In the

Supreme Court of the United States

MOOSE LODGE NO. 107,	)	
Appellant,	)	
vs.	)	No. 70-75
K. LEROY IRVIS, et al.,	)	

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Pages 1 thru 44

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K. LEROY IRVIS, et al. :
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- x

Washington, D. C.
Monday, February 28, 1972

The above-entitled matter came on for argument

at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

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Washington, D. C. 20006.

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Frederick Bernays Wiener, Esq.,
for Appellant 3

Harry J. Rubin, Esq.,
for K. Leroy Irvis, et al. 20

Rebuttal by Mr. Wiener 42

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 70-75, Moose Lodge against Irvis.

MR. WIENER: Mr. Chief Justice--

MR. CHIEF JUSTICE BURGER: Would you just suspend for one moment, Mr. Wiener.

Mr. Wiener, you may proceed.

ORAL ARGUMENT OF FREDERICK BERNAYS WIENER, ESQ.,

ON BEHALF OF THE APPELLANT

MR. WIENER: Mr. Chief Justice, may it please the Court:

The substantive issue in this case is whether anything in the Constitution of the United States requires the virtual destruction of private clubs in this country. But before I can reach that question, the rules require that I reach the jurisdictional issue which the Court postponed. Before I can usefully do either, I must briefly sketch the facts.

The appellant, Moose Lodge, is a private club in every respect, and the parties have so stipulated in detail. It has selective and invitational membership procedures. Admission to the clubhouse is restricted to members and their guests. It has never received and isn't now receiving any public funds. This clubhouse is not located on public property. It performs no public functions.

It conducts no community activity. It has never asked for public assistance either from courts or police in the conduct of its affairs.

It has never sought public patronage through advertising. It is not a recent transformation. There is no sham or subterfuge here. It is a non-profit corporation controlled by its membership, and the objects of its bounty are Moose House, which is an orphanage and school, and Moose Haven, which is a home for the elderly.

Here is all that Moose Lodge receives from public bodies. It has an occupancy permit for its building. It has an operating permit for its elevator. It has a health permit for its restaurant. It gets also what every private resident within the city limits gets--water, steam heat, and trash removal, for which it pays. And it has a club liquor license from the Commonwealth.

Moose Lodge's membership is restrictive as is that of other clubs and organizations in this country that include more than 70 million Americans. Restrictions are, first, male; second, caucasian and not married to a non-caucasian; third, belief in the Supreme Being.

I had better read from the Court's findings as to how this case arose.

"A caucasian member in good standing brought plaintiff, a Negro, to the Lodge's diningroom and bar as

his guest and requested service of food and beverages. The Lodge, through its employees, refused service to plaintiff solely because he is a Negro. Thereupon, the plaintiff, Mr. Irvis, who is the Majority Leader of the Pennsylvania House of Representatives, brought this action against the Moose Lodge and the members of the Pennsylvania Liquor Control Board, alleging the unconstitutionality of the Pennsylvania Liquor Code as applied because it did not prohibit the issuance of club licenses to clubs with racial membership restrictions."

The three-judge court held that liquor regulation by Pennsylvania was so pervasive that Moose Lodge's membership restrictions were thereby transformed into state action. But it made a significant qualification which I had better read in preference to characterizing. This is from page 40 of the appendix.

"Nothing in what we here say implies a judgment on private clubs which limit participation to those of a shared religious affiliation or a mutual heritage in national origin. Such cases are not the same as the present one where discrimination is practiced solely on racial grounds," and the judgment was that either the Moose Lodge had to drop its racial restrictions or else lose its liquor license.

Moose Lodge moved to modify that judgment so as to

permit Mr. Irvis guest privileges. He opposed that. It was denied by the Board. This appeal followed and Your Honors postponed jurisdiction. Under the rules, I must argue that jurisdictional point first.

Q What specifically was Moose Lodge's motion to amend the judgment? Where in the record is that?

MR. WIENER: That is at page 42 of the appendix. There is an answer at page 44, and the motion was denied.

Q The effect of it would have been to--

MR. WIENER: Permit any member to bring Mr. Irvis in as a guest.

Q Only Mr. Irvis?

MR. WIENER: Anybody similarly situated.

Q Anybody similarly situated.

MR. WIENER: Yes.

Now, one of the points on which we agree with Irvis is that the complaint did indeed state a cause of action within the jurisdiction of the three-judge court, because it was an action to enjoin statewide legislation on the ground that as applied it denied the plaintiff the equal protection of the laws. It was not like that Texas University case where the legislation wasn't of statewide application. It wasn't like that Native American Church case where some of the members of the court couldn't find an allegation of unconstitutionality. Here that allegation

was made. I don't think it would be profitable or helpful to the Court for me to discuss the cases in detail. They are all set out in our brief.

We think that even though jurisdiction originally attached--and, of course, the touchstone is the complaint--it was thereafter lost, and it is our view that there is no present case or controversy because the decree gives Irvis no personal redress but, to the contrary, is a judgment punitive in character and legislative in its application.

It was stipulated that the loss of a liquor license would seriously impair Moose Lodge's ability to contribute to the benevolent purposes of the Supreme Lodge. Irvis didn't ask for damages. He didn't sue as a taxpayer. He didn't bring a class action. He doesn't seek membership. He repeatedly conceded here and below the right of the Moose Lodge to exclude him. And he repeatedly said there was nothing illegal in its doing so. And he rejected modification of the judgment which would have let him in as a guest. So that all he wants is to have the Moose Lodge lose its liquor license, and we say he has no personal stake in that anymore than any of the other 12 million inhabitants of the Commonwealth.

Q You are saying there is no longer a case or controversy?

MR. WIENER: Yes, Your Honor.

And having done our duty by raising the jurisdictional question, I pass to the substantive issues. But by way of essential preliminary I must deal with the District Court's suggestion, that there is somehow a difference between racial restrictions, on the one hand, and religious or ethnic restrictions on the other. Now, that, to put it most gently, is completely mistaken.

There is no constitutional distinction whatever between state action that discriminates either on racial or religious or ethnic grounds. It is simply not true that the Constitution sustains the anti-semite while denouncing the anti-Hamite. It is simply not true that some groups are entitled to more equal protection than others.

What this purported distinction really does is a picking and choosing among associations and groups on the basis of their beliefs and preferences which seems to me a most glaring denial of due process, because all three restrictions are equally bad if the membership requirements are indeed state action. And, interestingly enough, that is one of the few points on which the Attorney General of the Commonwealth agrees with us. He says they are all equally bad.

Therefore, if the private club with the racial

restriction can't have a liquor license because those restrictions are state action, then neither can any other private club with religious or ethnic distinctions. So that if the judgment below is correct, scores of millions of Americans now associated in all manner of private clubs can't have liquor licenses either. And since precedents invariably build on each other, the next will be they will risk losing building permits, restaurant permits, and all the rest. Irvis says they are all different, but there is a Maine statute that makes the racially restrictive club lose its restaurant permit also while not taking it away from the religiously or ethnically restrictive club.

Fortunately for the continued pluralistic existence of the Republic, and the Elks' brief amicus documents the statement that we are indeed a nation of joiners, the decision below is wrong for three separate reasons which I shall discuss in order.

First, the First Amendment right of associational privacy protects private clubs and fraternal organizations from any and all state effort directed at the full exercise and enjoyment of that right.

Second, the issuance of a liquor license does not and cannot transform the acts of the licensee into those of the licensing authority.

And, three, Congress in the Civil Rights Act of

1964 has twice drawn a line between these apparently competing constitutional rights by excepting from the public accommodations title private clubs not in fact open to the public and by forbidding the Civil Rights Commission from investigating the membership practices and the internal operations both of private clubs and of fraternal organizations. And I will take first the right of associational privacy which, it seems to us, can be viewed either negatively or affirmatively.

Negatively it is the proposition that social rights are not enforceable in the courts or by law; and for this proposition I draw on the dissenting opinion of the Elder Justice Harlan in the civil rights cases. I had better give that citation because it's not in the brief. 109, U. S., at 59.

"I agree that government has nothing to do with social as distinguished from technically legal rights of individuals. No government has ever brought or ever can bring its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has no concern.

"I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to law for his conduct in that regard. For

even upon grounds of race no legal right of a citizen is violated by the refusal of others to maintain merely social relations with him."

That, as I have indicated, is the dissenting opinion. But it is in an area where the dissents of the Elder Justice Harlan have now more weight than those of the Court.

Affirmatively there is a right of--a constitutional right of liberty of association which is documented by many decisions of this Court and which amounts to this, that in my home and in my club and in my choice of business associates I can act on my prejudices, even those of race. My preferences may be enlightened, they may be eccentric, they may be bigoted, they may represent prejudices, they may represent postjudices. But in my private domain I can exclude whom I want and for any reason. And as indicated there is no doubt here about the--

Q Wouldn't the logical conclusion from that affirmative statement of the right of privacy be that the state couldn't choose to prohibit the type of discrimination that was found here?

MR. WIENER: I think very clearly so. The analogy that we used in the brief was the doctrine of unconstitutional conditions. Your Honor will recall anti-removal statutes. The basis, the rationale, for striking down those

statutes was that the state cannot interfere with the exercise of the federally guaranteed right. So that the answer is--the short answer, Your Honor, is yes. The state can't interfere. The right to pick one's associates from among those like-minded is an area beyond governmental cognizance and the result below really strikes a wounding blow at human privacy.

Q You wouldn't carry that to the extent of saying it would be illegal for Pennsylvania to deny a liquor license to establishments that discriminate?

MR. WIENER: If they're private, I would. Oh, definitely, definitely; because if it's private, you can discriminate. If it is a public place, no, clearly not. But this is private. The club is just an extension of the home. In Evans v. Newton the Court said that if you have a golf club that's all white or a golf club that's all black, that's the right of private association. But if you have a municipal golf course, then you can't discriminate.

So, I would say as long as it is private, the state can no more lift the license of Moose because it is limited to caucasians only or to those who aren't agnostics or atheists than it can lift the license of the Knights of Columbus Council, which is restricted, I am told, to practicing Catholics, or the liquor license of the Knights of Peter Claver, who are black, male, and Catholic. So that

if it is a bona fide private club--of course, I am excluding the shams and the subterfuges and--

Q So, you would treat the liquor license like water or electricity?

MR. WIENER: I would. There isn't much difference because, Your Honor, once you say the liquor is special, we get to the restaurant license. Now, my brother says the restaurant license is different. The State of Maine says no. Irvis in his last brief espouses the proposition from a recent three-judge court case that anybody who discriminates can't have solace from the government. That means that where you cut off the water, because how many homes in this country get water from other than public bodies, and you would cut off power in large parts of the west, urban and rural, because of the vast proliferation of municipal power plants. So that if you can cut off a liquor license, you can step by step cut off all the rest if you agree with the three-judge District Court that no discrimination can receive any solace. And I want to emphasize there is no difference between racial, religious, or ethnic. After all--

Q Is this position essential to your prevailing in this case?

MR. WIENER: Well, I have three positions. And the second one is, which I'll--one is the affirmative right

to privacy and the inability of law or government to dictate social relations. The second proposition for reversal is that the issuance of the license doesn't transform or transmute or metamorphose the acts of the licensee into those of the licensor.

I want to emphasize the shaky and indeed sandy foundation on which the notion of state action was erected in this case. A caucasian member in good standing brought plaintiff, a Negro, to the Lodge's diningroom and bar as his guest and requested service of food and beverages. The Lodge, through its employees, refused service to plaintiff solely because he was a Negro.

Well, this is an action against the Liquor Control Board to lift the liquor license. What did the Liquor Control Board have to do with the refusal to serve food? And there is nothing in this finding by the Court that says that the Commonwealth had anything to do with this refusal of service. Because, after all, you can hardly exist nowadays without some kind of--a whole series of licenses from state and federal authorities.

If I may interject a personal note, I need four licenses to be here at this lectern speaking to Your Honors. First I had to be admitted to a state court. Then I had to be admitted here. Then I had to be admitted in the District. And now every year I have to pay a professional license fee

to the District to be able to practice my profession and gain my livelihood. If you drive an auto on the highway, you need a driving license, you need a car registration, and in many, perhaps most, states you need an annual safety inspection.

If you operate a teetotaler club or a locker system club, you need an occupancy permit, an elevator permit, and a restaurant permit. Those essential licenses don't turn the lawyer or driver into a public utility who is required to serve all comers. And those licenses don't turn a private club into a place of public accommodation.

Q If your adversary is correct, Mr. Wiener, in your view is the so-called bottle club in the same category as the licensed liquor dispenser?

MR. WIENER: I am told that having a locker system--that is, every member having his stick a stock of liquor in your locker, not selling liquor, not buying liquor from the club--that that would not require a liquor license.

Q But the state has a monopoly on the liquor and it's selling it, isn't it?

MR. WIENER: Yes, but the state doesn't say that if you buy a bottle of Old Oberholt and take it to your home you can't exclude people you don't like.

Q I know it doesn't say that, but it is nevertheless selling the liquor to enliven a party that may

discriminate against--

MR. WIENER: Well, that's the extent to which you would go. And the irrationality of the decision becomes apparent when you look at some of the other restrictions. Regulation 119 deals with sacramental wines. By parody of reasoning, that would be an unconstitutional support of religion. And we think there just isn't any state action here. And as I've said, if any benefit is the touchstone, nobody can have electric light or electric power if you are going to discriminate in your home.

Q Isn't your argument really that there may be state action but there is no state action that denies equal protection of the law?

MR. WIENER: Exactly. In other words, the position that we take on that is the position that Your Honor and Justice Black and Justice Harlan took in Bell against Maryland, that you can't attribute to the licensing authority discriminatory acts on the part of licensees. It's too big a jump.

Q Mr. Wiener, you have said that Pennsylvania doesn't call for any license of a so-called locker club. Are there some states that do require it?

MR. WIENER: Your Honor, I am not an expert on liquor regulation in the several states. But if you say that Pennsylvania is so pervasive, you are going to have to

test the other 50 states to see whether there is a difference.

The notion that the Court below espoused that liquor regulation was more continuous than other regulations, the bar isn't regulated any more continuously than the restaurant. And as for the so-called pervasive regulation, what is pervasive? Look at building codes; look at building codes. This is the Pennsylvania Liquor Code. This is the Building Officials' Conference of America--BOCA--basic building code. My figures are that some 800 municipalities have adopted these codes in whole or in part.

Now, I don't think that one is more pervasive than the other, and I think you're going to have an awful time if you are going to try to compare every area of regulation against liquor regulation to see whether one is or is not pervasive. I just think that to say that the pervasiveness of a regulation transforms the acts of the licensee into those of the licensing authority is just to rewrite the Constitution. The Constitution says no state shall deny to any person within its jurisdiction the equal protection of the law. It doesn't say no person licensed by a state. It doesn't say no person pervasively licensed by a state. And, indeed, Your Honors, our entire recent constitutional history warns against too great departures from the text.

Take liberty of contract. What a sorry chapter that was from Lochner v. New York through Moorehead against Depell. Or take the immunity of governmental instrumentalities which emphasizes the value of looking to the text rather than its exigesis.

Mr. Justice Frankfurter, when that doctrine was overruled, said this: "The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution rather than to be primarily controlled by a fair conception of the Constitution. Judicial exigesis is unavoidable with reference to an organic act like our Constitution drawn in many particulars with purposeful vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." And the Constitution says no state.

The third ground for reversal is the congressional action in the Civil Rights Act of 1964. There are two provisions. First, is Section 203(e) which exempts from the operation of the public accommodations title private clubs that are not in fact open to the public. And then perhaps even more significantly, the Section 504(a) which forbids

the Civil Rights Commission from examining the membership practices and the internal operations of private clubs and fraternal organizations. And that is the commission, if Your Honors please, that Congress directed to collect information concerning the denial of equal protection and they weren't to look into private clubs.

Congress, as the legislative history shows, wanted to protect the constitutional right of private association from interference by the commission, and that's clear from the legislative history.

Finally, there is a 13th Amendment point which has been raised. Up to page 39 of his brief here, Irvis said, "The injury suffered by Irvis was not just that a private organization barred him because he was black. This it was entitled to do." But 70 pages later he contends that to have barred him was a badge or incidence of slavery. Well, now, that just doesn't wash because the Moose restriction is caucasians only. That bars American Indians. American Indians not only were never systematically enslaved but they had Negro slaves of their own, the freedmen of the Choctaw, Chickasaw, and Seminole Nation. So that clearly caucasians only is not a badge or incident of slavery.

So that we say jurisdiction isn't lost or if it can't be regained by amendment, the judgment below must be

reversed with directions to dismiss for failure to state grounds for relief.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wiener.

Mr. Rubin.

ORAL ARGUMENT OF HARRY J. RUBIN, ESQ.,

ON BEHALF OF K. LEROY IRVIS, et al.

MR. RUBIN: Mr. Chief Justice, and may it please the Court:

Like Mr. Wiener, I would like to begin with a brief discussion of the preliminary jurisdictional issue which the Court has asked us to argue. And I would like to note, as Mr. Wiener did, that both parties are agreed that three-judge court jurisdiction was proper in this case and therefore approach the issue from another angle. I would like to approach it from the standpoint of what this case is not with respect to the three-judge court problem, and I would take my text from the citations which appeared just a little over a month ago in this Court's opinion in Board of Regents, the citations twice, as I recall, to the case of Phillips v. The United States or, I believe in this Court, The United States v. Phillips, in which Justice Frankfurter discussed the three-judge court problem in some depth and pointed out that the touchstone in these cases where we have legislative action or administrative action is whether or not there has been some lawless exercise of

authority by some administrative agency of the Commonwealth of Pennsylvania in this case or some state official in the Phillips case. And I think when you phrase or cast this case in terms of whether or not there has or has not been a lawless exercise of authority, you realize that this is not the Phillips case. This is a case in which the state liquor board, acting pursuant to powers granted to it only by the state liquor code and acting strictly in accordance with the provisions of that state liquor code, has granted and renewed a license to a private club in conformity with the provisions of that state liquor code.

Consequently, this case does not involve the type of lawless, unauthorized administrative action which the Court in the Phillips case held would preclude three-judge court jurisdiction.

I think it goes without saying, of course, that this is not a case like Board of Regents. This is not a case in which only a purely local issue is involved. This is a case in which a statewide statute affecting statewide policy of statewide application is presented to the Court. I think we need not dwell on that particular aspect of the three-judge court problem.

I would point out that this case goes further than a case in the area of liquor regulation in which this Court has upheld three-judge court jurisdiction. In the

case of Idlewild v. Epstein, the New York liquor case involving the store at the New York airport, the Court upheld three-judge court jurisdiction there in an attack on a special provision of the New York liquor law which applied only to one particular complainant, the Idlewild Liquor Shop at the New York airport, that shop claiming that it was not required to get a license because of its peculiar operations in which it sold only to passengers in foreign commerce.

Well, our case is much broader than that. Our case involves a statewide application of Pennsylvania's liquor laws to hundreds of statewide and local club organizations. Consequently, if Phillips is good law, if Idlewild is good law, if Board of Regents is good law, as I urge that they all are, then this case does present a case for three-judge court jurisdiction and does present a case for appeal to this Court from the decision of the court below.

Q Could I ask you, what happened to the litigation in the Pennsylvania courts?

MR. RUBIN: Yes, Mr. Justice White. The Pennsylvania Human Relations Commission--and I speak only from hearsay, we have nothing to do with that case nor did my client have anything to do with that case--the Pennsylvania Human Relations Commission itself brought an

action in state courts seeking to hold that this private club was in fact a place of public accommodation I believe on the ground that because it allowed guests to enter it should then be so held to that extent.

Q Under the Pennsylvania law.

MR. RUBIN: Under the Pennsylvania law. That case, that argument was rejected by the Court of Common Pleas of Dauphin County in Harrisburg. On appeal of the Pennsylvania Superior Court it was again rejected, and the decision of the court below was affirmed. It was held that this was not a place of public accommodation.

Q Did it go to the Supreme Court?

MR. RUBIN: I understand that the Human Relations Commission has filed a petition to the Pennsylvania Supreme Court requesting the Supreme Court to hear it and as best I know, no action has been taken on that petition.

Q So, that issue is still pending in Pennsylvania?

MR. RUBIN: That issue would be considered still pending.

Q There was no constitutional issue involved in that case?

MR. RUBIN: There was none.

Q Any issue under the state law as to whether or not it's a place of public accommodation?

MR. RUBIN: As the Human Relations Commission has

brought it, under Pennsylvania's Human Relations Act.

Q Right, I understand. Under the state statute. And in this case, as I understand it further, it is conceded that for purposes of the constitutional issue before us that this is a bona fide private club.

MR. RUBIN: That is correct, Mr. Justice Stewart; we have uniformly taken that position from the beginning of the case.

Q Would this require an all-black club--

MR. RUBIN: I think an all-black club whose only purpose was to provide social and fraternal amenities to its membership would be in the same position.

Q And--but you do--anything to do with rates. How about an all-Italian club?

MR. RUBIN: Mr. Wiener has raised the question based on the lower court statement about ethnic clubs, religious clubs, and we have answered it this way at great length in our brief.

Q Well, you just say no and--

MR. RUBIN: The answer is yes and no, Mr. Justice White. And the answer is this way. There are bona fide private clubs whose purposes involve ethnic distinctions. That is, in the brief that has been filed by the Elks there are literally hundreds of clubs of, say, ethnic Americans who are together in private organizations for the purpose of

furthering their ethnic histories, their ethnic traditions, their ethnic backgrounds. If that club is bona fide and once we have passed the special scrutiny that race requires in these matters, then there is no reason why that club cannot discriminate on those grounds as we see it, because the purpose of the discrimination is a rational one; it is not what this Court has called invidious discrimination.

It is true they may exclude someone who is not of that ethnic origin. But the purpose of the club being in existence is a reasonable one. It is not just a social purpose.

Q What about all-male clubs?

MR. RUBIN: All-male clubs?

Q Or all-women clubs?

MR. RUBIN: We still don't have a constitutional amendment, as I believe, forbidding discrimination on grounds of sex.

Q That's the equal protection clause though.

MR. RUBIN: As far as I know, there has been no ruling on that point.

Q What's your position on it?

MR. RUBIN: On all-male clubs?

Q Yes.

MR. RUBIN: I would have to rely on the feeling that since we do not yet have a constitutional amendment

specifically stating that, the equal protection clause does not provide that type of protection.

Q So, that's just across the board. Say a restaurant refuses to--

MR. RUBIN: No, a restaurant is normally a public place. The person who is entitled to go--

Q So, the equal protection clause would protect--

MR. RUBIN: The restauranteur has waived any rights to privacy.

Q I'm just saying the women would have an equal protection claim there.

MR. RUBIN: Yes, in that respect.

Q I got interested years ago in the Moslem religion and in Moslem churches around the world, but I have never been able to get into the Black Moslem Church. They always stopped me at the door. Is that unconstitutional?

MR. RUBIN: I would probably have to ask further why you were stopped at the door.

Q Because I was white.

Q The answer is they're Muslims, not Moslems.

[Laughter]

MR. RUBIN: Like Mr. Wiener in his discussion of liquor laws, I am going to have to retreat to the point of

saying I know little enough about that to try to expound on the depths to which that would go. We know how far we would go when we're discussing this particular problem. I am not sufficiently familiar with the Black Muslims.

I do want to mention one other thing, however, in connection with the preliminary issues or what I would call the preliminary issues, and that is this question of whether there is or is not a case or controversy here. Mr. Irvis initiated this case seeking only one thing. He was only seeking to preclude the Commonwealth of Pennsylvania from giving solace or support or comfort to the discriminating private club by issuing this liquor license to it. He never at any time requested membership in the Moose Lodge because we respect the right of Moose Lodge as a private club to determine its own membership requirements.

He did not seek damages because the nature of the deprivation that is involved here would make redress by way of damages insufficient and inadequate. This is a continuing type of discrimination that takes place which would involve the Commonwealth of Pennsylvania over and over and over again.

Therefore, it seemed to us--and we assume the lower court agreed--that the proper redress here is to sever the relationship between the discriminating private

clubs and common law.

Q Would you say then that if he had never been denied entrance to the club and nevertheless brought this suit, that he would have a proper case?

MR. RUBIN: Yes. I think that result inevitably follows, Your Honor.

Q So that you're saying that any black person, any Negro, could have brought this suit and should be given the standing to litigate this action.

MR. RUBIN: That's correct. The problem would then only be one of proof--that is, Does the Moose Lodge in fact exclude Negroes? There obviously would have been no proof problem. Here our proof was supplied by the fact that Mr. Irvis was excluded, so we didn't have that problem.

Q His being denied entrance was just a way of proving the discrimination.

MR. RUBIN: It was the catalyst which proved our point.

Q What about a white person raising the same issue?

MR. RUBIN: I think the white person who was the member of the Moose Lodge--

Q Any citizen could raise it, I suppose.

MR. RUBIN: I'm not that certain. I think that a black person, any person who is discriminated against, has

a special standing.

Q Whether he was discriminated against at the club or not, I take it.

MR. RUBIN: Yes, I think that's true.

Q Did Mr. Irvis want his drink?

MR. RUBIN: Mr. Irvis was taken to the club by a white member. They sat down at the bar. I understand that they requested food and beverage and were refused.

Q Why is that not in the stipulations?

MR. RUBIN: I believe it is, Your Honor.

Q It is? I'll take your word for it if it is.

MR. RUBIN: Yes, on page 32 of the appendix, Mr. Wiener points out in the opinion of the Court food and beverage were requested.

Q I just read the stipulation.

MR. RUBIN: Food and beverage were requested.

Q My whole point was all you want was to get the liquor license.

MR. RUBIN: That's correct.

Q And how much good will that do Mr. Irvis?

MR. RUBIN: It will put Mr. Irvis in the position of being a Negro citizen of the Commonwealth of Pennsylvania who knows that a private club is not being aided by the Commonwealth of Pennsylvania in its discrimination.

Q What about the restaurant license?

MR. RUBIN: The restaurant license? The restaurant license like--and I would answer Mr. Justice White's point on this same thing--we think of the restaurant license, the building permit, the supply of water, the supply of electricity, as being in a totally different category from this liquor license, and there are several reasons for that.

First of all, the restaurant license, the building permit, are supplied to the Moose Lodge as they are supplied to any public--any person, any organization, for the benefit of the public. It's for public health and safety. They are open to all persons. Water and electricity is supplied to all persons generally. The function of government. The liquor license is not in that position.

Q I was talking about the restaurant license. I didn't say one mumbling word about--

MR. RUBIN: The restaurant license, Mr. Justice Marshall, as we understand it, is only a sanitary license. That is, when we use the phrase "restaurant license," we were talking only about that license which indicates that the City of Harrisburg has inspected the restaurant kitchen facilities and found them to be sanitary.

Q And must continue to do it.

MR. RUBIN: And must continue to do it. But that too is for the protection of the public, protection of those

persons who use the restaurant. It is not the type of license that has a special benefit to it.

Q What I'm really driving at is the motion that was made to modify.

MR. RUBIN: The motion that was made to modify was a motion which would have allowed Mr. Irvis to be admitted as a guest.

Q And any others?

MR. RUBIN: I would assume that it would have to be any others. Mr. Wiener so stated.

Q Will you explain for me why you oppose the motion to modify?

MR. RUBIN: Yes. I can answer both of those questions I think at the same time. The motion to modify which would have allowed Mr. Irvis or any others to be admitted as a guest would have done nothing to remove the Commonwealth of Pennsylvania from the discriminatory actions of the Moose Lodge.

That is, it still would have been a matter of being dependent upon a white member of the Moose Lodge to invite him there. It will would have been a matter of no particular Negro being sure that the Moose Lodge would or would not discriminate. The Commonwealth of Pennsylvania would still be issuing that license to a discriminating private club. And I think it's worth noting that at the

time this motion to modify was being presented, the Moose Lodge was in the process of amending its bylaws to forbid Negroes from being guests. So, at the same time they were saying let us modify the decree so that we can admit Mr. Irvis as a guest, their bylaws were being amended to say no Negroes can come in as guests, let alone members.

We feel that the idea that he should then be allowed to come in as a guest through a modification of the decree does not go to the heart of the problem. It does not supply the type of redress that we think cuts through the problem of state participation or support for the discrimination of the Moose Lodge, and that is why we oppose it.

Q If I understand Mr. Wiener correctly, at no time did he ask to be a member.

MR. RUBIN: That is correct.

Q Legally or otherwise.

MR. RUBIN: That is correct.

Q And this case has never been tried or the membership point raised.

MR. RUBIN: That is right. We have never requested membership. We would not request membership because we respect the argument that the Moose Lodge as a private club is entitled to select its own members.

Q But it can't serve liquor.

MR. RUBIN: We are only asking that Pennsylvania's liquor licensing participation be removed from whatever Moose Lodge wants to do. There have been references made to the bottle club problem. Like Mr. Wiener, I would say in Pennsylvania that does not pose any issue of state involvement at all. A person can take a bottle to another place, sit down with his friends, and have a drink of liquor, if he wishes. But that is not the same thing as we have here. And just so that there is no misunderstanding of what we have here, I trust the Court understands that in Pennsylvania liquor licenses are not just something freely available. There is a quota system to the number of licenses that can be given. There is local option which prevents licenses from being given out in certain places. It has been stipulated in this case that the liquor license provides special benefits to the Moose Lodge because the Moose Lodge has stipulated that itwould suffer damage in its membership and operation if it didn't have this liquor license. And that is why, to go back to what I was saying before and what Mr. Justice White raised before--

Q Before you go back, does the record show the number of private clubs licensed to serve liquor in the State of Pennsylvania?

MR. RUBIN: No, it does not, Mr. Justice Powell.

Q Do you know?

MR. RUBIN: Offhand? No. I would have to say that it is in the hundreds.

In the brief for the Attorney General--this is not in the record, it is in the Attorney General's brief--there are 4238 clubs licensed under the Pennsylvania Liquor Code.

Q Mr. Rubin, am I right in thinking from your earlier comment about the proposed amendment to the bylaws that at the time Mr. Irvis sought service in the Moose Club he was not refused as a guest personally from any written provision in the bylaws?

MR. RUBIN: That is my understanding, Mr. Justice Rehnquist. That he was simply refused service and he was told that he was refused service because he was a Negro. There was nothing written in the bylaws that said guests could not be Negroes. That came during the course of these proceedings.

Q I suppose you're aware that in some states the so-called locker clubs are regulated under the same licensing authority as other liquor licenses.

MR. RUBIN: I would have to answer that, Mr. Chief Justice, by saying I am not really aware of it. And I'm not sure we were really talking--locker clubs is one thing, and I think the reference that Mr. Wiener gave was to a bottle club. I was thinking when I read that of someone

who would leave his house with a bottle in his hand, go to his club, meet with a few of his friends and have a drink. To that extent I don't know of any regulation. But I would not preclude that from being the case in other states.

Q Mr. Rubin, I have one little problem of proof. Are you satisfied that the record shows that Mr. Irvis came as a guest of a member? The complaint, as I read it, does not so allege. I realize the opinion below states this.

MR. RUBIN: It clearly states that on page 32.

Q Paragraph 11 merely says the plaintiff entered the premises and requested service of food and beverage. I find nothing there indicating he was accompanied by a member. You can do it later.

MR. RUBIN: I would have to look. I know that the Court's opinion below very clearly stated that point.

Q I know it did, but I'm looking for the proof.

MR. RUBIN: Yes.

Q Would you say that the parties litigated the issues on that assumption?

MR. RUBIN: Oh, yes, there was no question about that, Mr. Chief Justice. That was a matter of public record, I should say, because it was in the newspapers at the time. No one had any question about that point.

I do want to finish the point I was making about

whether or not this license is like water or like electricity. I would sum that up simply by saying that when you have the government providing or through the governmental process something that is being provided to everyone, You don't have the same thing as you have with the liquor license in Pennsylvania.

As I mentioned, Pennsylvania has a restriction on liquor licenses. They aren't freely available. In addition to that, the liquor license confers certain special benefits, as this record very clearly shows, by the Moose Lodge's own admissions. It would have trouble maintaining itself, according to it in its membership and in its operations if it didn't have this liquor license.

Q That would certainly be true if it didn't have any heat or light too.

MR. RUBIN: That's true, but the heat or light is supplied to you, to me, to everyone else.

Q In this case it is supplied to a club that discriminates racially.

MR. RUBIN: That's correct. We think the proper constitutional line is that the government is doing something on a special basis, if there is some special benefit not freely available to all, and this is the case with the liquor license.

Q Wasn't it rather freely available to all

clubs, the liquor license?

MR. RUBIN: No. There are many places in Pennsylvania today where there are no licenses available.

Q With 4000 club licenses it doesn't seem to me that they are very scarce.

MR. RUBIN: I can only go outside the record, Mr. Justice White, on that by telling you that in a recent case of which I am familiar when a new municipality elected to have licenses, there was such a rush for club licenses that everyone was trampled. So that there seems to be no end to the desire for these restrictive licenses in Pennsylvania despite the fact that there are 4000 now in existence.

Q Out of all the clubs seeking them, you think it is permissible to disqualify those clubs who discriminate?

MR. RUBIN: I would disqualify those who discriminate on grounds of race; and I want to make it perfectly clear I had previously indicated in my answer to your question that there are certain clubs which discriminate, in which racial discrimination may take place as a consequence of the nature of the discrimination, an ethnic discrimination. It may or may not take place. But if that ethnic discrimination is reasonable in relation to the purposes of the club, we are satisfied that that's permissible. And I don't want to overlook, in all candor,

something that is not mentioned in the brief of Moose Lodge, and that is there are many clubs--what I'm saying is that there are many clubs in that list that the Elks presents which, in our opinion, would not be precluded from getting a liquor license. But there are many clubs which are not in that list, the local social clubs, which have no purpose in life except social. There is no basis for their discrimination except they don't want Negroes. Those clubs would be affected by this decision in Pennsylvania. There is no question about that.

Q What would you say about a club like Moose which served the person in the position of your client but then struck the host club member from membership; had no direct action with respect to the person that served but the conduit?

MR. RUBIN: There is a case, as I recall, the Barrows case, in this Court in which you would have stated that the white person who was affected by the discrimination practiced against his black brother would have a cause of action against his club, would have standing to raise that.

Q What if he didn't raise that though?

MR. RUBIN: He has the right not to raise it as well as to raise it. But we would have indicated that Mr. Englehart, who happened to be the white member who took Mr. Irvis to the club, would have been able to bring a

case under those circumstances.

Q That is not the direct issue.

MR. RUBIN: That is not the direct issue here.

Q So, you're indicating, I take it, that that kind of sanction against the members for bringing inadmissible guests would be something that the guest in the position of your client could not reach; is that what you're suggesting?

MR. RUBIN: I don't think that Mr. Irvis is harmed by a sanction against a guest because there was no sanction. If in fact the Moose Lodge said--

Q Isn't he harmed in the sense that this fellow can't take him back to the Moose Lodge again?

MR. RUBIN: That's true, and I think that would be Mr. Englehart's right of action to raise it.

Q Mr. Irvis, I'd like to go back to the discussion earlier as to the distinction you draw, if you do, between risk and sex as a basis for discrimination. And I have in mind the numerous court decisions which do not allow states to discriminate on the basis of sex with respect to admission to state institutions, schools and the like. Is it your position that a club could discriminate, a men's only club or women's only club?

MR. RUBIN: It really is my position that we are slowly reaching the point where that will not be allowed.

I do not know if the decisions of this Court have yet reached that point. But it would seem to me that if the purpose of the club has nothing to do with maleness, to be consistent with my position with respect to the reasons for the club's existence, if it has nothing to do with maleness as such and there is no reasonable ground for the exclusion, then the club would have to be put to the test of admitting the female or giving up its license. But it would not be ordered out of hand to admit the female. That is the basis for the distinction we are making here between a private club and a public organization.

Q Would the Whosis Whatsis Male Sauna Bath have a reason?

MR. RUBIN: I'm going to just have to avoid that question. I suppose the reasons for it in one culture are different from the reasons in another. I understand in the Orient they don't find those distinctions as difficult as we do.

Q Could a reason be for this large number of club licenses the fact that they're much cheaper?

MR. RUBIN: The license itself is not expensive. No license is expensive itself in Pennsylvania, Mr. Justice Marshall.

Q What is the difference between the regular license and the--

MR. RUBIN: The differences are only in the fact that basically the club has more freedom in the use of its license. It can stay open on Sundays. It can stay open on election day. Stay open on Sundays a greater time now in Pennsylvania since we're open elsewhere. But there is no other great distinction between the licenses.

Q That's the value, that it can stay open longer.

MR. RUBIN: That's one of the values, certainly. One of the values.

We think that what we are dealing here, if it please the Court, with is a matter of grave concern to the country. It's a matter of whether or not state supported, state aided discriminations should be permitted. A member of this Court I think has stated it as well as anyone. "The state action doctrine reflects the profound judgment that denials of equal treatment and particularly denials on account of race or color are singularly grave when government has or shares responsibility for that. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore, something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination."

We see this case as a case in which Pennsylvania, by granting this license to this private club and to other racially discriminating private clubs has involved itself in the racial discrimination of the private club. And we urge this Court to affirm the judgment of the District Court.

Q Mr. Rubin, how does the state share, in terms of that language, share in the discrimination?

MR. RUBIN: The state would share, Mr. Chief Justice, in the same way that the state would have shared in Burton. It helped make possible the existence and the actions of the organization which does the discriminating.

Q Suppose they give up their liquor license and continue to do just what they are doing?

MR. RUBIN: That's perfectly all right. The state would then not share in the discrimination, and that's all we're seeking.

Q Even if they refused to serve him a cup of coffee?

MR. RUBIN: That's correct. That's correct. We see nothing wrong in the discrimination. It's in the state's participation. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rubin. Mr. Wiener, you have three minutes left.

MR. WIENER: Yes, Your Honor. I want to address myself to worthy norms.

The recognition of the right of privacy has nothing to do with the worthiness or unworthiness of the associational rights sought to be protected. The United States v. Robel, 389 U. S., held that Roble's constitutional right of association--in this instance, to be a member of the Communist Party--prevailed over the congressional prohibition of his being employed in the defense plant. Now, I take it that decision didn't mean that the Court was endorsing the norms of the Communist Party, much less saying that they were worthy norms. And the same thing here. Whether the Moose restrictions are worthy or otherwise is not my concern. It is theirs, and they have a right to privacy. And I want to emphasize that when they say caucasians only, it isn't any worse than saying any one of 20 European nationalities, because there aren't any black Swiss, there aren't any black Swedes, there aren't any black English, and except in a pejorative sense there aren't any black Irish.

Q Mr. Wiener, what is a caucasian?

MR. WIENER: It's not--

Q This is left up to the Lodge to decide that.

MR. WIENER: It's not restricted to someone who hails from the region of the Caucasus Mountains. And it seems to me that insofar as there seem to be conflicting interests involved, Congress has drawn the line in two

provisions of the Civil Rights Act. And it is our view that if you are going to--

Q That's the '64 act?

MR. WIENER: Yes, Your Honor. 203(e) on private clubs, 504(a) on limiting the Civil Rights Commission.

And it seems to me that if you are going to support the congressional determination and the enforcement of post-Civil War amendments to permit illiterates to vote because that's a congressional determination, I think you should give at least equal weight to the congressional determination that private clubs and fraternal organizations are beyond the reach of government.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wiener. Thank you, Mr. Rubin. The case is submitted.

[Whereupon, at 11:02 o'clock a.m. the case was submitted.]

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