No. 86-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,

v.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF *AMICI CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION IN SUPPORT OF APPELLEES

JILL L. KAHN
Counsel of Record
Anti-Defamation League
of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 490-2525
Attorney for *Amici Curiae*

Of Counsel
LIVIA D. THOMPSON
JUSTIN J. FINGER
JEFFREY P. SINENSKY
MEYER EISENBERG
Anti-Defamation League
of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

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CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

For seventy-five years, the Anti-Defamation League of B'nai B'rith has pursued the objective set out in its charter "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." Towards that end, the Anti-Defamation League has been consistently in the forefront of fighting discrimination and ensuring that all persons receive equal protection under the law.

In support of governmental efforts to eradicate discrimination in clubs, the Anti-Defamation League previously filed an *amicus* brief before this Court in the case of *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, ___ U.S. ___, 107 S. Ct. 1940 (1987). ADL has filed numerous other *amicus* briefs urging the unconstitutionality or illegality of discriminatory laws or practices, *e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

The New York County Lawyers' Association ("NYCLA"), one of the largest county bar associations in the United States, is a New York not-for-profit corporation whose membership is composed of more than 10,000 attorneys practicing in all fields of law. Since its founding, NYCLA has been an active force in the promulgation of laws ensuring civil rights, political equality and equal justice. NYCLA was among the first bar associations in the country to admit women since its 1908 charter was gender neutral. Through its Committee on Women's Rights and its Committee on Civil Rights, NYCLA has engaged in numerous activities aimed at eliminating discrimination against women and minorities, including preparing reports, drafting and testifying in support of legislation, and appearing as *amicus curiae* in litigation in both federal and state court.

NYCLA is dedicated to the principle of equal access for women and minorities to clubs and organizations as defined by and provided in New York City Local Law 63. The NYCLA Board of Directors has passed a resolution barring the conduct of NYCLA business at discriminatory clubs subject to Local Law 63. NYCLA supports the right of all persons to join those purportedly "private" clubs where business and professional contacts are made and which represent a traditional avenue for economic and political advancement. For these reasons, NYCLA is vitally interested in the outcome of this case and strongly supports the position of Appellees.

This Court is presented with the opportunity to remove one of the many obstacles faced by women and minorities on their road to

equality by upholding New York City's right to subject nonprivate clubs to its anti-discrimination laws. The Anti-Defamation League believes it is able to bring to these issues before the Court the perspective of a national human rights organization dedicated to safeguarding all persons' civil rights, and the New York County Lawyers' Association provides the reflections of many attorneys in the county in which the statute at issue is applicable. *Amici* therefore respectfully offer this Court their accumulated experience with the issues raised by this case.

QUESTION PRESENTED

Does Local Law 63 comport with the Supreme Court's decisions in *Roberts* and *Rotary* as to what constitutes a private association exempt from public accommodation laws?

STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief for Appellees.

SUMMARY OF ARGUMENT

At issue in this case is the constitutionality of New York City's Local Law 63, which amends the City's public accommodations statute by providing specific guidelines for determining when a social or business club is not a distinctly private club and therefore subject to its public accommodation law. The ordinance's limited reach to business and social clubs with more than 400 members, regular meal service and regular payment from or on behalf of nonmembers does not violate Appellant's First Amendment associational rights.

Local Law 63 comports with this Court's holdings in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, ___ U.S. ___, 107 S. Ct. 1940 (1987), in which the Supreme Court discussed certain factors that are relevant in determining whether an establishment is a private membership association or a public accommodation. Thus, Appel-

lant's argument that the statute violates its members' constitutional freedom of intimate and expressive association is without merit.

The *Roberts* Court identified several factors as being important in deciding whether a right of intimate association exists; these include a club's "size, purpose, policies, selectivity, [and] congeniality . . . ." 468 U.S. at 620. A comparison of the terms of Local Law 63 with these factors demonstrates that the ordinance does not restrict the policies or practices of any club which enjoys intimate associational rights since the ordinance reaches only those clubs with more than 400 members in which nonmembers regularly participate through meal service and by payments to the club.

Regarding Appellant's freedom of expressive association, the compelling state interest served by New York City's prohibition against discrimination by clubs used in furtherance of trade or business unquestionably justifies any limited infringement. As in *Roberts* and *Rotary*, Local Law 63 is narrowly tailored and unrelated to the suppression of ideas, and New York City's compelling interest cannot be achieved through means significantly less restrictive of associational freedoms.

ARGUMENT

I. Introduction and Historical Perspective

While the right to associate is an important, fundamental right, history has taught us that when the majority and the powerful exclude the minority and the weak, the rejected group suffers.

The New York State Club Association's (hereinafter "Appellant" or "Association") view of history is curiously one-sided; while evoking the past as proof of the importance of the right of individuals to associate to the exclusion of others, Appellant fails to recall that protection of *minorities* was considered vital. Appellant recites Alexis de Tocqueville as "succinctly describing the fundamental importance of the right of association," brief for Appellant at 15, without explaining that de Tocqueville lauded the right to associate because it could protect the minority against the majority, and not

because it also allowed the majority to associate. As de Tocqueville noted further along in the chapter cited by Appellant:

> In America *the citizens who form the minority associate* in order, first, to show their numerical strength and to diminish the moral power of the majority; and, secondly, to stimulate competition and thus to discover those arguments that are most fitted to act upon the majority. . . . Political associations in the United States are therefore peaceable in their intentions and strictly legal in the means which they employ; and they assert with perfect truth that they aim at success only by lawful expedients.

de Tocqueville, *Democracy in America*, at 203 (Vintage Books ed. 1945) (emphasis added).

The history of business and social clubs demonstrates that restrictive membership and guest policies have traditionally excluded racial, ethnic, and religious minorities as well as women. The result of this exclusion—denial of access to social, business and professional leaders of the community, lack of opportunity for career advancement, and stigmatizing discriminatory treatment—has a powerful impact on minorities and women.

Before the 1960's, many clubs were explicit about their exclusionary policy. One New Jersey club in the 1950's required applicants to state that "I am not a member of the Negro or Hebrew race or blood" and each month a newsletter reminded members that the club's by-laws restricted those of "the Negro or Hebrew race or blood." *Rights—ADL Reports on Social, Employment, Educational and Housing Discrimination*, Vol. 1, No. 8, Oct.-Nov. 1957 (hereinafter "*Rights*").

New York has had its share of overtly racist or religiously bigoted clubs. The Lake Placid Club, established in 1895, included the following inscription in its literature and on one of its cornerstones:

> No one will be received as a member or guest against whom there is physical, moral, social or race objection, or who would be unwelcome to even a small minority. This excludes all consumptives, or rather invalids, whose presence might injure health or modify others' freedom or

> enjoyment. This invariable rule is rigidly enforced: it is found impracticable to make exceptions to Jews or others excluded, even when of unusual personal qualifications.

Rights, Vol. 2, No. 3, June-July 1958. The Lake Placid Club defended its restrictive policy on the grounds that it was a "private club," although it derived a substantial part of its business from conventions, nonmembers frequented the establishment, and it did not have a selective membership process. *Rights*, Vol. 2, No. 3.

Amici do not contest the fact that clubs have served an important function in American political and social life over many years. It is also true that for many years it was assumed without question that clubs could have single sex, single race and/or single religion membership. The right to spend time with whom one wants, and to avoid contact with persons whom one does not want to see, was even given implicit Supreme Court approval in 1896. In *Plessy v. Ferguson*, the Court stated:

> The object of the [14th] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.

163 U.S. 537, 544 (1896). With this decision, "separate but equal" gained official sanction. So long as all people were free to create their own associations, this doctrine supported their right to exclude others from such organizations on the basis of race or for any other reason.

The argument that racially segregated facilities are "equal" was rejected by this Court in *Brown v. Board of Educ.*, 347 U.S. 483 (1954):

> To separate [children and teenagers] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

347 U.S. at 494. Heralded as the death knell for the "separate but equal" doctrine, *Brown v. Board of Educ.* ushered in a generation of

cases successfully challenging segregated workplaces, transportation facilities, and other areas of business and social interaction as inherently unequal. However, discrimination in purportedly private clubs persisted. These so-called private clubs were frequently the locales for important business and professional dealings and women and minorities were often excluded. In the meantime, many groups who were previously excluded were breaking down barriers to participation in the professional and business worlds.

ADL has continued to monitor private club discrimination since the 1960's.[1] Although explicit statements of racial or religious exclusion have for the most part disappeared, in *Amici's* experience such statements still exist with regard to women. Moreover, numerous recorded episodes demonstrate that many clubs continue to discriminate on the basis of race or religion even though their written policy statements may appear neutral.

A rapidly developing public sentiment, impatient with continuing practices of racial, gender and religious discrimination by clubs and organizations, has led to increased litigation in both state and federal courts against so-called "private" clubs whose membership often includes the business and social leaders of the community. *See, e.g., Burning Tree Club, Inc. v. Maryland,* Mem. Op., Case No. 3108902 (Cir. Ct. for Anne Arundel County July 21, 1987), *app. pending,* ___ Md. ___ (Ct. of App.); *Jonathan Club v. California Coastal Comm'n,* Case No. C563602 (Sup. Ct. Los Angeles County, 1985), *app. pending,* ___ Cal. App. 3d ___ (Ct. of App., 2d Dist.). There

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[1]In 1962, ADL conducted a survey to determine the extent of religious discrimination in social clubs. The results were published in *Rights* in January 1962. The survey included 1,152 clubs from 46 states and the District of Columbia (Atlanta, Maine, New Hampshire and Vermont were not represented), 349 of which were city clubs and 803 of which were country clubs. ADL found that 67 percent of the clubs practiced religious discrimination. *Rights,* Vol. 4, No. 3 (Jan. 1962).

Later, ADL surveyed leading athletic clubs across the country to determine whether they maintained religiously or racially restrictive policies. *Rights,* Vol. 7, No. 2 (June 1968). Of the 38 clubs surveyed, only 3 maintained open membership policies with respect to both race and religion.

has also been increased emphasis on corrective legislation at state and local levels. Clubs which discriminate are now faced with a potential withdrawal of tax benefits, liquor licenses, zoning waivers and other legislatively-granted privileges.

Were Appellant's argument to prevail, the end result would be to turn back the clock of integration and to allow clubs that in fact serve a public function to remain as segregated institutions—all under the guise of the right of private association.

II. Local Law 63 Comports with Supreme Court Precedent

In evaluating Local Law 63, the Court need not define the outer limits of associational freedoms. Since Appellant has conceded the relevancy of *Roberts* and *Rotary*, the validity of the ordinance can be determined by an examination of these decisions. Such an examination makes it clear that Local Law 63 is a constitutional means of eliminating discrimination against women and minorities. Although Appellant argues that the ordinance goes beyond the guidelines of *Roberts* and *Rotary* in regulating clubs, *Amici* submit that Local Law 63 comports with *Roberts* and *Rotary* and should be upheld based on the Court's reasoning in those cases.

The Association asserts broadly a claim that its member clubs enjoy an unbounded right to freedom of association which is impermissibly burdened by New York City's efforts to eradicate discrimination. The Association is a consortium of "private" clubs and associations, some of which "limit their membership on grounds of, *inter alia*, race, religion, sex or national origin." Brief for Appellant at 4. The Association candidly admits it also includes as members clubs which "practice no discrimination whatsoever." *Id.* Appellant states that its member clubs were formed for a variety of reasons. *Id.* Presumably, the size of the Association's member clubs varies as well, and not all provide regular meal service.

In this challenge to New York City's anti-discrimination ordinance, therefore, this Court is not presented with an association whose characteristics and activities can be readily or accurately described with any degree of specificity. *Cf. Rotary*, 107 S. Ct.

1940 (1987); *Roberts*, 468 U.S. 609 (1984); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Appellant nevertheless asserts that Local Law 63 violates its member clubs' freedom of association apparently on the strength of its claims that certain characteristics of certain member clubs may fall within constitutionally protected boundaries. The proper focus of First Amendment analysis, therefore, is not on indeterminate characteristics of the Association's member clubs, but rather on the precise terms and limited reach of Local Law 63.

Under this Court's analysis, freedom of association encompasses two distinct areas of constitutional protection: "[A]n individual's choice to enter into and maintain certain intimate or private relationships" and the right to "associate for the purpose of engaging in protected speech or religious activities." *Rotary*, 107 S. Ct. at 1945. Applying this analysis, the Court has upheld against First Amendment challenges the application of Minnesota and California statutes to the discriminatory practices of the United States Jaycees and Rotary International, respectively. *Roberts*, 468 U.S. 609; *Rotary*, 107 S. Ct. 1940. The constitutionality of Local Law 63 is compelled by the application of *Roberts* and *Rotary*.

A. Local Law 63 Does Not Unconstitutionally Infringe Intimate Association Rights

New York City's public accommodation law, which covers all institutions, clubs, or places of accommodation that are "not distinctly private," prohibits discrimination based on race, creed, color, national origin, physical or mental handicap, and actual or perceived sexual orientation. New York City Admin. Code, Title 8, §§8-107, 108 and 108.1. Local Law 63 provides specific guidelines to determine when such an entity is not "distinctly private."[2] *Id.* at §8-102(9).

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[2]Under Local Law 63, a club or association is not "distinctly private" if it has over 400 members, if it provides regular meal service and if it regularly receives payment from or on behalf of nonmembers.

Freedom to engage in intimate association affords constitutional protection to only those "highly personal relationships" that involve "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life." *Roberts*, 468 U.S. at 620. Thus, the limits of intimate association are determined not by subjective or superficial assertions of privacy but rather by a deeper analysis of the characteristics of the relationship.

This Court has recognized intimate association as among the fundamental rights that are "implicit in the context of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937), *quoted in Bowers v. Hardwick*, ___ U.S. ___, 106 S. Ct. 2841, 2844 (1986). In *Roberts*, the Court identified such factors as "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" as being important in deciding whether a right of intimate association exists. 468 U.S. at 620.

The *Roberts* Court emphasized the limited nature of intimate associational freedom by noting that thus far it has only been applied to marriage, childbirth, raising and educating of children, and cohabitation with relatives. 468 U.S. at 619. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Moore v. East Cleveland*, 431 U.S. 494 (1977). Close review of Appellant's argument reveals no substantive bases for its claim of intimate association on behalf of its member clubs. Comparing the terms of Local Law 63 to the Court's analysis in *Roberts* and *Rotary*, it is apparent that the ordinance is consistent with the Court's holdings in those cases.

Local Law 63 precludes regulation of clubs with less than 400 members, consistent with the Court's concern about the "relative smallness" of the membership. *Roberts*, 468 U.S. at 619. Indeed, in *Roberts*, the Court noted that the Minneapolis and St. Paul chapters of Jaycees—those at issue in that case—had approximately 430 and

400 members, respectively. 468 U.S. at 621. Appellant's assertion that the significance of a club's size depends on its location is without merit. A club's size has the same effect on "intimacy" regardless of its geographical location.

A second important factor is the selectivity of the club and the extension of club privileges and services to nonmembers. The Court noted in *Roberts* that nonmembers "regularly" participated in Jaycees' activities, despite their inability to share decisions of control over club functioning. Local Law 63 similarly mandates nondiscrimination only in clubs that regularly provide meal service and regularly receive payment from or on behalf of nonmembers. These are clubs which, by definition, allow nonmembers to enjoy the services and benefits of the facilities. The Association's claim of selectivity is belied by the willingness of its members to extend club facilities to nonmembers for a fee.

Moreover, in its provision relating to reimbursement of fees, Local Law 63 reaches only those clubs and associations that include or offer activities used in furtherance of trade or business. Members thus enjoy benefits of a quasi-commercial nature which, by virtue of involvement by nonmembers, are public as well.

Although Appellant correctly notes that this Court has not mentioned food service or reimbursement as criteria for determining whether a club is private, these factors are consistent with the Court's concerns and reflect New York City's efforts to assert narrowly its power over institutions which most closely resemble the traditional notion of public accommodations, *i.e.*, restaurants and hotels. *See* Title II, Civil Rights Act of 1964, 42 U.S.C. §2000a; New York Civ. Rights Law §44a (McKinney 1976).

Clubs, such as those at issue in this case, which are neither small nor selective and whose activities, "central to the formation and maintenance of the association involve[ ] the participation of strangers to that relationship," do not implicate the right of intimate association. 468 U.S. at 621.

B. Local Law 63 Does Not Unconstitutionally Infringe Expressive Association Rights

Freedom of association protects an individual's right to join with others in activities protected by the First Amendment. While not absolute, the right of expressive association protects group activity "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622-623. Expressive associational rights are premised on the protection afforded individual expression under the First Amendment. *NAACP v. Alabama*, 357 U.S. 449 (1958). Just as First Amendment jurisprudence has placed limits on the constitutional guarantee of free speech, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), associational rights may be subject to narrowly drawn, content neutral "regulations adopted to serve compelling state interests." *Roberts*, 468 U.S. at 623.

The Court has recognized that ensuring access by women and minorities to goods and services otherwise available to the public is a compelling interest justifying limited government regulation of individual conduct. Upholding the validity of the federal public accommodations law, the Court noted the statute's "fundamental objective . . . was to vindicate 'the deprivation of personal dignity' that surely accompanies denials of equal access to public establishments." *Heart of Atlanta*, 379 U.S. at 250. In *Roberts*, recognizing the "stigmatizing injury" of gender discrimination, 468 U.S. at 625, this Court ruled that "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." *Id.* at 623. Similarly, in *Rotary*, the Court found that any impact California's Unruh Civil Rights Act may have on sex-segregated Rotary Clubs "is justified because it serves the State's compelling interest in eliminating discrimination against women." 107 S. Ct. at 1947. New York City has a no less compelling interest in exposing and eliminating an institutional barrier to women and minorities attaining equal access to business opportunities and professional advancement.

In *Rotary*, the Court expressly reserved the question of "the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country." 107 S. Ct. at 1947, n.6. Such a determination, the Court noted, "requires a careful inquiry into the *objective characteristics* of the particular relationships at issue." *Id.* (quoting *Roberts*, 468 U.S. at 620) (emphasis added). The "objective characteristics" that the Court relied on in *Roberts* and *Rotary* are reflected by the express terms of Local Law 63.

The three-fold analysis of Local Law 63 setting out the criteria for clubs subject to regulation is "unrelated to the suppression of ideas [and] cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. As in this Court's analysis of Minnesota's Human Rights Act, Minn. Stat. §363 *et seq.*, Local Law 63 "does not distinguish between prohibited and permitted activity on the basis of viewpoint" and makes no distinction among clubs and associations based on "constitutionally impermissible criteria." *Id.* New York City "has progressively broadened the scope of its public accommodations law in the years since it was first enacted . . . with respect to the number and type of covered facilities. . . ." *Id.* at 624. "Nor is the state interest in assuring equal access limited to the provision of purely tangible goods and services. . . ." *Id.* at 625. New York City "has adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct." *Id.*

As in *Roberts* and *Rotary*, Appellant "has failed to demonstrate that [the challenged law] imposes any serious burdens on the . . . members' freedom of expressive association," *Roberts*, 468 U.S. at 626, because there is no evidence that admitting women and minorities to New York City clubs "will affect in any significant way the existing members' ability to carry out their various purposes." *Rotary*, 107 S. Ct. at 1947. For the purpose of this inquiry we can assume that these clubs' protected expression encompasses a variety of community, political, cultural, economic and social activities. Local Law 63, if applied, would "not require the clubs to abandon

or alter any of these activities," although it would impose nondiscriminatory membership rules on these clubs. *Rotary*, 107 S. Ct. at 1947.

This Court has noted the lack of protection afforded discriminatory association under the First Amendment:

> [A]lthough the Constitution does not proscribe private bias, it places no value on discrimination. . . . Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

Norwood v. Harrison, 413 U.S. 455, 469-470 (1973), *quoted in Runyon v. McCrary*, 427 U.S. 160, 176 (1976) and *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

As this Court found in *Roberts*, construing Minnesota's Human Rights Act, Local Law 63 adopts a "functional definition" of "private club" that reaches a limited number of purportedly "private" extensions of business establishments.

> This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups. . . . *Roberts*, 468 U.S. at 626.

CONCLUSION

Local Law 63 is content neutral and narrowly drawn to accomplish New York City's goal of eliminating discrimination in restrictive clubs that advance members' professional careers and business contacts. The ordinance is a reasonable measure taken by the City to ensure all persons access to clubs that function as extensions of the business community. Its prohibition against discrimination falls within constitutional guidelines as set forth by this Court in *Roberts* and *Rotary*.

For the foregoing reasons, the judgment of the New York Court of Appeals upholding the validity of Local Law 63 should be affirmed.

JILL L. KAHN
Counsel of Record
Anti-Defamation League
of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 490-2525
Attorney for *Amici Curiae*

Of Counsel
LIVIA D. THOMPSON
JUSTIN J. FINGER
JEFFREY P. SINENSKY
MEYER EISENBERG
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH

823 United Nations Plaza
New York, N.Y. 10017

MEMORANDUM

To: National Legal Affairs Committee

From: Jeffrey P. Sinensky

Date: January 19, 1988

Subject: New York State Club Association, Inc. v. The City of New York: Private Club Discrimination (U.S. Supreme Court)

We are pleased to enclose ADL's amicus brief filed in the Supreme Court of the United States in the above referenced case. Authorization to file this brief was granted by the National Legal Affairs Committee at its October 20, 1987 meeting. ADL argued the constitutionality of a New York City law which is intended to give all city residents access to purportedly private clubs where business is regularly conducted and professional contacts are made.

This case arose when the New York State Club Association, a consortium of private clubs, brought an action against the City of New York, the Mayor of the City of New York, the City Human Rights Commission and its members challenging the constitutionality of Local Law 63 of the Administrative Code of the City of New York. The Administrative Code prohibits racial discrimination in places of public accommodation but exempts "distinctly private" clubs. Local Law 63 amends the Code by providing that clubs which meet the following three-prong test are not "distinctly private": a) the club has over 400 members; b) provides regular meal service; and c) derives significant benefit from the participation of non-members by accepting payment from them or on their behalf in furtherance of trade or business.

The Court of Appeals of the State of New York (the state's highest court) rendered its decision on February 17, 1987, affirming the Appellate Division's decision upholding the constitutionality of Local Law 63. The court held that, contrary to the Club Association's arguments, Local Law 63 was not preempted by or inconsistent with state anti-discrimination laws and was therefore a valid constitutional exercise of police power by New York City. The court held further that Local Law 63 does not impermissibly shift the burden of establishing exemption from the anti-discrimination laws onto the clubs, nor does it violate the club members' constitutional rights of privacy, free speech and association.

ADL's brief to the U.S. Supreme Court argues that the decision below should be affirmed. The brief emphasizes that Local Law 63 comports with prior Supreme Court decisions as to what constitutes a private association exempt from public accommodation laws. In two prior decisions, the Supreme Court upheld against First Amendment challenges the application of Minnesota and California puhlic accomodation statutes to the discriminatory practices of the Jaycees and the Rotary organizations, respectively. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, ___ U.S. ___, 107 S. Ct. 1940 (1987) and Roberts v. United States Jaycees, 468 U.S. 609 (1984). Applying the Court's reasoning in those cases to Local Law 63, ADL argued, the New York City ordinance should be upheld.

Under the Supreme Court's analysis, freedom of association encompasses two distinct areas of constitutional protection, the first being the right of an individual to enter into and maintain certain intimate or private relationships, and the second being the right to associate for the purpose of engaging in expressive speech or religious activities. ADL's brief argues that Local Law 63 does not infringe upon the Club Association's right of either intimate or expressive associational freedom.

In the Roberts and Rotary decisions, the Supreme Court identified such factors as size, selectivity, and seclusion from others in critical aspects of the relationship as important in determining whether a right of intimate association exists. Local Law 63 addresses only those clubs which have over 400 members, provide regular meal service and receive reimbursement from or on behalf of non-members. Such clubs, which are neither small nor selective, do not implicate the right of intimate association.

The brief argues further that Local Law 63 does not impose a burden on the club members' freedom of expressive association. There is no evidence that admitting women and minorities to those New York City clubs affected by the ordinance will affect in any significant way the existing members' ability to engage in various expressive activities. Moreover, New York City's compelling interest in removing the barriers to economic advancement and political and social integration that have plagued women and minorities in the past justifies limited government regulation, particularly where there is no less restrictive means of achieving that end.

ADL's brief was prepared by Jill L. Kahn and Livia D. Thompson of the Legal Affairs Department. The New York County Lawyer's Association joined on the brief.

JPS:ms

cc: ADL Regional Directors