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TABLE OF CITATIONS

CASES:

QUESTION PRESENTED

1. Is the licensing and regulation, under an extensive and pervasive state regulatory scheme, of an organization that refuses to dispense goods and services to persons on the grounds of their race, "state action" in violation of the equal protection clause of the Fourteenth Amendment?

STATEMENT

There are some 4,238 "clubs" which are licensed by the Pennsylvania Liquor Control Board (LCB) to dispense alcoholic beverages on their premises to members and their guests for a price. As defined by the "Liquor Code", 1951, April 12, P. L. 90, Art. I, §101, 47 P.S. §1-101 et seq., a "club" is any non-profit association of any reputable group of individuals formed for purposes of mutual benefit, entertainment, fellowship or lawful convenience, having some primary interest to which the sale of alcoholic beverages is only secondary. The Code further provides that "clubs" so licensed must hold regular meetings, conduct its business through regularly elected officers, admit members by written application, charge and collect dues, maintain records and may waive and reduce dues for servicement. LCB Regulation §113.-09, requires "every club licensee shall adhere to all of the provisions of its constitution and by-laws." The obvious purpose of the above-cited provisions is to assure that liquor licensees holding "club" licenses are *bona fide* clubs and not in fact taprooms or bars having the appearance of a club but availing themselves of the special and highly valued privileges of a "club" license. These provisions demonstrate how pervasive and extensive regulations must be once the State has entered the field of licensing clubs to dispense liquor.

That liquor licensees who sell alcoholic beverages for on the premises consumption are highly regulated

has been fully described by the Court below and in the briefs of the appellants and appellees. See 318 F. Supp. 1246, at pp. 1248-1250, and pp. 8-9 of Appellee Irvis' brief. That special privileges pertain to "club" licensees is evident from statutory provisions which permit them to remain open for liquor sales for longer hours than other licensees. The club licensee may sell alcoholic beverages on Sunday but unlike the non-club licensee is not required to have a substantial food business. 47 P.S. §4-406 and Act No. 27, 1971 Session of the Pennsylvania General Assembly. See Appellee Irvis' brief, pp. 59-60.

The facts of this case are agreed. Moose Lodge No. 107 holds a "club" license issued by the LCB. Appellee Irvis, as a guest of a member of Moose Lodge No. 107, was refused service of an alcoholic beverage solely on the ground that he is a Negro (A. 6). Moreover, as a member lodge of the Loyal Order of Moose, Irvis is barred from membership as a result of the provisions of the constitution and bylaws of this order which restrict membership in Moose Lodges to male Caucasions and male Caucasions married to female Caucasians. These provisions completely bar Irvis from availing himself of the highly regulated privileges extended by the club license and conferred by this Comonwealth on Moose Lodge No. 107. This bar arises solely on the grounds of his race.

The Court below held that refusal of Moose Lodge No. 107, in the context of the pervasive and extensive liquor regulatory scheme of Pennsylvania, was State action in violation of the equal protection clause of the Fourteenth Amendment. The Court declared

the club license of Moose Lodge No. 107 invalid and further indicated that the statutes authorizing licensing of clubs by the LCB were unconstitutional insofar as they countenanced the racial discrimination complained of.

It is the position of the Commonwealth that the racial discrimination complained of was State action in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution. The logical corollary of this position is that the statutes and regulations regulating and licensing clubs are unconstitutional insofar as they authorize the LCB to license clubs which discriminate in the sale of alcoholic beverages on the grounds not permitted by the Fourteenth Amendment. It is submitted that the Commonwealth, by virtue of the monoply power it exercises over the entire liquor business, the pervasive and extensive nature of its regulatory scheme and the special privileges it confers on club licensees has inextricably involved and identified itself in the affairs of such clubs. As a consequence, the liquor dispensing activities of exclusionary clubs bear the mark of "state action" and foster the suspicion and distrust of government which is dysfunctional to governmental process and anathema to the concept of a democratic society.

SUMMARY OF ARGUMENT

Moose Lodge No. 107 holds a "club" license issued by the Pennsylvania LCB. As a licensee it is subjected to continuous and close regulation of its affairs by the LCB. Moose Lodge No. 107 discriminates by refusing to serve alcoholic beverages to Negroes.

There is substantial authority emanating from this Court and lower federal courts holding that such discriminatory activity constitutes State action in violation of the equal protection clause of the Fourteenth Amendment. The policy rationale of such authority is that when a State extensively regulates an area of activity or undertakes in large measure to perform activities in a particular area but also permits private persons or organizations who are regulated or participating in the governmental activities to discriminate, the State, by its regulation of or participation in such activities has itself promoted discrimination. This rationale recognizes that there is a substantial gray area between prohibited discriminatory activity by "purely" state agencies and officials and permissible discriminatory activity by "purely" private individuals. The rationale also recognizes that the purposes of the Fourteenth Amendment could be easily avoided should its prohibitions extend only to discriminatory activity of officials who are elected or appointed by law and agencies which are created and operate under law and the officers of which are established by law.

This rationale is applicable to this case. By licensing clubs which discriminate the Commonwealth is promoting discrimination in an area where it has expressed a strong and abiding interest, it has circumscribed the activity of its licensees by numerous regulations and statutory provisions and conferred special benefits on such licensees. To categorize the discriminatory activities of club licensees in the context of such a regulatory scheme as "private" for purposes of the equal protection clause comes close to making its prohibitions against official discrimination a sham.

ARGUMENT

It is anathema to a system of government, which has as its fundamental doctrine the equality of all citizens before the law, any doctrine which categorizes some of its citizens as inferior to others. Racism, in the form of *de jure* segregation of blacks and, whites, *Brown v. Board of Education*, 347 U.S. 483 (1954), denial of governmental benefits and services on the grounds of race, *Evans v. Newton*, 382 U.S. 296 (1966), racially restrictive covenants, *Shelly v. Kraemer*, 334 U.S. 1 (1948), racially exclusionary clauses in the governing provisions of clubs and organizations, or the racially exclusionary practices of labor unions, *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio E.D. 1967), and persons maintaining places of public accommodation, 42 U.S.C. §2000a-1, should not be actively encouraged or fostered by duly constituted government. In viewing "state action" under the Fourteenth Amendment the question should not be what are the areas in which racism and racist activities are permitted but to what extent have the powers of and benefits conferred by the State been used to promote activities which are invidiously discriminatory. Where the powers exercised or benefits conferred by the State are substantial and direct and go beyond a mere failure to prohibit or refusal to regulate, the conclusion should be that the discriminatory activity in question has risen to the level of state action in violation of the Fourteenth Amendment.

There are few difficulties and many advantages to be derived from such an approach. The constitutional rights of privacy and expression no doubt permit individuals and groups to harbor bigoted ideas and to express these ideas publicly, *Adickes v. Kress and Co.*, 398 U.S. 144, 169 (1969). Beyond these interests there is nothing to be gained by government affirmatively aiding the encouragement of racism. Rather emasculation of the purposes of the Fourteenth Amendment may be avoided and much of the apparent chaos in case law surrounding the "state action" concept can be explained.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court held that discrimination on the grounds of race by a tenant-coffee shop located on the premises of a parking garage owned by the Parking Authority was "state action" in violation of the equal protection clause. Mr. Justice Clark wrote:

> "Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' [citation omitted] Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be

attributed its true significance." (365 U.S. at 722, 81 S. Ct. at 860.)

Prompting this holding, was the presence of several factors indicating substantial involvement of the State with the proscribed discriminatory activity. The factors were that the municipal authority had constructed and was operating the facility in which the coffee shop was located; they had leased premises to the coffee shop; and both the coffee shop and Parking Authority derived immediate benefits from one another's presence in the garage.

In *Griffin v. Maryland,* 378 U.S. 130 (1964), five black youths, who purchased tickets, attempted to ride a carousel in a privately owned amusement park and were arrested by a private detective who was acting on orders by the park management. The private detective had also been deputized by the local sheriff and apparently had attempted to act pursuant to this authority also. This Court held that the detective's function of carrying out the instructions of the private owners and his deputization by the local sheriff made his activity state action in violation of the equal protection clause.

State action was again found to be present when the public trustees of a racially exclusionary park were replaced by private trustees so that the park would continue to be managed on an exclusionary basis. *Evans v. Newton,* 382 U.S. 296 (1966).

Additionally, numerous lower court opinions have attempted to describe the parameters of state action. In *Ethridge v. Rhodes,* 268 F. Supp. 83 (S.D. Ohio, E.D. 1967), the District Court held that a state's exe-

cution of a collective bargaining agreement with a labor union in connection with a state building project when the union practiced discrimination was "state action". Similarly in *Smith v. McQueen,* 316 F. Supp. 899 (M.D. Ala., 1970), the District Court found state action present where a State had exempted a local, racially exclusionary YMCA from all State and local taxes and had entered into contracts with the "Y" for the "Y" to coordinate State sponsored recreational activities.

Finally, in *Seidenberg v. McSorley's Old Ale House,* 317 F. Supp. 593 (S.D. 1970), state action was present by virtue of the fact that the State had licensed a New York bar with a well-known tradition of excluding citizens of the female sex. The refusal of the licensing authority in the context of the latter's pervasive regulatory powers over the former was held to violate the equal protection clause.

In the cases discussed above the various courts were faced with a myriad of factual situations bearing little or no apparent similarity. However, in every case the State involvement went beyond mere refusal of the State governing authority to prohibit the discriminatory activity and the mere refusal of the State to regulate the activity of the individual or organization committing the discriminatory activity. The State in every case had either extensively regulated the area in which the individual or organization was participating or was the moving force behind an activity which substantially benefitted the party which had discriminated. Moreover, although this view was not clearly articulated, the courts in each case regarded the question of whether state action was pres-

ent from the position of how much State activity was involved and not from the position of whether "private" persons were engaged in discriminatory activity.

In the instant case, there is present both an extensive, state regulatory scheme and substantial benefits conferred on club licensees by the State. Under the circumstances it is clear "state action" exists in violation of the equal protection clause by the continued licensing of Appellant, Moose Lodge.

At this point it should be noted what the ramifications of a decision by this Court will be if continued licensing of Moose Lodge No. 107 is held violative of the Fourteenth Amendment. The Moose Lodge and similarly exclusionary clubs, if they do not rectify their exclusionary practices at least for purposes of the sale of liquor, will be no longer permitted club licenses. There may be activities unrelated to the sale of liquor on club premises which such clubs may still be able to conduct on an exclusionary basis. The extent of State involvement in such activities, an involvement not disclosed in this record, will determine, as here, whether such activites are permitted.

Finally, the Commonwealth would like to respectfully indicate its disagreement with an apparent narrowing of the scope of the ruling of the Court below. Circuit Judge Friedman, in the course of an able and well documented opinion, indicated that his opinion implied no judgment ". . . on private clubs which limit participation to those of a shared religious affiliation or a mutual heritage in national origin." 318 F. Supp. at 1251.

Although the question of the validity of a club license of a religiously or ethnically exclusionary club is not before this Court, it is clear from numerous rulings of this Court that "state action" which discriminates on the basis of religious affiliation or national origin is as equally invidious as racial discrimination. See *Sailer v. Leger,* 403 U.S. 365, at p. 372 (1971); *Oyama v. California,* 332 U.S. 633 (1948); and *Torcaso v. Watkins,* 367 U.S. 488 (1961).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below be affirmed.

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