

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-421

TITLE BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, ET AL.,
Appellants V. ROTARY CLUB OF DUARTE, ET AL.

PLACE Washington, D. C.

DATE March 30, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 BOARD OF DIRECTORS OF ROTARY :
4 INTERNATIONAL, ET AL., :
5 Appellants :
6 v. : No. 86-421
7 ROTARY CLUB OF DUARTE, ET AL. :
8 -----x

9 Washington, D.C.

10 Monday, March 30, 1987

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 1:35 p.m.

14 APPEARANCES:

15 WILLIAM P. SUTTER, ESQ., Chicago, Illinois; on behalf
16 of the Appellants.

17 MS. JUDITH RESNIK, ESQ., Los Angeles, California; on
18 behalf of the Appellees.

19 MS. MARIAN M. JOHNSTON, Deputy Attorney General of
20 California, Sacramento, California; Intervenor
21 on behalf of the Appellees.

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on behalf of the Appellees	28
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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No.86-421, Board of Directors of Rotary International against Rotary Club of Duarte.

Mr. Sutter, you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM P. SUTTER, ESQ.,
ON BEHALF OF THE APPELLANTS

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

The Court has postponed consideration of jurisdiction in this case to this hearing, so I will briefly talk about that before I get into the merits.

The contention is made by the appellees that the constitutional issue was not properly raised in the courts below. And that's been briefed heavily by both sides.

What the appellants said in their trial brief, and what was dealt with by the court, both the trial court and the Court of Appeals in California, was the question of whether application of the Unruh Act to Rotary would violate Rotarians constitutional right to freedom of expression, freedom of association.

The Court of Appeals held that the Unruh Act did apply, and that it did not violate the First

1 Amendment.

2 That, I submit, makes this an appealable
3 case. I refer the Court to the Pruneyard case, decided
4 only a few years ago, when the Court said, and I'm
5 quoting: "The California Supreme Court rejected
6 appellant's claim that recognition of such a right
7 violated appellant's right to exclude others, which is a
8 fundamental component of their Federally protected
9 property rights. Appeal is thus the proper method of
10 relief."

11 That could be precisely applied to this case
12 if you changed instead of, "which is a fundamental
13 component of their Federally protected property rights"
14 to "their Federally protected First Amendment rights"

15 In either case, the California Supreme Court
16 held that the application of the law did not violate
17 their constitutional rights.

18 Appeal, it seems to me, is the proper
19 procedure.

20 However, if it isn't the proper procedure, it
21 is of course within the power of this Court to treat the
22 jurisdictional statement as a petition for certiorari,
23 and to grant certiorari.

24 And in that event, I would hope that this
25 case, which has attracted nationwide attention, which is

1 the first of cases arising on the same issue in six, or
2 eight, or ten other jurisdictions, all involving
3 male-only organizations, such as the Kiwanis, the
4 Lions, the Boy Scouts, that the Court would see fit to
5 take this case on certiorari, if it isn't a direct
6 appeal, and utilize this opportunity hopefully to
7 re-express its devotion and adherence to the First
8 Amendment; but in any event, to put to rest a very
9 serious question involving the rights of male-only or
10 sex-only -- there are female-only organizations as well
11 that are interested, and they filed amicus briefs in
12 this case -- their rights to exclude members of another
13 sex from what might be termed a private club, a social
14 organization, or a service club as in the case of
15 Rotary.

16 Turning to the merits, the case involves the
17 right of individual Rotarians, joined together in local
18 Rotary Clubs, which are social clubs, in which all the
19 courts have found that fellowship, camaraderie, the
20 desire to do good for society, both in the community and
21 in the world at large, are predominant motives and
22 purposes.

23 QUESTION: But it really doesn't involve the
24 local clubs, does it? It -- it involves the
25 international affiliation.

1 This particular local club wanted to admit
2 women?

3 MR. SUTTER: That is -- this particular club
4 did, Your Honor. But I think it inherently must involve
5 the local club.

6 The Court of Appeals felt that it must involve
7 the local club, because it said that in deciding the
8 case against International, it must look at and decide
9 whether the local club was itself subject to the Unruh
10 Act.

11 And I submit that's necessary for the
12 following reasons.

13 If a local Rotary Club is regarded as a truly
14 private club, and if it is the decision of this Court
15 that a truly private club is not subject to Unruh Act
16 type -- because of its First Amendment intimate or
17 expressive associational rights, then a local Rotary
18 club couldn't be found to violate the Unruh Act.

19 What has happened here is that all local
20 Rotary Clubs, which have voluntarily adopted the rule
21 that women may not be members, have joined together in
22 an international confederation known as Rotary
23 International.

24 QUESTION: No, no, no, it doesn't follow. You
25 can find that a local club has constitutional protection

1 with regard to its local association of the 46 members,
2 one with another, without necessarily being drawn to the
3 conclusion that it has constitutional protection with
4 regard to all of its associations, including its
5 decision to affiliate with an international of, what, a
6 million -- a million people.

7 Those are two quite different questions,
8 aren't they? And we don't have to answer them both the
9 same way.

10 MR. SUTTER: I think we have to decide what
11 the Unruh Act applies to. And the California Court of
12 Appeal, reading the Unruh Act, which says that every
13 person has the right to obtain goods and advantages,
14 held that membership in the local club was a good or an
15 advantage; and therefore, it was subject to the Unruh
16 Act.

17 Now it can only reach that decision if the
18 local club, which is the only organization which makes
19 available membership, which is the good or advantage
20 that the Court is talking about, is itself subject to
21 the Unruh Act.

22 Now if the club is not subject to the Unruh
23 Act, then I submit that the International, which does
24 not do business in California, is not registered there,
25 cannot be held to violate the Unruh Act, because it says

1 to a club which can legally discriminate against women,
2 we want you to legally discriminate against women.

3 If the local club is subject to the Unruh Act,
4 then so is International for compelling it to violate
5 that Act.

6 But I think it is necessary, it is essential,
7 to the decision in this case that the Court find that a
8 local club is subject to the Unruh Act and that the
9 members don't have First Amendment rights.

10 Now if they don't --

11 QUESTION: Why -- now you say, Jurisdiction
12 over the International is only achieved through the
13 local club?

14 MR. SUTTER: No, I'm not saying that precisely.

15 I'm saying that if the local clubs -- every
16 local club in California is entitled to exclude women,
17 and it's only the local club that women or anyone else
18 can belong to, because there are no individual members
19 of International, if it is only the local club to which
20 they can belong, and if each of those clubs
21 independently can exclude women, then the fact that the
22 International says, great, we want you to exclude women;
23 you must exclude women if you are to call yourself
24 Rotary -- now you can admit women; you can be a local
25 service club; you can do any of those things on your own

1 -- but it is only local clubs which have voluntarily
2 agreed not to admit women that can call themselves
3 Rotary because they have made that agreement among
4 themselves.

5 Now, I don't think that their making that
6 agreement can cause the International to be violative of
7 the Unruh Act if they are not violative of the Unruh
8 Act.

9 Now if they are, then it is.

10 QUESTION: Yes, but you may be mixing up the
11 statutory and the constitutional questions. Maybe they
12 violate the Unruh Act by what they do. But your answer
13 would be, well, they have a constitutional right to
14 associate, so the Unruh Act cannot prevent them from
15 making them that decision.

16 And it may well be the International violates
17 the Unruh Act by cancelling their franchises. But does
18 it necessarily follow they have a constitutional right
19 to cancel their franchise?

20 It seems to me those are two separate
21 questions.

22 MR. SUTTER: I don't think that the
23 International has a constitutional right of association,
24 because the --

25 QUESTION: Well, that's your point. They have

1 a constitutional right to cancel this franchise if it
2 has women in it.

3 MR. SUTTER: They're asserting this right on
4 behalf of the individual members of Rotary, Your Honor,
5 really.

6 QUESTION: But not on behalf of the individual
7 members of the Duarte Club.

8 MR. SUTTER: No, not on behalf of the
9 individual members of the Duarte Club.

10 The individual members of the Duarte Club are
11 entirely free --

12 QUESTION: Whose freedom of -- whose
13 constitutional right to associate together is it that
14 you say protects the International's right to cancel
15 this franchise?

16 MR. SUTTER: Individual Rotarians in
17 individual local Rotary Clubs.

18 QUESTION: All, other than Duarte?

19 MR. SUTTER: Not all other than Duarte. The
20 San Francisco Club has admitted women. And if we win
21 this case, presumably the San Francisco Club will either
22 have to expel the women or, we believe, be removed from
23 Rotary.

24 No local club, no local service club, is
25 compelled to admit women, or exclude women, if they

1 don't want to be a member of Rotary International.

2 They can be a service club, Rotary Duarte,
3 with the X sign that they have painted, continues to
4 exist. It continues to do good work. It is a service
5 club, and it admits women.

6 That is a laudable result. But they are not
7 entitled to belong to an association of clubs which have
8 concluded not to admit women.

9 QUESTION: California's saying sort of the
10 same thing, that Rotary International is entitled to
11 affiliate only with organizations that don't admit
12 women, but not in California.

13 MR. SUTTER: Well, that's --

14 QUESTION: So that, you know, that's fair too.

15 MR. SUTTER: That isn't quite fair. Well, it
16 may be fair, but the question is, is it constitutional.

17 Everything that is constitutional is not fair,
18 and everything that is fair is not constitutional, I
19 submit.

20 If -- if the International cannot compel a
21 club -- let's take a club other than Duarte. Some
22 other club doesn't admit women. Doesn't want to admit
23 women. Wants to adhere to the compact that they have
24 all entered into, and which they could all change by
25 appropriate vote, which but which have refused to do on

1 six separate and distinct occasions.

2 I submit that this case, as the statute of
3 California was construed by the Court of Appeal -- now
4 the statute could have been written differently,
5 perhaps, or could have been construed differently. But
6 the Court of Appeal felt that in order to find
7 International violative of the statute, it had also to
8 find, and it did find, Duarte violative of the statute.

9 In doing that, I submit that it found that all
10 California clubs would violate the statute if they
11 didn't -- if they adhered voluntarily to the
12 International provision that they must exclude women.

13 If International can't enforce it against
14 Duarte, how can they voluntarily sustain it vis-a-vis
15 the Rotary Club of Orange County?

16 QUESTION: But Mr. Sutter, maybe that's
17 correct as a matter of logic, but I'm not sure that's
18 this case.

19 Because this case, as I understand it, the
20 California courts held that the International violated
21 the California statute.

22 What they did was a statutory violation.

23 MR. SUTTER: Yes.

24 QUESTION: And you're arguing --

25 MR. SUTTER: They also held that Duarte did,

1 or they also held that Duarte was subject to the Unruh
2 Act and could not exclude women.

3 QUESTION: Well, that may be, but that's
4 dicta, because they're not excluding women. That's not
5 this case, because they voluntarily admitted women.

6 What they held was a violation of the statute,
7 as I understand, insofar as the judgment has any effect,
8 is what the International did.

9 It seems to me you have to be able to argue
10 that the International had a constitutional right to
11 violate the California statute in the way that it did.

12 MR. SUTTER: I say that it does -- that the
13 right of the International turns on the nature of the
14 California clubs. That's all I'm saying.

15 If the California clubs themselves have the
16 right to violate the statute because they aren't subject
17 to it, then International has a right to violate the
18 statute because it is a compact of those clubs.

19 It has no separate membership. There's no
20 statutory right of anybody to belong to International.

21 The statute doesn't address the subject of
22 clubs belonging to an international federation.

23 QUESTION: Well, yes it does, because
24 California has held it does. I mean, maybe it doesn't
25 on its face as you read it, but it has held that the

1 International does not have the right to expel this
2 particular club.

3 MR. SUTTER: It has held that. Yes, it has
4 held that. But I say that it has held that -- and the
5 Court of Appeals said that it held that -- based on the
6 character of the local club.

7 All I'm saying is that the character of the
8 local club is integral to a decision as to the
9 International.

10 QUESTION: (Inaudible) if International
11 doesn't have any members of its own, it's hard to frame
12 a constitutional argument on the right of association
13 for the International, isn't it?

14 MR. SUTTER: I'm attempting to frame an
15 argument on behalf of the members of the local clubs,
16 because what I say is that this decision inherently
17 carries with it -- it's not an express holding in this
18 case -- inherently carries with it the decision that no
19 other California Rotary Club may properly exclude women.

20 If it doesn't hold that, or if that isn't
21 inherent in it, it is clearly then inherent in, by
22 overbreadth argument, which I didn't want to come to
23 here, and I really didn't want to come to at all because
24 it's a latter argument, this statute then is so broad
25 that the language of the court that said Duarte is a

1 business, that Duarte may not exclude women, that
2 applies under the Unruh Act, which applies to all
3 arbitrary acts, to all arbitrary discriminations.

4 And every other club in California is going to
5 think that it applies to them. The right of free
6 expression is going in fact to be chilled.

7 But I submit that that's not necessary to get
8 to that kind of a point, because really, the California
9 Court of Appeals said that in looking at the issue of
10 International, we must look at the character of Rotary
11 -- I mean Duarte and local clubs; it didn't say just
12 Duarte. "And local clubs."

13 QUESTION: What's wrong with that?

14 MR. SUTTER: What's wrong with that?

15 QUESTION: Yes.

16 MR. SUTTER: Nothing. I think you have to
17 look at the local clubs.

18 QUESTION: That would be all right with you,
19 if all the clubs --

20 MR. SUTTER: I think you have to look at the
21 local clubs, and then find out --

22 QUESTION: -- if all the clubs of California
23 have to admit women, that's all right with you.

24 MR. SUTTER: No. No, that is not all right
25 with me.

1 QUESTION: Well, I was just wondering.

2 MR. SUTTER: No, my point is not whether all
3 California clubs should admit women or should not,
4 clearly. It might be a very good thing if they all did.

5 My point is whether the Duarte case, this
6 case, and the California Court of Appeals decision,
7 compels them to admit women.

8 Under the Unruh Act, applying the Unruh Act,
9 it is my contention that they must admit women. But it
10 is also my contention that applying the Unruh Act to the
11 local California clubs would be violative of their First
12 Amendment rights.

13 QUESTION: (Inaudible) this case, it was
14 voluntary, wasn't it?

15 MR. SUTTER: This case was voluntary.

16 QUESTION: Where do you get the "must"?

17 MR. SUTTER: The Roberts case, which is the
18 case that everybody talks about as either being
19 controlling on the law or controlling on the facts -- we
20 say it's controlling on our side because of the law;
21 appellees say it's controlling because they think the
22 facts are the same. That was the Jaycees' case decided
23 only a few years ago.

24 What's involved in exactly the same posture as
25 this case, in that case a Minnesota Jaycees organization

1 admitted women. The International said it had to throw
2 them out or be thrown out of Jaycees itself.

3 That case went back and forth. Ultimately the
4 Eighth Circuit held that, no, they did not have to throw
5 them out, because of the First Amendment associational
6 rights, not of Jaycees International, but because of the
7 First Amendment associational rights of the members of
8 the Jaycees.

9 That was reversed by this Court. It was not
10 reversed because this Court said or the Minnesota
11 Supreme Court said, we're only looking at Jaycees
12 International; we don't have to worry about that. They
13 said, we're reversing this decision because the Jaycees
14 don't meet the tests, the local Jaycees don't meet the
15 test, for First Amendment rights.

16 They are large clubs. They are unselective
17 clubs. They admit women as associate members. They do
18 all of these things, none of which --

19 QUESTION: Had they met those tests, we would
20 then had to have proceeded to see whether the
21 international organization or the interstate
22 organization meets that test.

23 I mean, you're right that that one was decided
24 on the basis of the local -- of the local units. But it
25 could be decided on the basis of the local units.

1 Had we decided there with respect to the local
2 units what you want us to decide here, that is, that the
3 local units themselves are insulated against this kind
4 of a state command, we would then, in Roberts, have had
5 to proceeded and say, well, given that, what about the
6 whole affillated organization?

7 Why isn't that the case?

8 MR. SUTTER: Well, Your Honor, every case that
9 there is, that I'm aware of, pending or past, has
10 involved this type of situation where an organization, a
11 dissident group, a dissident member of the organization
12 has concluded to admit women, and then the organization
13 has attempted to enforce the compact.

14 And why is that? Because if a local club,
15 which has discretion as to whom to admit, and which has
16 selective grounds for admission, votes a woman down, how
17 can she sue and demonstrate that she was excluded
18 because she was a woman?

19 That's the only case that could bring directly
20 the right of the local club into issue. There are none
21 of those cases around the country.

22 The cases around the country are all cases
23 where the local club, Kiwanis or somebody, did admit a
24 woman, and the enforcement of the aggregation's rules,
25 the association's rules, has then caused that club to be

1 either suspended or to have to remove the woman from
2 membership.

3 And I submit that in every one of those cases,
4 the issue is, is the enforcement of the rule adopted by
5 an aggregation of local clubs, is that enforcement legal?

6 And the question of whether it is legal turns
7 on whether the local clubs actually have the right by
8 themselves to make such a rule, and then to band
9 together and say, all of us are going to abide by the
10 same rule.

11 At that point, it turns into a trademark,
12 service mark, type of case. The recent Kiwanis case in
13 the Third Circuit which has gone back -- well, it's on
14 motion for rehearing in the Third Circuit, but which was
15 sent back to the District Court -- didn't get to the
16 constitutional issue because the Third Circuit
17 concluded, contrary to the Federal district court, that
18 the New Jersey statute simply didn't apply to things
19 like Kiwanis.

20 But in deciding that, it did not look at the
21 International. It looked, as it properly had to, at the
22 local club.

23 Again, what are the attributes of the local
24 club? Does it qualify as a private club? If it does,
25 then this suit, which was against International, is

1 gone.

2 They didn't look at the attributes of the
3 International to decide that the suit was gone; they
4 looked at the attributes of the local club to decide
5 that the suit was gone.

6 QUESTION: But that was in construing the
7 statute.

8 MR. SUTTER: Yes, but I think the same -- the
9 same result applies whether you're construing the
10 statute or the Constitution.

11 It is the rights of the application to the
12 local group that has to determine whether there is or is
13 not a public accommodations law which has been violated
14 in the first place; and secondly, if the law has been
15 violated, whether that violates in turn the rights of
16 the members of the association, because those are the
17 only people who are affected.

18 There aren't any members, again --

19 QUESTION: That is a question of California
20 law. If California has misinterpreted its statute to
21 come to the conclusion that Rotary International is
22 providing goods or services, I mean, that may be a very
23 foolish interpretation of the statute, but it seems to
24 me that's up to the California courts.

25 MR. SUTTER: They didn't, actually. They

1 determined that the local club was furnishing the goods
2 and services.

3 They held that membership was the goods and
4 services.

5 QUESTION: Likewise, if California wants to
6 say that the furnishing of goods and services by a local
7 club under its statute is sufficient to attribute the
8 sale of goods and services to the international, once
9 again, that's a question of California law.

10 It seems to me our only problem is whether
11 California has the power to exclude association in the
12 international group, regardless of how they get there.

13 That's the only Federal constitutional result
14 that we're looking at, it seems to me. You may be right
15 that they got there by a very -- very devious process.
16 But that's --

17 MR. SUTTER: I don't think they got there that
18 way. I think they got there the way I'm saying they had
19 to get there. I think they got there because they held
20 that the local club was itself subject to the Unruh Act.

21 If they hadn't held that, I do not think they
22 would have gotten there. And if they hadn't gotten
23 there, we wouldn't have this case.

24 But we did get -- they did get there. I
25 submit that they got there because they said the local

1 club was subject to the Unruh Act, and that it didn't
2 have First Amendment rights.

3 Or they didn't maybe come to that, but they
4 said it was subject to it.

5 QUESTION: And it is. And it is, as a matter
6 of statutory law.

7 MR. SUTTER: And it is, as a matter of
8 statutory law. We can't quarrel with the California
9 construction of the facts, that's --

10 QUESTION: But the only constitutional issue
11 we have before us is that not that, but rather, the
12 application to the International.

13 So that may be quite correct as a matter of
14 statutory law, and that's not the constitutional issue.

15 QUESTION: Yes, but what if -- isn't it your
16 submission that the local club could not
17 constitutionally be required to comply with the law?

18 MR. SUTTER: That is correct.

19 QUESTION: And suppose you were right.
20 Suppose you were right. Then I suppose you would say
21 that -- then the case is over, isn't it?

22 MR. SUTTER: My view is that if the local club
23 cannot constitutionally be compelled to comply with the
24 Unruh Act, then International cannot be compelled not to
25 enforce its provision, which permits the local club to

1 do just that very thing, or which requires the local
2 club to do that very thing.

3 QUESTION: Why do we get to that question in
4 the case of the Duarte Club, which wanted to admit
5 women?

6 I mean, its conduct doesn't violate the Unruh
7 Act in the eyes of the California court, does it?

8 MR. SUTTER: It was found to be subject to the
9 Unruh Act. And I submit that it had to be found subject
10 to the Unruh Act. They found it didn't violate it, of
11 course, because it let women in.

12 But they found that it was subject to the
13 act. That was a necessary predicate to their finding
14 that the International was subject to the Unruh Act and
15 violated it, because the International was telling a
16 club which couldn't discriminate against women, because
17 it violated -- because it was subject to the Unruh Act,
18 it couldn't tell that club, you must discriminate.
19 Because that would be compelling the local club to
20 violate the law.

21 And that was the violation of which
22 International was guilty.

23 Now if telling that club to comply with the
24 law would not be a violation on the part of
25 International.

1 QUESTION: Is there anything in this record to
2 show that the reason the woman was admitted was because
3 of the California law?

4 MR. SUTTER: No, Your Honor, there is nothing
5 in the record to show that.

6 QUESTION: That's what you're saying. That's
7 what you're saying.

8 MR. SUTTER: No, I don't believe that's what
9 I'm saying. I'm saying that -- I'm saying that there's
10 no -- compelling a person to do something lawful is not
11 itself unlawful.

12 And --

13 QUESTION: (Inaudible) saying that this club
14 could not be compelled to admit women.

15 MR. SUTTER: Because of the great difference
16 between Rotary Clubs and Jaycees organizations, yes.

17 QUESTION: So they could expel women or keep
18 them out without violating the law?

19 MR. SUTTER: That is correct.

20 QUESTION: And you say International could
21 insist that they do just that?

22 MR. SUTTER: As long as that's lawful for them
23 to do, International could insist that they do it
24 without International's violating the law.

25 And if International can't enforce that, that

1 to me is saying that they can't do it, and that is the
2 constitutional right of the members that I'm complaining
3 about.

4 QUESTION: So what's your argument, that the
5 local club doesn't have to live up to California law?

6 MR. SUTTER: Well, I submit that's based on a
7 great number of facts which distinguish this case from
8 the Jaycees case.

9 A., we have selectivity in membership. B., it
10 is a fellowship organization. It does not -- and there
11 was no finding by either the trial court or the Court of
12 Appeals that there was any sale of memberships or any
13 sale of goods and services to the general public.

14 As a matter of fact, the Court of Appeal held
15 that even its decision didn't require Rotary Clubs to
16 open their membership to the general public.

17 So it's a quite different factual situation in
18 that regard from the Jaycees case where memberships were
19 sold, and the membership was a product or a service,
20 because the membership was for the sole purpose of
21 becoming a member of an organization which was the
22 advancement of its members.

23 That was sold widely without selectivity.
24 Advertisements were made for membership. And the only
25 people who couldn't just step up and buy one for a buck,

1 or whatever the price was, were women.

2 In our case, you must be proposed for
3 membership. There's an elaborate membership admissions
4 policy, followed by virtually all clubs the testimony
5 will indicate.

6 And we are like the Indian Hill Club or the
7 Jonesboro Athletic Club or whatever it might be.

8 Now it may be --

9 QUESTION: "We" being the individual clubs.

10 MR. SUTTER: "We" meaning the individual
11 Rotary Club. It may be that California has a legitimate
12 interest in avoiding or eliminating sex discrimination.
13 I don't question that there's a legitimate interest
14 there.

15 I simply say that it is not a compelling
16 interest if we don't have this public service -- sale of
17 service to the public aspect.

18 QUESTION: What do you interpret you have to
19 do to comply with the court's order here? Could --
20 could you comply with the order by simply saying, we
21 will not affiliate with any Chicago clubs?

22 See, I have some problem about whether
23 California can dictate its policy nationwide, so that
24 even if other states have no problems with mens-only
25 clubs, those clubs in other states cannot join Rotary

1 International as an all-male group.

2 MR. SUTTER: I interpret the court's order
3 here as saying we can't throw the Duarte club out; we
4 have to give them their charter back.

5 It seems to me that it is an absolutely
6 necessary flowage from that that we can't compel them to
7 call themselves the sort-of Rotary Club of Duarte, or
8 the women-admitting Rotary Club of Duarte; that they
9 have to be a full Rotary Club.

10 QUESTION: So you have to make them affiliate
11 with your club in Iowa, assuming Iowa has no law like
12 this, even though Iowa would have no problem about --

13 MR. SUTTER: About having men-only clubs?
14 Yes, I think we have to do that.

15 More than that, I think if the Orange County
16 club in California, if we say, you, Orange County club,
17 you don't have any women now. Don't let them in. I
18 submit that that is violative of the law.

19 But I don't think it should be violative of
20 the law, if the Orange County club doesn't want to have
21 women and isn't violating the law by not having.

22 And that, I think, is the crux of this case.
23 I think this case is not restricted to Duarte. I think
24 it compels Rotary International to permit each and every
25 club in California to admit women; and if any club in

1 California chooses not to admit women, I think that club
2 is in violation of the Unruh Act, because the local club
3 has been held to be subject to the Unruh Act, and this
4 court says -- this case says that if you're subject to
5 it, keeping women out violates it.

6 Now, I don't know whether keeping women out
7 necessarily violates it. California says that -- my
8 time is up.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Sutter.

11 We'll hear now from you, Ms. Resnik.

12 ORAL ARGUMENT OF JUDITH RESNIK, ESQ.,

13 ON BEHALF OF THE APPELLEES

14 MS. RESNIK: Thank you, Mr. Chief Justice, may
15 it please the Court.

16 Duarte, which is a local Rotary Club, and the
17 State of California, agree that it's absolutely
18 essential for women to be able to participate in the
19 Rotary International organization, and in the Rotary
20 Clubs of California.

21 Rotary is a service and business
22 organization. To be selected to be a member of Rotary,
23 one has to be a leader in the professional, crafts or
24 business communities.

25 And the point of Rotary is to render service

1 to those communities to alter business practices for the
2 better.

3 The harm to women by its being excluded is
4 enormous, because the communication to us is that we're
5 second class citizens, that we aren't business leaders;
6 that one could have a club that is a true cross-section
7 of the business community and exclude us.

8 And California has a strong, important
9 interest in the ending of discrimination against women
10 and other minorities.

11 This Court has reserved the question of
12 jurisdiction until this time. The jurisdictional
13 question, either by appeal or certiorari, depends upon
14 the existence of a substantial Federal question.

15 It is our view, both the State of California
16 and myself on behalf of Duarte, that there -- that there
17 is no substantial Federal question, because this case is
18 governed by, and the outcome is the same as, the Jaycees
19 case.

20 However, there are a couple of distinctions
21 that arguably could be drawn. First, the State of
22 California -- or actually, second, the State of
23 California will be discussing the differences in the
24 California statute; its version of a public
25 accommodations law, and how it differs from that at

1 issue.

2 QUESTION: (Inaudible) challenge then the
3 right -- their right to -- your opponents' right to
4 bring their case here by way of appeal. You just say
5 that the appeal should have been dismissed for want a
6 substantial Federal question.

7 MS. RESNIK: Well, we have challenged -- as we
8 believe they started out, this case was not appropriate
9 for appeal, although by the time they worked it to this
10 Court, there may be grounds for appeal.

11 Many commentators, members of this Court as
12 well as others, have suggested that the distinctions
13 between appeal and certiorari have made life difficult
14 for all of us, and have urged that this Court no longer
15 have a mandatory jurisdiction.

16 If it's here either under appeal or
17 certiorari, it's because there is a substantial Federal
18 question. We do continue to suggest that appeal is
19 inappropriate, but on the certiorari side, the question
20 would be whether or not there is this issue of national
21 significance.

22 And that gets me immediately to the procedural
23 posture of this case.

24 The procedural posture is that a local club
25 admitted women, and the international expelled it. The

1 California Court of Appeals held and enjoined the
2 International from expelling a local that wanted to
3 admit women.

4 It is true that in passing the California
5 Court of Appeals did discuss that the local Duarte might
6 be subject -- or was subject to the Unruh Act, but that
7 wasn't essential to its holding.

8 There are two reasons why the Court ought not
9 to reach beyond the holding in this case. The first is
10 the practical point that not only is it that that's not
11 the case here, that's not even the case coming down the
12 pike.

13 To my knowledge, there are no cases pending --
14 and I think here I agree with my adversary -- not only
15 in terms of Rotary but in terms of similar clubs like
16 Kiwanis and Lions.

17 None of these cases --

18 QUESTION: Are you suggesting that even if
19 Duarte would not violate the California law if it
20 excluded women, that when it does -- when it does have
21 women in it voluntarily, Rotary, as a vast international
22 organization, may not exclude it?

23 MS. RESNIK: I am agreeing with the thrust of
24 some of the comments that the --

25 QUESTION: Well, just answer my question.

1 MS. RESNIK: I'm sorry. I -- I am saying that
2 the International is subject to the Unruh Act, and may
3 not exclude the local.

4 QUESTION: Even if the local could legally
5 under California law exclude women?

6 MS. RESNIK: Even if the local could legally
7 exclude women. However, the Court of Appeals here found
8 that this local could not legally exclude women as well.

9 But I'm suggesting --

10 QUESTION: Because of the Unruh Act?

11 MS. RESNIK: Yes, the Court of Appeals --

12 QUESTION: And they thought that would be
13 constitutional, also, the Unruh Act as applied to this
14 club?

15 MS. RESNIK: The Court of Appeals found that
16 both the International and the local, in dicta, was a
17 businesslike organization; and therefore, under
18 California's interpretation of its statute, that both of
19 these organizations had sufficient businesslike
20 attributes so as to be regulated by the State of
21 California's antidiscrimination laws.

22 But the reason not to move beyond is that
23 although -- I guess I disagree with the notion that
24 either women or members of other minorities have been
25 shy in bringing lawsuits claiming their rights of

1 admission.

2 Around the country locals of Rotary, Kiwanis,
3 and Lions have been admitting women; and it's the
4 international or national organizations that are saying,
5 no, you can't.

6 So that the rights at stake here are the
7 rights of the International to be subject to California
8 law. And here, the International, with its 350-person
9 staff, with a publishing wing with a multimillion dollar
10 budget, is clearly a kind of businesslike organization
11 that is legally subject both under the statutory
12 interpretation under California law, and
13 constitutionally subject to California law as well.

14 QUESTION: So you're saying --

15 MS. RESNIK: Sorry, talking too fast.

16 QUESTION: Let's assume for that for some
17 reason or another, this particular local Duarte club was
18 not subject to the Unruh.

19 MS. RESNIK: I'm saying that I don't want to --

20 QUESTION: Let's assume it wasn't.

21 MS. RESNIK: Certainly.

22 QUESTION: Just assume it wasn't. I take it
23 you think that's immaterial, that it's got women in it,
24 and if the International club expels that club because
25 it's got women in it, the international club is

1 violating your act?

2 MS. RESNIK: It certainly is violating the
3 California law, and it's constitutional for California
4 to enforce its law against them.

5 I don't want to seem to be ducking the
6 question of the local clubs in any way, however. And I
7 do want to --

8 QUESTION: Ms. Resnik --

9 MS. RESNIK: Yes.

10 QUESTION: -- let me ask you this. You know,
11 there are obviously various important interests in
12 conflict here. One is the interest in association.
13 California has come to the judgment that its interest
14 against discrimination against women overcomes that.
15 That's fine for California.

16 But what about Iowa that comes to a different
17 conclusion, and they say, yes, there is the interest
18 against discrimination, but there's also -- people ought
19 to be able to associate with whom they wish, and not
20 with whom they don't wish?

21 How can this California order compel a
22 nationwide organization, indeed, an international
23 organization like Rotary -- Rotary, to alter its
24 character, so that even if all of the clubs in Iowa who
25 are impeded by no Iowa law, and all of the clubs in

1 let's say 49 other states want to join in an
2 organization that is male-only, they can't do so, just
3 because of California law?

4 MS. RESNIK: Well, not to echo too much your
5 comments in the earlier portion of this argument,
6 California can only enforce its law in California; and
7 the choice is of course open to Rotary, should it choose
8 to withdraw from the State of California, and thereby
9 continue its all-male status, if that would be permitted
10 in other states.

11 California can't tell an Iowa club what to
12 do. It can only tell clubs operating in California that
13 they are bound by California law.

14 QUESTION: Well, then, this order doesn't mean
15 what it says. Because this order says that Rotary
16 International must admit this club.

17 MS. RESNIK: The order says that Rotary is
18 forbidden from expelling this club, that's correct.
19 Presumably, and I'm a little reluctant to speak for the
20 Court of Appeals were they faced with that question,
21 presumably what would happen if Rotary said we hereby --
22 Rotary International said, we hereby withdraw from
23 California, I would be amazed if the California Court of
24 Appeals would say, we enjoin you from withdrawing from
25 California.

1 QUESTION: Well, that's what they did. They
2 can't withdraw as long as they have to admit this club.

3 MS. RESNIK: No, I would disagree. They can
4 withdraw totally from the state. They can't be in the
5 state of California, operating under California law.
6 And presumably we have a strong tradition among the 50
7 states, not only in their public accommodations law,
8 which vary, but in many other state laws that vary from
9 state to state.

10 Multistate corporations and multistate
11 organizations are often subject to different laws in
12 different states, and we all live with that as one of
13 the joys or sorrows of the Federal system.

14 The -- I think it's very important to
15 understand --

16 QUESTION: Unless they choose to withdraw.

17 MS. RESNIK: Unless they choose to withdraw.

18 QUESTION: And if they withdraw, they don't
19 have to worry about it.

20 MS. RESNIK: And it is -- it is --

21 QUESTION: I'm saying, are you sure that this
22 doesn't prevent them from withdrawing?

23 MS. RESNIK: It is certainly my interpretation
24 of the California Court of Appeals, that the California
25 Court of Appeals did not say, we enjoin you from

1 withdrawing from the State of California.

2 The California Court of Appeals said, we
3 enjoin you from expelling Duarte while you're --
4 implicitly -- while you're here. And if you choose to
5 leave, of course, I do not believe the State of
6 California could do anything about that.

7 But to return again to this question.
8 Practically, there's no case coming down the pike that
9 involves an individual knocking on a door and a local
10 saying no.

11 And jurisprudentially, there's a real reason
12 to pause, which goes to the question of, what are the
13 nature of the rights here at the stake?

14 International says that essentially, under the
15 Jaycees' rubric, it has two kinds of rights: expressive
16 freedoms and associational freedoms of intimacy.

17 The Court in the Jaycees opinion explained the
18 two kinds of rights that are available. On the
19 expressive side this Court discussed the ability of a
20 group to come together to advocate political, social,
21 religious interests, and to come together.

22 And the question in the test was, would the
23 inclusion of any of these out-group members in any way
24 impair or impede the original members coming together
25 and advocating their rights?

1 If anything, the Rotary International presents
2 an easier example than did the Jaycees. Rotary is
3 avowedly apolitical and areligious. Unlike the Jaycees,
4 where there was both the creed and the organization did
5 from time to time take political positions, Rotary is
6 forbidden, the International and the local clubs, from
7 taking any kinds of positions on any political or
8 controversial matters whatsoever.

9 Further, Rotary says, we have three expressed
10 purposes: humanitarian service, worldwide peace, and
11 improving the ethical standards in the business
12 communities.

13 And in order to do that, we're going to take a
14 cross-section of business leaders from a community to do
15 service in the business world.

16 There is absolutely nothing about the
17 admission of women that will distort, capture the
18 agenda, or in anyway co-opt Rotary from doing what it
19 wanted to do.

20 In fact, Duarte admitted women because it
21 said, in our community a third of the business leaders
22 are women, and the only way we can be a cross section
23 and influence our community for the good is to include
24 women.

25 Moreover, Rotary International permits the

1 inclusion of women in many of its activities. It runs
2 programs for 14 to 18-year-olds, and for 18 to
3 28-year-olds; women and men, girls and boys, are full
4 participants in those organizations as well.

5 Rotary invites women as speakers. Women are
6 invited as guests, as -- awards have been given to
7 women. So it's -- so that there's not a hint or a
8 whisper that including women will in any way do any kind
9 of harm to the expressive interests.

10 On the intimacy side, the International is an
11 association of clubs; not an association of members. In
12 the Jaycees' case, the members were members of the
13 national organization. In the International Rotary,
14 clubs are members of the international organization.

15 There is unquestionably some difference in the
16 way one became a Jaycee and the way one becomes a
17 Rotarian. Jaycees between the ages of 18 and 35,
18 submitting an application and paying some dues, if you
19 were male, you became a Jaycee.

20 To become a Rotarian, there is some
21 selectivity, and that's not disputed, although there is
22 a dispute about how selective it is.

23 But the Court of Appeals and Rotary of Duarte,
24 as well as Seattle and San Francisco and the other clubs
25 that have admitted women, have presented arguments that

1 it is, in fact, quite easy to become a Rotarian.

2 But it's undisputed that there's some degree
3 of selectivity. There's selectivity in businesses as
4 well.

5 The fact of selectivity alone is not a trump
6 card that prevents a state from imposing its statute,
7 constitutionally, in an organization.

8 Just as a business is subject to Title VII, so
9 may organizations that have some degree of selectivity
10 be subject to states' antidiscrimination laws.

11 One has to not just say selectivity. One has
12 to say selectivity for what. This Court has defined the
13 right of intimate association, in the constitutional
14 sense, as a term of art; a constitutional term.

15 It is a very limited right. Parental
16 decisions vis-a-vis children. Decisions about
17 marriage. Family relations and family-type
18 associations.

19 This Court has never extended that right
20 beyond to the kind of large collections that a Rotary
21 Club by definition is.

22 A local Rotary Club cannot start unless there
23 are at least 20 members fitting 20 different business
24 classifications. And then there have to be another 20
25 potential classifications.

1 We know from the record that the clubs range
2 in size from 20 to over 900 people.

3 Furthermore, every local Rotary Club must, as
4 a matter of international practice, admit any of the
5 other roughly one million Rotary -- Rotarians from
6 around the world to their meetings.

7 And further, local Rotary Club members are
8 encouraged to invite students, members of the media,
9 salespersons, employees, various guests to come and come
10 to the meetings.

11 So the meetings are not collections of
12 intimates who spend unending numbers of hours one with
13 another. The meetings are collections of loosely-knit
14 group of people who've come together for the betterment
15 of all of us, for the community and for the business and
16 professional life.

17 That's not the kind of intimacy that this
18 Court has announced is protected.

19 Really, what Rotary International is saying
20 here is, develop a new constitutional right on behalf of
21 us. And precisely because it's this expansion of a
22 right that would function to stop a legitimate state
23 statute, it would be tremendously important to have an
24 example of a real, live club that might prompt such a
25 right: a seven-person poker club; a children's club.

1 There may be examples of collections of people that this
2 Court might want to think about developing some form of
3 a new right, but surely not on this record, with Rotary
4 telling us that the heart of Rotary is not even its
5 clubs, but rather, its service to the community.

6 Mr. Pigman, the general secretary of Rotary,
7 testified that, after he explained what a Rotary meeting
8 was like in terms of that time, he went on to testify:
9 But you know the heart of Rotary isn't really the
10 clubs. To really understand Rotary, you've got to go
11 out into the community, because Rotary is engaged in
12 service activities in the community.

13 And in those service activities, Rotary joins
14 together with many other groups in the community; with
15 groups that admit women as well as with groups that
16 don't, in doing better for the professional and business
17 world.

18 I do want to just also, I guess, reinforce the
19 notion that the fact that there be some chemistry or
20 some -- Mr. Pigman testified that it might feel
21 different in terms of the Rotary International rubric,
22 is something that is -- it may be true, but it is not
23 that from which new constitutional rights emerge.

24 Presumably innkeepers 20 years ago, when faced
25 with public accommodation laws, said, it's going to feel

1 different to have blacks in inns or swimming pools or
2 parks. But this Court did not say, that's a trump;
3 that's the barrier that prevents constitutionally a law
4 from being applied to groups of people.

5 In sum, it is -- it is completely
6 constitutional for a State such as California to
7 exercise its sovereign right to limit the -- a
8 businesslike organization, such as Rotary International,
9 and indeed, if any Rotary Club followed the rules of --
10 a local Rotary Club as well, and require it, as a
11 businesslike organization, to follow the California
12 statute.

13 The Deputy Attorney General from the State of
14 California will discuss more of the California's
15 interest.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
18 Resnik.

19 We'll hear now from you, Ms. Johnston.

20 ORAL ARGUMENT OF MARIAN M. JOHNSTON, ESQ.,

21 AS INTERVENOR SUPPORTING APPELLEES

22 QUESTION: Ms. Johnston, before you start,
23 would you identify the Federal question that's presented
24 by this case?

25 MS. JOHNSTON: The only Federal question in

1 this case is whether there is any provision in the
2 United States Constitution that forbids California,
3 acting in its sovereign power to protect the welfare of
4 its people, from forbidding the type of sex
5 discrimination --

6 QUESTION: Was that question raised in the
7 complaint?

8 MS. JOHNSTON: The complaint was filed by
9 Rotary Club of Duarte against Rotary International,
10 alleging that Rotary International violated the Unruh
11 Civil Rights Act.

12 QUESTION: But was there any allegation of a
13 Federal right involved in the complaint?

14 MS. JOHNSTON: No, Your Honor.

15 QUESTION: Did the Court of Appeals of the
16 State of California decide any Federal question?

17 MS. JOHNSTON: Only to the extent that it
18 found that the application of Unruh to Rotary
19 International was not unconstitutional.

20 QUESTION: The only Federal case it cited, if
21 I remember correctly, was Roberts. But it did not
22 expressly conclude that there was any violation of the
23 Federal Constitution that I recall.

24 MS. JOHNSTON: No, it concluded quite the
25 contrary that applying Unruh to Rotary International did

1 not violate any constitutional rights.

2 QUESTION: But did it make any decision under
3 the Federal Constitution?

4 MS. JOHNSTON: Only that the application was
5 not unconstitutional.

6 QUESTION: Well, I don't want to interrupt
7 your short argument. But I'll look more carefully at
8 the opinion. I don't recall seeing any discussion, any
9 specific discussion, of a Federal right.

10 MS. JOHNSTON: I believe it did refer to the
11 fact that there were no violations either of the rights
12 of intimate association or expressive association.

13 And as this Court has reminded us on numerous
14 occasions, there may be a desire to discriminate by many
15 groups, but invidious private discrimination has never
16 been accorded affirmative constitutional protection.

17 And without having some specific Federal
18 prohibition on what California has done, then the
19 decision below should be affirmed.

20 California is committed to the eradication of
21 sex discrimination. And this commitment is equal to its
22 commitment to eliminating race discrimination, not just
23 in the Unruh Civil Rights Act, but as a constitutional
24 matter, in the other civil rights statutes, and in
25 California's common law history, race and sex

1 discrimination are equally invidious.

2 And I think it's undisputed that being able to
3 call oneself a Rotarian is valuable. It's valuable in
4 the business community. Rotary is respected as being a
5 cross-section of the business community.

6 And it's true --

7 QUESTION: General Johnston, can you tell us
8 how Rotary International can comply with this court
9 order, if it wishes, in those states that do not feel
10 the way California does, to continue as an all-male
11 organization?

12 MS. JOHNSTON: I would certainly agree with
13 counsel for Duarte that the State of California has no
14 intent to try and enforce its law outside the State of
15 California.

16 All that we are requiring is that Rotary
17 International not expel local clubs such as Duarte who
18 choose to admit women.

19 If they are expelled, then they no longer
20 enjoy the advantage of being able to identify themselves
21 --

22 QUESTION: But you are affecting states other
23 than California, then. Because if you apply this
24 injunction, literally, it means that even though Rotary
25 Clubs in all the 49 other states that don't have a law

1 like the Unruh law, assuming, even though all those
2 clubs want to have an affiliation in an all-male
3 national organization, California alone can prevent
4 that.

5 MS. JOHNSTON: We are not preventing those
6 clubs operating in other states, if that is not unlawful
7 in those other states.

8 Now it may affect those other states --

9 QUESTION: It's not just the clubs operating
10 in the other states. It's that those clubs want to have
11 a national organization, and they want to affiliate with
12 one another. They want to have the kind of visitation
13 privileges that Rotary International provides.

14 If you're a member of Rotary, you can go into
15 any club in that town. And they want to be able to go
16 to an all-male club.

17 MS. JOHNSTON: Well, in that sense, Your
18 Honor, it's no different than saying that Rotary
19 International doesn't discriminate on the basis of race,
20 even though it's operating in communities where race
21 discrimination may be permitted.

22 Rotary --

23 QUESTION: You acknowledge, then, that as this
24 -- that -- that this injunction prevents Rotary from
25 doing that; that Rotary cannot get out of California and

1 just say, we'll operate in the other 49 states?

2 MS. JOHNSTON: Oh, no, it could certainly
3 leave California, if it is no longer a business
4 establishment operating in California, then it wouldn't
5 be subject to California's law.

6 QUESTION: How can it do that? I thought that
7 the only way it now does business in California is
8 through its affiliates, that is, the local Rotary
9 Clubs. And this Injunction prevents it from expelling
10 this local Rotary Club.

11 MS. JOHNSTON: And I assume that Rotary would
12 not want to leave California because of the number of
13 members that it has. But it certainly could decide it
14 is no longer going to charter or recognizes clubs in
15 California.

16 QUESTION: How can it do that and comply with
17 this Injunction?

18 MS. JOHNSTON: I don't think this injunction
19 provides anything further than, if it is in the
20 business, doing business in California, that it has to
21 do so in a nondiscriminatory manner.

22 QUESTION: And doing business in California
23 consists of no more than having a local Rotary Club in
24 California. And this injunction prevents it from
25 terminating a local Rotary Club in California.

1 MS. JOHNSTON: That's true.

2 QUESTION: And wouldn't you say that -- that
3 under this injunction, or one that would undoubtedly be
4 forthcoming, that Rotary International could not exclude
5 women delegates who are members of local California
6 Rotary Clubs?

7 MS. JOHNSTON: That's correct.

8 QUESTION: So they would have to, at the
9 international meeting, unless Rotary wanted to withdraw
10 entirely from California, Rotary would have to admit the
11 California lady delegates into their convention?

12 MS. JOHNSTON: They would certainly have to
13 treat women Rotarians from California the same as they
14 treat men Rotarians from California. That's the purpose
15 of the Unruh Civil Rights Act.

16 QUESTION: Suppose -- how can they withdraw
17 from -- can they withdraw from California if they just
18 say, we will no longer have any California local Rotary
19 Clubs? Can they do that?

20 MS. JOHNSTON: They can do that, Your Honor.

21 QUESTION: And that would comply with this
22 injunction?

23 MS. JOHNSTON: That would comply with the
24 California law, because they would no longer be
25 operating in California, so they wouldn't be violating

1 California law.

2 But California's message which it gives to
3 business establishments in California is that you do
4 have to treat women as equals, and you cannot treat them
5 as second class citizens.

6 Turning to the overbreadth issue which counsel
7 for Rotary International alluded to: It is true that
8 the Unruh Civil Rights Act is broad. It was
9 deliberately broad.

10 California formerly had a statute similar to
11 that in many other states, which referred to places of
12 public accommodation. It decided that that language was
13 too narrow, and that there were too many groups being
14 excluded from coverage that California wished to prevent
15 from discriminating.

16 So it decided to enact a statute which used
17 very broad language. It used language of "all", of
18 every kind whatsoever, to signify its intent to prohibit
19 a broad range of discrimination.

20 But the fact that it's broad does not mean
21 that it's unconstitutionally overbroad, because there is
22 no substantial danger that the Unruh Civil Rights Act
23 will be misapplied to intrude upon constitutionally
24 protected activities.

25 Now two possible areas have been raised,

1 either dealing with intimate association rights or
2 expressive rights.

3 Any time there has been any hint that Unruh
4 might be misapplied to those types of situations,
5 California courts have made it very clear that they will
6 not permit that to happen.

7 In the case dealing with the Christian yellow
8 pages, where a sales director was selling solicitation
9 ads, it said, although we will regulate your
10 discriminatory business practices, we will not regulate
11 your First Amendment rights, your expressive rights.

12 QUESTION: Suppose one of these clubs, some
13 other club in California, refused to admit women, and a
14 suit was brought, and it was held that the club had to
15 admit women, under Unruh.

16 MS. JOHNSTON: Yes, Your Honor.

17 QUESTION: Is it possible that it could be
18 held under Unruh that it didn't need to admit women?

19 MS. JOHNSTON: Not under Unruh. It's possible
20 that there would be constitutional problems which would
21 prevent Unruh from being applied.

22 California courts have made it very clear,
23 using language very similar to this Court's language in
24 the Jaycees case, that Unruh does not govern truly
25 private groups; groups that are purely social,

1 continuous, and personal; groups that operate outside of
2 public view.

3 QUESTION: But there isn't any Rotary -- local
4 Rotary Club that could be of that nature, I gather?

5 MS. JOHNSTON: I don't believe so, if it were
6 operating as Rotary International tells us that Rotary
7 local clubs are supposed to operate.

8 It's conceivable that there is a group
9 somewhere calling itself Rotary that would fall within
10 the constitutionally protected zone of privacy. And if
11 that's true, they would certainly be both protected as a
12 constitutional matter, but also, I believe that the
13 California courts would find that they are not covered
14 by the Unruh Civil Rights Act.

15 Because again, the California courts have
16 construed Unruh not to cover truly private clubs.

17 QUESTION: But therefore, are you saying at
18 least it's theoretically possible -- I suppose you would
19 argue the contrary -- that the International Rotary is a
20 business organization covered by the statute even though
21 the local might be constitutionally protected?

22 MS. JOHNSTON: It's certainly theoretically
23 possible that there are Rotary -- groups calling
24 themselves Rotary that are constitutionally protected.

25 QUESTION: That are associations that could

1 elect to restrict their membership.

2 MS. JOHNSTON: And there clearly are many
3 associations which are constitutionally protected. I
4 just doubt whether --

5 QUESTION: Is it theoretically possible that
6 all of them are like that? Just sort of theoretically
7 possible --

8 MS. JOHNSTON: Theoretically possible --

9 QUESTION: -- that all of them are like that,
10 and the law would still apply to the International, in
11 your view.

12 MS. JOHNSTON: That's correct, because Unruh
13 requires --

14 QUESTION: Even if one of them -- even if one
15 of them -- even if one of them, even though it didn't
16 have to, admitted women voluntarily, and Rotary threw
17 them out for it, Rotary as an organization nevertheless
18 could not do that?

19 MS. JOHNSTON: Because it is depriving women
20 of the opportunity to call themselves Rotarians, and
21 denying them all the benefits that that engenders.

22 In sum, California prohibits only arbitrary
23 and invidious discrimination. It does not prevent
24 selectivity which is legitimate in terms of a group's
25 purposes; it does not prohibit all invidious

1 discrimination if a substantial justification can be
2 shown; and it doesn't cover groups protected by any
3 intimate association rights.

4 But since the Unruh Civil Rights Act, as
5 interpreted and as applied by the California courts,
6 does not intrude upon any Federally constitutionally
7 protected rights, then I think the sovereign power of
8 the state to enact legislation and to apply that
9 legislation for the public welfare of the citizens of
10 that state should be upheld, and the decision below
11 should be affirmed.

12 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
13 Johnston.

14 The case is submitted.

15 (Whereupon, at 2:52 p.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:
#86-421 - BOARD OF DIRECTOS OF ROTARY INTERNATIONAL, ET AL.,
Appellants V. ROTARY CLUB OF DUARTE, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)