IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1292

MOOSE LODGE NO. 107, *Appellant,*

v.

K. LEROY IRVIS, and WILLIAM Z. SCOTT, Chairman, EDWIN WINNER, Member, and GEORGE R. BORTZ, Member, LIQUOR CONTROL BOARD, COMMONWEALTH OF PENNSYLVANIA

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

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MEMORANDUM IN OPPOSITION TO THE MOTION TO AFFIRM

Pursuant to Rule 16(4), appellant MOOSE LODGE No. 107 files this memorandum in opposition to the appellee Irvis's Motion to Affirm.

First. Of course we did not expect the appellee Irvis to criticize the decision below in his favor, much less to file here a confession of error. But his motion to

affirm, a pleading appropriate only when the issues between the parties are purely factual or when the legal questions presented are palpably insubstantial, wholly misapprehends the nature of this Court's jurisdiction of cases on appeal.

Second. The court below candidly admitted in its opinion (J.S. App. A4) that "This case presents a situation which is one of first impression." And the court below in effect repeated that earlier acknowledgement of judicial novelty by granting the appellant Moose Lodge's motion for a stay pending appeal only a very few days after that motion was filed, and before the appellee Irvis's expression of no objection had been received. Thus, without in any sense either rearguing or even summarizing what is already set forth in our Jurisdictional Statement, it is perfectly obvious that what was decided below did not involve merely replowing fields that were already well marked by earlier decisions of this Court.

There is in consequence no need, certainly at this juncture, to distinguish with precision the authorities now put forward by the appellee Irvis (M/A 4, 5); it is quite sufficient to point out that the court below did not purport to be traveling a well-marked furrow, but, to the contrary, acknowledged that it was cutting a new path.

Third. The present case, while accordingly one of first impression, is only one of many that are currently in the courts. Considerable other litigation similarly involves the question whether a State's issuance of liquor licenses to private clubs turns those clubs' by-laws into "state action," so that their restrictive membership requirements automatically become subject to the Fourteenth Amendment, and the further question

whether such "state action" outweighs the members' countervailing constitutionally protected liberties of privacy and private association.

1. *Gerber* v. *Hood,* Civil No. 7701, W.D. Wash., N. Div., is now before a three-judge district court, seeking to enjoin the Washington State Liquor Control Board from issuing liquor licenses to any club engaging in discriminatory acts on the basis of race, religion and national origin, and to require the Board to revoke any licenses already issued to such organizations. The Loyal Order of Moose, the Fraternal Order of Eagles, the Benevolent and Protective Order of Elks, and the Washington State Federation of Fraternal, Patriotic and City Country Clubs, have all been permitted to intervene.

2. *Pitts* v. *Wisconsin,* E.D. Wis., No. 69-C-260, seeks to revoke all tax exemptions issued to similar fraternal and benevolent organizations, naming the Eagles and the Elks. If the plaintiff were to succeed, all Moose Lodges would be affected.

3. *Revere Lodge No. 1117, B.P.O. Elks* v. *Miller,* Superior Court of Massachusetts for Suffolk County, is an action to restrain the Massachusetts Alcoholic Beverages Commission from revoking the plaintiff's liquor license; the Commission had directed all Elks, Moose, and Eagles Lodges to show cause why their liquor licenses should not be revoked because of the membership restrictions in their respective charters. A preliminary injunction was denied after the Commonwealth's Attorney General stipulated that no such licenses would be revoked *pendente lite.*

4. *McGlotten* v. *Portland Lodge No. 142, B.P.O.E.,* D. Ore., is an action challenging the Elks' tax exemption on the ground of its membership restrictions.

5. The State of Maine in 1969 enacted Section 1301-A of Title 17 of the Revised Statutes, which would deny not only liquor but also food licenses to clubs which have racial restrictions, but which, like the ruling below (J.A. App. A11), would permit such licenses to continue to be issued to "organizations which are oriented to a particular religion or which are ethnic in character." *

A case challenging that statute, brought by twelve Elks Clubs in the Superior Court of Maine at Portland, resulted in judgment for the plaintiffs; we are advised that it has been appealed.

6. We are likewise advised that the passage of similar ordinances elsewhere (e.g., by the City of Madison, Wisconsin) will shortly result in additional litigation.

Fourth. In our view, the issuance of a state liquor license to a *bona fide* private club does not and cannot transform the membership requirements of such a club into state action; and the court below, by acknowledging its decision to be one of first impression, concedes that its result does not flow from any ruling ever announced here.

In our view, further, the right of individuals to fashion their private lives by picking their associates so as to express their own preferences and dislikes, and

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* The operative part of Ch. 371 of 1969 reads as follows:

> "No person, firm or corporation holding a license under the State of Maine or any of its subdivisions for the dispensing of food, liquor or for any service or being a State of Maine corporation or a corporation authorized to do business in the State shall withhold membership, its facilities or services to any person on account of race, religion or national origin, except such organizations which are oriented to a particular religion or which are ethnic in character."

by joining such clubs and groups as they choose, are themselves constitutionally protected liberties under earlier expressions here—which the court below did not even deign to cite.

It follows that the questions now presented are substantial, and that they require plenary consideration with briefs and oral argument before they can be resolved.

CONCLUSION

For the following additional reasons, it is respectfully submitted that the Court should note probable jurisdiction in the present case.

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