IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-75

MOOSE LODGE NO. 107, *Appellant,*

v.

K. LEROY IRVIS, *et als.*

On Appeal from the United States District Court for the Middle District of Pennsylvania

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APPELLANT'S MEMORANDUM IN CONNECTION WITH MOTION OF AMERICAN JEWISH COMMITTEE ET AL. FOR LEAVE TO FILE A BRIEF AMICI CURIAE

This Court's Rule 42(3) requires among other things that a motion for leave to file a brief *amicus curiae* shall "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties."

Examination of the motion for leave to file a brief *amici curiae* in the present case, submitted on behalf of

American Jewish Committee, American Jewish Congress, and Anti-Defamation League of B'nai B'rith, as well as of the brief *amici curiae* attached to that motion, which seeks affirmance of the judgment below, discloses an utter failure to comply with the foregoing rule. It was for this reason alone that request for leave to file was in May 1971 refused these movants by appellant Moose Lodge.

In the instant motion, filed in July 1971, counsel for the prospective *amici curiae* still have not made the slightest showing that the appellee Irvis, the only actual party to this cause who is presently supporting the judgment appealed from, has up to now failed or will hereafter fail to adduce a single one of the legal or factual matters that they now advance.

Contrariwise, counsel for the prospective *amici curiae,* who propose to launch an attack (Motion, p. 2) on "the ultimate bastions of privilege—the private clubs," never once cite, much less discuss, the Congressional exemption for such clubs that is contained in Section 201(e) of the Civil Rights Act of 1964 (42 U.S.C. § 2000a(e)). That subsection expressly provides that the provisions of Title II of the Act ("Injunctive Relief against Discrimination in Places of Public Accommodation")—

> "shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b)."

Consequently counsel for the prospective *amici curiae* never once address themselves to one of the appellant Moose Lodge's major arguments (Point V,

M.L. Br. 86-107), to the effect that "The Congressional exception for 'a private club or other establishment not in fact open to the public' marks a proper boundary between the competing constitutionally protected liberties of privacy and private association on the one hand and of freedom from discriminatory state action on the other, and that boundary should be respected and reaffirmed here."

Otherwise stated, counsel for the prospective *amici curiae* deliberately shut their eyes to the fact that Congress, without a single whisper to the contrary (M. L. Br. 87-98), undertook to preserve unimpaired those very "ultimate bastions of privilege—the private clubs" that counsel now so strenuously assail.

This memorandum has been filed because we deem it our duty as officers of the Court to call attention both to the violation of the Rules that the present motion involves, as well as to the uncandid and in consequence thoroughly unhelpful propaganda brief which that motion seeks to inflict on the Court.

Respectfully submitted.

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AUGUST 1971.