organization or group is "public" for purposes of applying various prohibitions on discrimination. These criteria include selectivity of

5 See Discrimination in Access to Public Places: A Survey of State and Federal Accommodations Laws, 7 N.Y.U. Rev. of L. & Soc. Change, 215, 233 (1978) [hereinafter cited as "Survey"].

the group in admission of members;[6] the existence of limits on the size of membership;[7] the degree of membership control over internal governance;[8] and advertising activities to attract members.[9] The most important factor has been an organization's membership practices. See United States v. Trustees of Fraternal Order of Eagles, 472 F. Supp. 1174, 1175 (E.D. Wis. 1979); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1203 (D. Conn. 1974); see also Wright v. Salisbury Club, Ltd., 632 F.2d 309, 312 (4th Cir. 1980).

Courts have applied these standards to invalidate discriminatory practices by groups and clubs that are no less "private" than the U.S. Jaycees: swimming clubs,[10] country clubs,[11] the Young Men's

6 Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); United States v. Trustees of Fraternal Order of Eagles, 472 F. Supp. 1174, 1175 (E.D. Wis. 1979); Castle Hill Beach Club v. Arbury, 2 N.Y.2d 596, 603-05, 142 N.E.2d 186, 188-89, 162 N.Y.S. 1, 4-6 (1957); Gillespie v. Lake Shore Golf Club, Inc., 91 N.E.2d 290, 291-92 (Ohio 1950).

7 Nesmith v. Young Men's Christian Association, 397 F.2d 96, 102 (4th Cir. 1968); Cornelius v. Benevolent Order of Elks, 382 F. Supp. 1182, 1203 (D. Conn. 1974); Wright v. Cork Club, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970).

8 Daniel v. Paul, 395 U.S. 298, 302-03 (1969).

9 Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976).

10 Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431 (1973); Clover Hill Swimming Club v. Goldsboro, 47 N.J. 45, 219 A.2d 161 (1966); Castle Hill Beach Club v. Arbury, 2 N.Y.2d 596, 162 N.Y.S. 1, 142 N.E. 186 (1957).

11 Vidrich v. Vic Tanny Intern., Inc., 102 Mich. App. 230, 301 N.W.2d 482 (1981); Wright v. Salisbury Club, Ltd., 632 F.2d 309 (4th Cir. 1980); Gillespie v. Lake Shore Golf Club, Inc., 91 N.E.2d 290 (Ohio 1950).

Christian Association,[12] and even fraternal organizations.[13] In a leading decision that paved the way for the decision of the Minnesota Supreme Court and the court below, Little League's exclusion of girls was held to violate a public accommodations law in National Organization for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33, aff'd mem., 67 N.J. 320, 338 A.2d 198 (1974).

Although the U.S. Jaycees try to relitigate the question whether they are a public or a truly private club, that issue was finally resolved by the findings of fact in the Minnesota administrative and judicial proceedings, which provided the stipulated record for the hearing conducted by the court below. 534 F. Supp. at 770-77. Using the same criteria employed by other courts in applying the "public" standard of anti-discrimination laws, the Minnesota Supreme Court determined that the U.S. Jaycees are unselective in their sale of memberships, strive for growth as an end in itself, recruit without any formal standards or procedures and set no limits on the size of the membership. 305 N.W.2d 764 (1981).

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12 Smith v. Young Men's Christian Association, 462 F.2d 634 (5th Cir. 1972); Nesmith v. Young Men's Christian Association, 397 F.2d 96 (4th Cir. 1968).

13 Commonwealth of Pennsylvania, Human Rights Commission v. Loyal Order of Moose, 448 Pa. 451, 294 A.2d 594, appeal dismissed, 409 U.S. 1052 (1972); Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970). See also United States v. Trustees of Fraternal Order of Eagles, 472 F. Supp. 1174 (E.D. Wis. 1979) (summary judgment denied to fraternal club in suit for violation of public accommodations law; club failed to sustain burden of proving it was a private club).

These conclusions were amply supported by the record. Members are referred to as "customers" and membership in the organization is referred to as "the product" or "the goods" in the organization's published material. Moreover, the sale of memberships occupies a tremendous amount of officers' time and recruitment achievement is recognized in the organization's awards system — more than half of which deal with "record breaking performance in selling memberships." 305 N.W.2d at 771. There are no published criteria by which members are selected, and no evidence in the record that any applicant for membership has ever been rejected -- except women applying for "full" membership rather than "associate" membership. On these particular facts, the U.S. Jaycees are clearly a "public" group having a "standing, open invitation to an unscreened, unselected, and unlimited number of persons from the general public." 305 N.W.2d at 773.

Thus the Minnesota Supreme Court broke no new ground in applying its public accommodations law to the U.S. Jaycees. Indeed, the U.S. Jaycees barely acknowledge the fact that tribunals in Massachusetts and Alaska have also held them subject to public accommodations laws in those jurisdictions. See Fletcher v. United States Jaycees, Nos. 78-BPA-0058-0081, Massachusetts Commission Against Discrimination (Jan. 27, 1981); Richardet v. Alaska Jaycees, No. 3AN-79-424 Civ. (Super. Ct. Sept. 18, 1980). Similar cases are also pending against the U.S. Jaycees in California and Pennsylvania.

The U.S. Jaycees seek to dispel the weight of these related proceedings by relying on a decision in Washington, D.C.[14] finding them not to be a place of public accommodation within the local statute, and on an earlier decision of this Court holding that no state action is involved in the organization's activities.[15] However, the District of Columbia Court of Appeals based its ruling on the specific definition of "place of public accommodation" in its Human Rights Statute, D.C. Code 1978 Supp. § 6-2201 et seq., a law that is very different from the Minnesota statute. Under the District of Columbia's statutory definition the U.S. Jaycees had no specific "place" and were not an "accommodation". With respect to the effect of this Court's earlier decision, Judge Murphy quite correctly pointed out that the state action issue has nothing to do with the issue of statutory coverage under a public accommodation law:

> "The absence of state action does not preclude an entity's being a public accommodation. There is no doubt that an organization may be regulated by government even if it receives no governmental funding, and such an organization can also be a public accommodation for constitutional purposes if it offers services and facilities to the public. See e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)." 534 F. Supp. at 772.

14 United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. App. 1981).

15 Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce, 508 F.2d 1031 (8th Cir. 1975). The same result was reached in New York Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975); Junior Chamber of Commerce v. United States Jaycees, 495 F.2d 883 (10th Cir.), cert. denied, 419 U.S. 1025 (1974)

Compare Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (held: granting a liquor license to the local branch of a national fraternal organization did not involve state action in the club's discriminatory practices) with Commonwealth of Pennsylvania, Human Rights Commission v. Loyal Order of Moose, Lodge 107, 448 Pa. 451, 294 A.2d 594 (held: the Lodge is a place of public accommodation under state law), appeal dismissed for want of substantial federal question, 409 U.S. 1052 (1972).

The U.S. Jaycees' associational claims should be rejected.

POINT 2

THE MINNESOTA HUMAN RIGHTS ACT IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD AND ITS APPLICATION IN THIS CASE, TO BAR THE DISCRIMINATORY PRACTICES OF THE U.S. JAYCEES, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The U.S. Jaycees claim that the Minnesota Human Rights Act, either on its face or as applied, is unconstitutionally "vague" or "overbroad" and violates the Equal Protection Clause. However, the U.S. Jaycees have failed to demonstrate even the most fundamental elements of these constitutional doctrines: that the statute provided inadequate warning that their discriminatory membership policies were prohibited; that the application of the statutory provisions to the U.S. Jaycees or to other organizations might impinge upon or threaten rights protected by the First Amendment; or that the statute somehow draws an irrational distinction between "public" and "private" organizations and unfairly discriminates against the U.S. Jaycees.

A. The Minnesota Human Rights Act is not unconstitutionally vague.

The vagueness doctrine, based on the due process requirements of the Fourteenth Amendment, requires legislative enactments to be clear and definite enough to give persons of ordinary intelligence fair warning of what is prohibited. The U.S. Jaycees' vagueness argument, directed to Section 363.01(18) of the Human Rights Law defining "place of public accommodation," asserts that the statute, as interpreted by the Minnesota Supreme Court, fails to give the necessary fair warning and invites arbitrary law enforcement because organizations are "left to guess" as to whether they are public (and therefore within the statutory scope) or private (and therefore exempt). The U.S. Jaycees further contend that the statute must be constitutionally tested for vagueness under a particularly strict standard of review because its prohibitions impinge upon the First Amendment rights of it and other organizations that choose to restrict membership and because the statute contains some provisions for criminal enforcement.

While it is true that statutes dealing with activities protected by the First Amendment or threatening criminal penalties are subject to stricter judicial scrutiny under the vagueness doctrine, neither factor is present here. As to the first, we have already demonstrated that the statute does not threaten any recognizable right of association or other rights derived from the First Amendment so far as the U.S. Jaycees are concerned.[16] As to the second, there has been no criminal action commenced in this case, and none is threatened.

16 To the extent that the U.S. Jaycees rely on the alleged infringement of the First Amendment rights of other organizations, it lacks standing to raise such a claim. See, e.g., Parker v. Levy, 417 U.S. 733, 756 (1973).

We submit, therefore, that the proper constitutional test by which to judge the Minnesota Human Rights Act is that set forth by this Court in Horn v. Burns and Row, 536 F.2d 251, 254 (8th Cir. 1976):

> "[a] noncriminal statute is not unconstitutionally vague . . . when its terms are such that the ordinary person exercising common sense can sufficiently understand and fulfill its prescriptions."

In evaluating claims of vagueness, courts look to the general usage of the statutory language, other judicial interpretations of the same terms and application of the language in other cases to the same or similar conduct. See, e.g., Rose v. Locke, 423 U.S. 48, 49-53 (1975).

The U.S. Jaycees' "no fair warning" argument must be evaluated in terms of the reality that a vast majority of states have public accommodations laws, substantially similar to the Minnesota Human Rights Act, and which raise the same or analogous issues of interpretation -- including the critical question of whether an organization is public or private.[17] In addition, there are several federal statutes, including Title II of the Civil Rights Law of 1964, 42 U.S.C. § 2000a(a), that bar similar types of discrimination and raise similar issues. Id.[18] These statutes have led to the development of a substantial body of law on precisely those issues that are at the heart of the U.S. Jaycees' vagueness claim.

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17 See generally, Survey, supra, 7 N.Y.U. Rev. L. & Soc. Change at 217, 238-40 (1978).

18 The Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982 and the Civil Rights Act of 1871, 42 U.S.C. § 1983 have also been successfully used to attack discrimination in public accommodations. See cases cited at Survey, supra, 7 N.Y.U. Rev. L. & Soc. Change at 226-32.

With respect to the Minnesota Human Rights Act, that State's Supreme Court decision is a well-reasoned interpretation of clear and precise statutory language,[19] with a compelling legislative history.[20] See 305 N.W.2d 764. As the district court pointed out, the Minnesota legislature has "demonstrated its commitment" to eliminating sex discrimination by specifically providing that: "It is the public policy of this state to secure for persons in this state, freedom from discrimination . . . in public accommodation because of . . . sex . . . ," Minn. Stat. § 363.12, and by specifically directing that the public accommodations law is to be "construed liberally for the accomplishment of the purposes thereof." Id. § 363.11. That is exactly what the Minnesota Supreme Court did when it examined three key words in the statute -- "business", "public" and "facility" -- in light of their accepted meaning and interpretation of the same or similar terms in the legislation of other jurisdictions.

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19 The statute makes it an "unfair discriminatory practice" to deny "any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex," Minn. Stat. § 363.03(3) and defines place of public accommodation broadly as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public." Id. § 363.01(18).

20 The provision was enacted in 1967 as part of a significant expansion in statutory coverage. The legislature retained a prior section, which barred discrimination in a limited enumerated set of places, and added the open-ended language that focused less on the places where discrimination was barred, and more on the type of conduct that would bring an organization or entity within the statutory coverage. See 305 N.W.2d at 766-68.

In sum, the U.S. Jaycees cannot seriously argue that the language of the Human Rights Act was not understandable to "ordinary persons exercising common sense" (Horn v. Burns and Row, supra) or failed to give prior notice.

The second leg of the U.S. Jaycee's vagueness claim -- the claim of arbitrary enforcement -- can be summarily rejected. This branch of the vagueness doctrine is used exclusively in criminal contexts and has no applicability to what is essentially a civil or administrative statute. It arises out of a concern that uncertain statutory language "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). In any event, for all of the reasons stated above, the Minnesota statute is sufficiently clear to guide any enforcement authority.

B. The Minnesota Human Rights Act is not unconstitutionally overbroad.

The overbreadth doctrine is in many ways the opposite side of the vagueness coin. The doctrine provides that a statute that is clear and precise enough to survive a vagueness challenge may nonetheless be unconstitutional if it encompasses within its prohibitions activities that are protected by the First Amendment. See Grayned v. City of Rockford, 408 U.S. 104 (1972). In addition, unlike the vagueness doctrine, a claim of overbreadth can be made by a litigant on behalf of

third parties to protect such persons from the chilling effect of the challenged legislation on First Amendment rights. The U.S. Jaycees appear to be claiming that the Minnesota Human Rights Act is unconstitutionally overbroad because its threatened application infringes upon the associational rights of other groups -- the Sons of Norway, B'nai Brith, the Black Muslims -- groups which may not even operate in Minnesota, which may even have nondiscriminatory membership policies and which might be characterized as "private" under the limiting construction given the statute by the Minnesota Supreme Court.[21]

The U.S. Jaycees do not bother to say what First Amendment rights are endangered or how, other than to assert the fact that a ban on discriminatory membership practices would require the Norwegians to mix with the non-Norwegians, the Jews to mix with the non-Jews, and the Black Muslims to mix with the white supremacists. Such speculation is not ripe enough to engage the serious consideration of this Court. The mere assertion that a statute might have a chilling effect on the First Amendment rights of some third parties does not confer standing to test that issue. Bigelow v. Virginia, 421 U.S. 809, 816-17 (1975).

21 "Private associations and organizations -- those for example that are selective in membership -- are unaffected [by the statute]." 305 N.W.2d at 771.

C. The Minnesota Human Rights Act does not violate equal protection.[22]

The U.S. Jaycees' final claim is that the application of the Minnesota Human Rights Act somehow violates the Equal Protection Clause of the U.S. Constitution. The U.S. Jaycees appear to be arguing that the legislation improperly makes a distinction between public and private organizations, or, more narrowly, between them and the Kiwanis.

As a first principle, a legislative classification will be upheld against an equal protection challenge so long as it bears "some rational relationship to legitimate state purposes." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 40 (1973) 427 U.S. 307, 314 (1976). The U.S. Jaycees do not dispute that Minnesota's goal of barring discrimination on the basis of sex is legitimate. They are therefore left with the argument that the classification chosen, distinguishing between public and private organizations, does not bear a reasonable relation to that goal. They take this postion despite the fact that numerous state and federal statutes make precisely the same distinction and none have been declared unconstitutional. See Clover Hill Swimming Club v. Goldsboro, 47 N.J. 45, 219 A.2d 161 (1966) (rejecting equal protection challenge to New Jersey public accommodations statute). Moreover, the Supreme Court held, as recently as last month, that "a legislature must have substantial latitude to establish

22 Although an equal protection claim was raised by the original pleadings, the U.S. Jaycees did not pursue it in the Court below. They now argue that the claim was "subsumed in its presentation before the lower court." U.S. Jaycees Brief at 47.

classifications that roughly approximate the nature of the problem perceived," Plyler v. Doe, No. 80-1538, 50 U.S.L.W. 4650, 4654 (U.S. June 15, 1982). Surely Minnesota could rationally determine that it is discrimination by public facilities and organizations that is most detrimental to society.

To the extent the U.S. Jaycees claim that the statute, as interpreted, discriminates against their organization and in favor of the Kiwanis, they fail even to allege the most basic element of a claim of discriminatory enforcement -- that there is some unjustifiable standard guiding the enforcement scheme. Oyler v. Boles, 368 U.S. 448, 456 (1962); Snowden v. Hughes, 321 U.S. 1, 8 (1944). The continued references to the Kiwanis throughout the U.S. Jaycees Brief[23] seem less an attempt to raise a serious constitutional issue than an expression of inter-organizational rivalry and an attempt to relitigate the final determination of the Minnesota Supreme Court that the U.S. Jaycees fall within the statute, a determination which even they concede is res judicata for purposes of this litigation.[24] In any event, as the court below found, the record in this case does not contain sufficient evidence as to the activities of the Kiwanis or other groups to determine whether the statute would apply to their activities. "Speculation by the Jaycees as to the future application of the statute to other organizations does not provide a sufficient basis to undermine its constitutionality." 534 F. Supp. at 773.

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23 U.S. Jaycees Brief at 15, 27, 35, 41, 43, 48, 49.

24 Id. at 6.

CONCLUSION

The U.S. Jaycees seek a reversal of the decision below by challenging the constitutionality of a state public accommodation law that is indistinguishable from existing federal and state statutes that have been upheld and enforced for decades. By attempting to align themselves with minority groups who have fought long and hard to exercise their constitutional freedom to express an unpopular view or pursue an unpopular goal, the U.S. Jaycees try to elevate the significance of this case. If the U.S. Jaycees seek to continue the solicitation and enlistment of members in the State of Minnesota, they must offer their women members the same rights as their male counterparts: the right to vote, the right to hold office and the right to receive recognition for their accomplishments within the organization. If, on the other hand, the U.S. Jaycees choose to continue to associate with women but to discriminate against them by offering an inferior membership status, then the U.S. Jaycees must restrict their activities to jurisdictions that are less committed than Minnesota to the full and equal enjoyment of goods, services and facilities offered within its boundaries.

Respectfully submitted,

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Dated: July 15, 1982
New York, New York

AFFIDAVIT OF
SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Carolyn Pellegrino, being duly sworn, deposes and says:

I am not a party to the action, am over the age of eighteen and reside at 63-95 Austin Street, Rego Park, New York 11374.

On July 15, 1982, I served the Brief of the Minnesota State Chapter of the National Organization for Women as amicus curiae in United States Jaycees v. McClure, No. 82-1493-MN on:

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by depositing two true copies of same, enclosed in a properly addressed postage prepaid envelope, in an official depository

under the exclusive care and custody of the United States Postal Service in New York.

Carolyn Pellegrino

Sworn to before me this
15th day of July.

Joan Weber

Notary Public

JOAN WEBER
Notary Public, State of New Yor
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Qualified in Nassau County
Commission Expires March 30, 19 83