

NO. 71786-9

THE SUPREME COURT
STATE OF WASHINGTON

FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564,
et al.,

Petitioners,

v.

GRAND AERIE, FRATERNAL ORDER OF EAGLES, et al.,

Respondents.

AMICI CURIAE
SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONERS

IN ASSOCIATION WITH:

TERRY L. FROMSON, PA
#27795
DAVID S. COHEN PA #88811
WOMEN'S LAW PROJECT
125 N. Ninth St., #300
Philadelphia, PA 19107
(215) 928-9801

VANESSA POWER, WSBA #30777
RITA LATSINOVA, WSBA
#24447
DORSEY & WHITNEY LLP
U.S. Bank Bldg. Centre
1420 Fifth Ave., #3400
Seattle, WA 98101
(206) 903-8800

Attorneys for Amici, Women's Law Project, et al.

TABLE OF CONTENTS

1.	SUMMARY OF ARGUMENT.....	1
2.	IDENTITY AND INTEREST OF AMICI CURIAE.....	2
3.	STATEMENT OF THE CASE.....	2
4.	ARGUMENT.....	2
	A. Excluding women from both business and non-business all-male clubs harms women in professional, social, and personal growth.....	2
	B. State anti-discrimination law can constitutionally apply to commercial and non-commercial groups alike.....	5
5.	CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

Bd. of Dirs. of Rotary Int'l v. Rotary
Int'l, 481 U.S. 535, 107 S. Ct. 1940,
95 L. Ed. 2d 474 (1987) 10, 11, 12

Boy Scouts of America v. Dale, 530 U.S. 640,
120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) 9

New York State Club Assoc., Inc. v. City
of New York, 487 U.S. 1, 108 S. Ct. 2225,
101 L. Ed. 2d 1 (1988) 11, 12

Roberts v. United States Jaycees, 468 U.S.
609, 104 S. Ct. 3244, 82 L. Ed. 2d 462
(1984) 8, 10, 11, 12

Statutes

RCW 49.60.040(10) 12

Other Authorities

Hunter, Nan D., The Freedom of Expressive
Association: Accommodating the Public
Sphere: Beyond the Market Model, 85 Minn
L. Rev. 1591 (2001) 10

Rhode, Deborah, Association & Assimilation,
81 N.W.U. L. Rev. 106 (1986) 6

1. **SUMMARY OF ARGUMENT**

Amici urge this Court to reverse Division II's decision in order to save the Washington Law Against Discrimination (WLAD) from the potentially unlimited loophole created when Division II broadly interpreted WLAD's private club exception to apply to any entity claiming to be a "fraternal organization." In their memorandum in support of review, Amici fully briefed the issues of how this gap will threaten the important protections WLAD gives the citizens of Washington as well as harm women and minorities by denying them the benefits of full participation in their communities. In this supplemental brief, Amici address Respondent's arguments that there is a bright line between business and social groups and that non-commercial groups are immune from anti-discrimination laws.

2. IDENTITY AND INTEREST OF AMICI CURIAE

Amici are fourteen local and national organizations dedicated to achieving equality for women and other minorities in all aspects of life. They work to advance this goal through vigilant enforcement of applicable anti-discrimination statutes. Amici seek to assist this Court by sharing their expertise and experience about the importance of proper interpretation of state laws prohibiting discrimination in public accommodations in light of the personal and societal impact of discrimination. The individual statements of Amici Curiae are attached in Appendix A.

3. STATEMENT OF THE CASE

Amici adopt Petitioners' statement of the case.

4. ARGUMENT

- A. **Excluding women from both business and non-business all-male clubs harms women in professional, social, and personal growth.**

Amici Curiae previously described in their

memorandum in support of review the multitude of ways in which women are harmed by their exclusion from all-male organizations. These harms include denial of access to jobs, professional development, and traditional avenues for economic, social, and personal development. See Amicus Curiae Corrected Memorandum in Support of Review at 4-7.

Respondent Grand Aerie dismisses Amici's research on harm to women as irrelevant, claiming that the Fraternal Order of Eagles "does not provide any business opportunities to its members." Brief of Grand Aerie in Response to Briefs of Amici Curiae at 4-5. In so doing, Respondent mischaracterizes the point being made by Amici. Amici do not claim that the Eagles are a commercial organization; rather, Amici's central argument is that when women are excluded from social groups such as the Eagles they are deprived of the professional benefits that accrue from the contacts and information gained by

interacting with others in such organizations.

Many male-only organizations, like the Eagles in this case, "cast the all-male club as a refuge from commercial activity with no demonstrable career significance." Deborah Rhode, Association & Assimilation, 81 N.W.U. L. Rev. 106, 121 (1986). However, available research provides little support for this characterization, demonstrating that men's social clubs continue to play a significant role in male professional development. Women who are excluded are deprived of the informal exchanges and personal contacts that help men advance. "In a society in which men obtain almost one-third of their jobs through personal contacts, and probably a higher percentage of prestigious positions, the commercial role of social affiliations should not be undervalued." Id.

Whether or not Respondent admits that membership improves its members' economic and professional opportunities, the reality is that

it does. By analogy, no one would describe the golf course as a place created for professional growth, but it is common knowledge that the social contacts made and information exchanged between the first and last tees further economic and business opportunities.

B. State anti-discrimination law can constitutionally apply to commercial and non-commercial groups alike.

Both the Eagles and their Amicus argue that the constitution precludes application of state anti-discrimination laws to non-commercial organizations. Specifically, the Eagles claim that "courts consistently have rejected attempts to regulate membership decisions of non-business groups," Brief of Grand Aerie in Response to Briefs of Amici Curiae at 6, while the Conference of Private Organizations asserts that states lack a "compelling interest in ensuring equal access to expressive activities that do not afford commercial opportunities." Brief of Amicus Curiae Conference of Private Organizations in

Support of Appellants at 8 (Division II). However, a thorough analysis of the case law shows that the Supreme Court has never put such restrictions on state anti-discrimination laws.

The constitutionally protected freedom of association consists of two separate components: the right to intimate association and the right to expressive association. See Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 3249-50, 82 L. Ed. 2d 462, 471 (1984). The right to intimate association, grounded in constitutionally protected personal liberty, will trump a state's anti-discrimination law when a group is small and has a high degree of selectivity. Id. at 620, 104 S. Ct. at 3250, 82 L. Ed. 2d at 472. The right to expressive association, grounded in the First Amendment, protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," in the absence of compelling state

interests. Id. at 622, 104 S. Ct. at 3252, 82 L. Ed. 2d at 474.

Nothing in this case implicates the first type of freedom of association -- the freedom of intimate association. The trial court found, and no party has challenged that finding to this Court, that because of their lack of selectivity and their size the Eagles are not a private group. See Petition for Review at 5 (citing trial transcript). Thus, the Eagles are not an intimate association warranting protection from anti-discrimination laws for that reason.

What is at issue in this case is whether and to what extent the Eagles are an expressive association under the First Amendment. Supreme Court jurisprudence has been clear that what is relevant in determining whether an organization is expressive under the First Amendment is, not surprisingly, whether the organization "engage[s] in some form of expression, whether it be public or private." See Boy Scouts of America v. Dale,

530 U.S. 640, 648, 120 S. Ct. 2446, 2451, 147 L. Ed. 2d 554, 563 (2000). Under that calculus, a business can be expressive just as a non-commercial organization can be non-expressive. The Eagles and their Amicus would have this Court believe that the First Amendment protects all non-commercial organizations regardless of their expressive nature. That is just not so.¹

Where the Eagles and their Amicus go wrong is by confusing the two types of association -- expressive and intimate. Whether an organization is a business is relevant, although hardly conclusive, in determining only whether the organization is deserving of protection under the intimate association doctrine. Bd. of Dirs. of Rotary Int'l v. Rotary Int'l, 481 U.S. 535, 545-

¹ Although Justice O'Connor believes the commercial nature of an organization is the determinative consideration, see Roberts, 468 U.S. at 631, 104 S. Ct. at 3257, 82 L. Ed. 2d at 480 (O'Connor, concurring); Nan D. Hunter, The Freedom of Expressive Association: Accommodating the Public Sphere: Beyond the Market Model, 85 Minn. L. Rev. 1591, 1625 (2001) ("Justice O'Connor is the Court's leading proponent of basing application of such a civil rights provision squarely on whether the group is primarily commercial."), her concurring views have never been adopted by a majority of the Court.

48 & n.6, 107 S. Ct. 1940, 1945-47 & n.6, 95 L. Ed. 2d 474, 484-85 & n.6 (1987); New York State Club Assoc., Inc. v. City of New York, 487 U.S. 1, 12, 108 S. Ct. 2225, 2233-34, 101 L. Ed. 2d 1, 15-16 (1988). In each of the Supreme Court cases cited by the Eagles and their Amicus, the organization at issue was found not to be deserving of intimate association protection. However, once that determination was made, whether the organization was commercial dropped out of the analysis. The Court's central focus in its First Amendment analysis was whether and to what extent the organization was expressive. See New York State Club Assoc., 487 U.S. at 13, 108 S. Ct. at 2234, 101 L. Ed. 2d at 16; Rotary Club, 481 U.S. at 548-49, 107 S. Ct. at 1947-48, 95 L. Ed. 2d at 486-87; Roberts, 468 U.S. at 622-29, 104 S. Ct. at 3252-55, 82 L. Ed. 2d at 474-78.

The Eagles and their Amicus make a simple error of logic: the fact that all of the cases

in which the First Amendment was found not to bar application of anti-discrimination laws involved commercial groups² does not mean, as a matter of law, that only business groups are subject to anti-discrimination laws. The Supreme Court has never so held, and the Eagles and their Amicus incorrectly make that leap of logic.

By arguing that the First Amendment distinguishes between commercial and non-commercial groups, the Eagles and their Amicus have drawn this Court away from the real issues here. As discussed above in section A, to grasp this case's impact it is important to understand that groups that are not explicitly commercial in

² There is an obvious reason for this: each of the cases before the Supreme Court just happened to involve a local statute limited by its language to commercial groups. See New York State Club Assoc., 487 U.S. at 6, 108 S. Ct. at 2230, 101 L. Ed. 2d at 11 (New York City ordinance defining "place of public accommodation" as "for the furtherance of trade or business"); Rotary Club, 481 U.S. at 541 n.2, 107 S. Ct. at 1944 n.2, 95 L. Ed. 2d at 482 n.2 (California statute limiting application to "all business establishments of every kind whatsoever"); Roberts, 468 U.S. at 615, 104 S. Ct. at 3248, 82 L. Ed. 2d at 469 (Minnesota statute defining "place of public accommodation" as, among other things, a "business"). The Washington anti-discrimination statute is not so limited. See RCW 49.60.040(10).

nature, such as the Eagles, play important roles in offering their members access to social and business capital. However, whether the group is commercial in nature is not determinative in the First Amendment analysis. Rather, whether and to what extent the group is expressive is the relevant inquiry. As to that issue, Amici refer the Court to Petitioners' persuasive analysis of the matter in their Supplemental Brief. See Petitioners' Supplemental Brief at 8-19.

5. CONCLUSION

For these reasons, as well as the reasons set forth in all briefing submitted by Petitioners and their supporting Amici, this Court should reverse Division II's decision.

Respectfully submitted this ____ day of May,
2002.

TERRY L. FROMSON, PA
#27795
DAVID S. COHEN, PA #88111
WOMEN'S LAW PROJECT
125 N. Ninth St., #300
Philadelphia, PA 19107
(215) 928-9801

VANESSA POWER, WSBA #30777
RITA LATSINOVA, WSBA #24447
DORSEY & WHITNEY LLP
U.S. Bank Bldg. Centre
1420 Fifth Ave., #3400
Seattle, WA 98101
(206) 903-8800

Attorneys for Amici Curiae,
Women's Law Project, et al

APPENDIX A
STATEMENTS OF INTEREST OF AMICI CURIAE

THE WOMEN'S LAW PROJECT

The Women's Law Project (WLP) is a non-profit public interest law firm located in Philadelphia, Pennsylvania dedicated to advancing the legal and economic status of women and their families. Since its founding in 1974, the WLP has worked to abolish sex discrimination in our laws and institutions through litigation, public policy advocacy, and individual counseling. WLP has a strong interest in the proper application of civil rights laws protecting women from discrimination in public accommodations.

WASHINGTON WOMEN LAWYERS

Washington Women Lawyers was created in 1973. It is a state-wide organization with local chapters in numerous counties. Lawyers and non-lawyers are welcome to be members; men and women comprise our membership. The principal purposes of this organization are (1) to further the full integration of women in the legal profession, and (2) to promote equal rights and opportunities for women and to prevent discrimination against them.

NAACP - SEATTLE BRANCH

The principle objects of the National Association for the Advancement of Colored People are to insure the political, educational, social and economic equality of minority group citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights; and to take all lawful action to secure the exercise thereof.

WASHINGTON STATE

NATIONAL ORGANIZATION FOR WOMEN

The National Organization for Women's (NOW) purpose is to take action to bring women into full participation in the mainstream of American society now, exercising all privileges and responsibilities thereof in truly equal partnership with men. This purpose includes, but is not limited to, equal rights and responsibilities in all aspects of citizenship, public service, employment, education, and family life, and it includes freedom from discrimination because of race, ethnic origin, age, marital status, sexual preference/orientation, or parenthood.

**AMERICAN ASSOCIATION OF UNIVERSITY WOMEN
OF WASHINGTON**

The American Association of University Women (AAUW) has been one of the leading women's organizations in the country for more than a century. Over 1,500 branches and 150,000 members nationwide currently promote equity for all women and girls, lifelong education, and positive societal change. Membership is open to all graduates who hold a baccalaureate or higher degree from an accredited college or university. In principle and practice, AAUW opposes all forms of discrimination based on class, gender, race, color, creed, national/ethnic origin, sexual orientation, age, disability, marital or socioeconomic.

**WASHINGTON CHAPTER OF THE
NATIONAL COUNCIL OF JEWISH WOMEN**

The National Council of Jewish Women (NCJW) Inc., is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve the quality of life for women, children, and families in Washington State and strives to ensure individual rights and freedoms for all.

ANTI-DEFAMATION LEAGUE

The Anti-Defamation League (ADL) was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to secure justice and fair treatment to all citizens alike. It has long been ADL's critical mission to combat all types of prejudice, discriminatory treatment, and hate. ADL has supported the enactment by Congress and the vigorous enforcement by the Executive Branch of our country's principal federal civil rights laws and has consistently made its voice heard in the courts as an advocacy organization fighting to guarantee equal treatment of all persons.

CALIFORNIA WOMEN'S LAW CENTER

The California Women's Law Center (CWLC) is a private nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center, established in 1989, works in the following priority areas: Sex Discrimination, Women's Health and Reproductive Rights, Family Law, Violence Against Women, and Child Care. Since its inception, the CWLC has worked to eradicate discrimination against women and girls. The CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue.

CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies is a multiethnic and multicultural feminist research, policy analysis and advocacy organization that brings women's diverse voices to important debates -- on women and AIDS, violence against women and girls, welfare reform, access to health care, educational equity, employers' work/family and workplace diversity policies, reproductive rights and health, and many other critical issues.

**FEMINIST MAJORITY AND
FEMINIST MAJORITY FOUNDATION**

The Feminist Majority Foundation (the Foundation) is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination and to the promotion of equality and women's rights. The Foundation's research and action programs focus on advancing the legal, social, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement in the United States. To carry out these aims, the Foundation engages in research and public policy development, public education programs, grassroots organizing projects, leadership training and development programs, and participates in and organizes forums on issues of women's equality and empowerment.

NATIONAL GAY AND LESBIAN TASK FORCE

Founded in 1973, the National Gay and Lesbian Task Force works to eliminate prejudice, violence, and injustice against gay, lesbian, bisexual, and transgender people at the local, state, and national level. As part of a broader social justice movement for freedom, justice and equality, NGLTF is creating a world that respects and celebrates the diversity of human expression and identity where all people may fully participate in society.

NOW LEGAL DEFENSE AND EDUCATION FUND

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services to define and defend women's rights. NOW Legal Defense was founded as an independent organization in 1970 by leaders of the National Organization for Women. The rights of women and girls to full accommodation in public places has long been a significant focus of NOW Legal Defense's work.

TRIAL LAWYERS FOR PUBLIC JUSTICE

Trial Lawyers for Public Justice, P.C. (TLPJ) is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to using trial lawyers' skills and strategies to advance the public good. TLPJ prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. TLPJ has litigated numerous discrimination cases, including sex discrimination cases filed pursuant to pay equity statutes and Title IX of the Education Amendments of 1972, as well as race discrimination cases filed under Title VI of the Civil Rights Act of 1964.

WOMEN EMPLOYED

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts.

PROOF OF SERVICE

I, Vanessa Soriano Power, hereby certify that on this ____ day of May 2002, I caused a true and correct copy of the foregoing Supplemental Brief of Amici Curiae to be served by hand delivery, via ABC Legal Messengers, on:

Howard (Terry) Hall
WOLFSTONE PANCHOT & BLOCH
801 Second Avenue, Suite 1500
Seattle, WA 98104-1514

John Widell
HALL ZANZIG WIDELL
1200 Fifth Avenue, Suite 1414
Seattle, WA 98101

Rosemary Daszkiewicz
Marilyn Hawkins
CAIRNCROSS & HEMPELMANN P.S.,
Cooperating Attorneys for the Northwest
Women's Law Center
524 Second Avenue, Suite 500
Seattle, WA 98104-2323

And by overnight delivery, via Federal Express, on the following individuals:

Maureen A. Hart
Senior Assistance Attorney General
1125 Washington St. SE
Olympia, WA 98504

Bruce E. H. Johnson
Jeffrey L. Fisher
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688

DATED at Seattle, WA this ____ day of May,
2002.

Vanessa Soriano Power