MANDATE

AFC

Court of Appeals of Maryland

No. 119 **, September Term, 19** 84

Burning Tree Club, Inc.

v.

Stewart Bainum, Jr. and
Barbara Bainum Renschler

Appeal from the Circuit Court for Montgomery County pursuant to certiorari to the Court of Special Appeals.
Filed: November 2, 1984
Dec. 12, 1984: Motion for leave to file amicus brief (AAG office)
Dec. 21, 1984: Above motion granted.
Dec. 20, 1984: Motion for leave to file amicus brief (E.R.A.)
Dec. 21, 1984: Above motion granted.
Dec. 21, 1984: Motion for leave to argue as amicus curiae (Atty. Gen. Office)
Dec. 21, 1984: Motion for leave to file amicus brief (National Club Assoc.)
Jan. 4, 1985: Motion of National Club Assoc. to file amicus brief granted.
Jan. 7, 1985: Motion of American Civil Liberties Union Fund to file amicus curiae brief.
Jan. 11, 1985: Above motion granted.

STATEMENT OF COSTS:

In Circuit Court:

Record
Stenographer's Costs

In Court of Appeals:

OVER -

Petition Filing Fee	$ 30.00
Printing Brief for Appellant	292.80
Portion of Record Extract — Appellant	633.60
Reply Brief	86.40
Appearance Fee — Appellant	10.00
Filing Fee on Appeal (Court of Special Appeals)	50.00
Printing Brief for Appellee	312.00
Portion of Record Extract — Appellee	
Appearance Fee — Appellee	10.00

STATE OF MARYLAND, ss:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals this twenty-second *day of* January *, 19* 86.

Alexander L. Cummings
Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

Jan. 24, 1985: Motion for leave to file amicus curiae brief. (Md. Comm's on Human Relations)
Jan. 29, 1985: Above motion granted.
Dec. 23, 1985: Judgment of the Circuit Court for Montgomery County affirmed as to the declaratory judgment and reversed as to the injunctive relief. Costs to be evenly divided between appellant and appellees.
Opinion by Murpny, C.J., announcing the judgment of the Court, in which Smith and Orth, JJ., join; Rodowsky, J., concurs in the judgment; Eldridge, Cole and Bloom, JJ., concur in part and dissent in part.
Concurring opinion by Rodowsky, J.
Concurring and dissenting opinion by Eldridge, J., in which Cole and Bloom, JJ., concur.

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1984

No. 119

BURNING TREE CLUB, INC.

Appellant

v.

STEWART BAINUM, JR. and BARBARA BAINUM RENSCHLER

Appellees

Appeal from the Circuit Court for Montgomery
County Pursuant to Certiorari to the
Court of Special Appeals
(Irma S. Raker and Calvin R. Saunders, Judges)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January 1985, a copy of the foregoing Brief of the E.R.A. Impact Project as Amicus Curiae in Support of Appellees wasmailed, postage prepaid, to Leslie Vial, Esquire, Venable, Baetjer & Howard, Two Hopkins Plaza, Baltimore, Maryland 21201 and Eileen M. Stein, Esquire, Stein & Huron, 7504 Bybrook Lane, Chevy Chase, Maryland 20815.

Sally B. Gold
Hylton & Gonzales
418 Equitable Building
10 North Calvert Street
Baltimore, Maryland 21202
(301) 547-0900

IN THE

COURT OF APPEALS OF MARYLAND

BURNING TREE CLUB, INC., *

Appellant,

NO. 119

v. *

STEWART BAINUM, JR. AND BARBARA BAINUM RENSCHLER, September Term, 1984

*

Appellees.

* * * * * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January, 1985, I caused the Daily Record to mail a copy of the Brief of State of Maryland Commission on Human Relations as Amicus Curiae to Ms. Eileen M. Stein, Attorney for Appellees, 7504 Bybrook Lane, Chevy Chase, Maryland 20815, and to Benjamin Civiletti, Esq., and Phil Jordan, Esq., Attorneys for Appellants; Venable, Baetjer, Howard and Civiletti, Suite 704, 1301 Pennsylvania, Avenue, N. W., Washington, D. C. 20004.

Risselle Rosenthal Fleisher

RRF:aec
1/25/84

No. 119-1984T

BURNING TREE v. BAIDOA

ANT'S R.B.

18 pp = $86.40

RCF

January 29, 1985

Risselle Rosenthal Fleisher, Esquire
General Counsel
Mayrand Commission on Human Relations
20 East Franklin Street
Baltimore, Md 21202-2274

Re: Burning Tree Club, Inc. v.
Stewart Bainum, Jr. and Barbara Bainum Renschler
No. 119, Sept. Term, 1984

Dear Ms. Fleisher:

Enclosed herewith in reference to the above entitled case is a self-explanatory order signed this date by the Court.

Very truly yours,

Clerk

ALC/jf
Encl:
cc: Eileen M. Stein, Esquire
Benjamin Civiletti, Esquire
J. Phillip Jordan, Esquire

BURNING TREE CLUB, INC.	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
v.	*	
	*	No. 119
	*	September Term, 1984
STEWART BAINUM, JR. AND BARBARA BAINUM RENSCHLER	*	
	*	

* * * * *

O R D E R

Upon consideration of the Motion of the Maryland Commission on Human Relations for leave to file a brief of amicus curiae in the above-captioned case, it is this 29th day of January, 1985

ORDERED, by the Court of Appeals of Maryland, that the Motion is hereby, granted, and the MCHR'S brief of amicus curiae be filed not later than January 30, 1985.

Chief Judge

IN THE COURT OF APPEALS OF MAARYLAND

BURNING TREE CLUB, INC., *

Appellant,

NO. 119

* September Term, 1984

v.

STEWART BAINUM, JR. AND BARBARA BAINUM RENSCHLER, *

Appellees.

* * * * * * *

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Now comes the State of Maryland Commission on Human Relations (hereinafter, MCHR), by its attorney, Risselle Rosenthal Fleisher, General Counsel, and moves, pursuant to Maryland Rule 885, for leave to file a brief of amicus curiae in the above-captioned case and, in support thereof, states as follows:

1. The MCHR is the agency which enforces Article 49B, Code Annotated, 1979 Repl. Vol., 1984 Cumm. Supp., the Maryland Anti-Discrimination Statute. Article 49B encompasses, inter alia, a prohibition against discrimination in places of public accommodation (not including "a private club or other establishment not...open to the public..."). Article 49B, §5. The statute also includes a prohibition against

discrimination by the "agencies, officers and employees of the State of Maryland" (§7), as well as by "any person, business, corporation, partnership, copartnership or association or any other individual, agent, employee, group or firm which is licensed or regulated by the Department of Licensing and Regulation..." (§8).

2. With this interest in mind, MCHR filed in the Circuit Court for Montgomery County, an amicus curiae brief on the limited issue of how Maryland courts had interpreted Article 46 of the Declaration of Rights to the Maryland Constitution (hereinafter, the "ERA") (E. Item No.47), since a primary issue before that Court was whether the State had impermissibly involved itself in invidious discrimination on the basis of sex by giving preferential tax treatment to Appellant here because of such discrimination.

3. In light of its charge under §5 of Article 49B, as well as under §§7 and 8 thereof, MCHR proposes to supply this Court with a brief survey of the cases decided in Maryland appellate courts, where the import and extent of coverage of the "ERA" has been decided.

WHEREFORE, MCHR seeks leave from this Honorable Court to file a short brief of amicus curiae, to be submitted on or before the

date on which the Reply Brief of Appellant is due.

Respectfully submitted,

Risselle Rosenthal Fleisher
General Counsel
Maryland Commission on Human Relations
20 East Franklin Street
Baltimore, Maryland 21202-2274
(301) 659-1752

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of January, 1985, I mailed a copy of the aforegoing Motion to Ms. Eileen M. Stein, Attorney for Appellees, 7504 Bybrook Lane, Chevy Chase, Maryland 20815, and to Benjamin Civiletti, Esq., and Phil Jordan, Esq., Attorneys for Appellants; Venable, Baetjer, Howard and Civiletti, Suite 704, 1301 Pennsylvania Avenue, N. W., Washington, D. C. 20004.

Risselle Rosenthal Fleisher

RRF:aec
1/23/85

STATE OF MARYLAND
COMMISSION ON HUMAN RELATIONS

20 EAST FRANKLIN STREET
BALTIMORE, MARYLAND 21202-2274
(301)-659-1700
TTY for Deaf-(301)-659-1737

JAN 1985

January 23, 1985

Mr. Alexander L. Cummings
Clerk
Court of Appeals of Maryland
Courts of Appeal Building
Rowe Boulevard and Taylor Avenue
Annapolis, Maryland 21401

RE: Burning Tree Club, Inc. v. Stewart Bainum, Jr and Barbara Bainum Renschler, No. 119, S. T. 1984

Dear Mr. Cummings:

Enclosed please find an original and seven (7) copies of a Motion for Leave to File Amicus Curiae Brief, along with a proposed Order, in the above-referenced case.

We will appreciate your processing this matter, and I look forward to hearing from the Court when a decision is made.

Thank you very much for your kind attention.

Sincerely,

Risselle R. Fleisher

Risselle R. Fleisher
General Counsel

RRF:aec

Enclosures

xcs: Eileen M. Stein, Attorney-at-Law
Benjamin Civiletti, Esq.
Phil Jordan, Esq.

783-7300

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JACQUELINE E. ZINS

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**NEW YORK OFFICE
***LONDON OFFICE
†NOT ADMITTED IN D.C.

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THOMAS C. MATTHEWS (1931-1979)

SENIOR COUNSEL
CARLETON A. HARKRADER
THOMAS J. SCHWAB

OF COUNSEL
DOUGLAS M. COSTLE
CHARLES H. GUSTAFSON
PETER G. KELLY
DON WALLACE, JR.

January 7, 1985

BY HAND

Clerk's Office
Maryland Court of Appeals
361 Rowe Boulevard
Annapolis, Maryland 21401

Re: Burning Tree Club, Inc. v. Stewart Bainum, Jr. and Barbara Bainum Renschler

Gentlemen:

Enclosed for filing in the above-captioned matter are the following:

- one original and seven copies of a Motion of the American Civil Liberties Union Fund to Submit a Brief, as Amicus Curiae, Urging Affirmance of the Judgment Below;

- one original of a proposed Order granting the Motion, and

- one original and 30 copies of the Brief the American Civil Liberties Union Fund proposes to submit as amicus curiae.

Also enclosed is an extra copy of the Motion and Brief to be stamped as filed and returned to the messenger delivering the above materials.

Thank you very much for your assistance.

Very truly yours,

Daniel H. Maccoby

Daniel H. Maccoby

DHM/em
Enclosures

No. 119-1984T.

BURNING TREE v. BAINUM

EEs BRIEF

65 pp = $312.00

JP
ADC

RCF

IN THE

COURT OF APPEALS OF MARYLAND

September Term, 1984

No. 119

BURNING TREE CLUB, INC.,

Appellant,

v.

STEWART BAINUM, JR., ET AL.,

Appellees.

FILED
JAN 8 1985
Alexander L. Cummings, Clerk
Court of Appeals
of Maryland

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January, 1985, a copy of Brief of Amici Curiae, State of Maryland and State Department of Assessments and Taxation, was mailed, postage prepaid, to Benjamin R. Civiletti, Esquire, and J. Philip Jordan, Esquire, Venable, Baetjer and Howard, 1800 Mercantile Bank and Trust Building, Two Hopkins Plaza, Baltimore,Maryland 21201, and David MacDonald, Esquire, Suite 16, 966 Hungerford Drive, Rockville, Maryland 20850, Attorneys for Appellants; Eileen M. Stein, Esquire, 7504 Bybrook Lane, Chevy Chase, Maryland 20815; and Sally Gold, Esquire, ERA Impact Project, Hylton & Gonzales, Suite 418, 10 N. Charles Street, Baltimore, Maryland 21202

Robert A. Zarnoch
Assistant Attorney General

RCF

January 11, 1985

Jeffrey F.Liss, Esquire
Attorney at Law
Wald, Harkrader & Ross
1300 Nineteenth Street, N.W.
Washington, D. C. 20036

Re: Burning Tree Club, Inc. v. Stewart Bainum, Jr.
and Barbara Bainum Renschler
No. 119, Sept. Term, 1984

Dear Mr. Liss:

Enclosed herewith in reference to the above entitled case is a self-explanatory order signed this date by the Court.

Very truly yours,

Clerk

ALC/jf
Encl:
cc: Edward L. Genn, Esquire
Elizabeth Symonds, Esquire

BURNING TREE CLUB, INC.	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
v.	*	No. 119
	*	
	*	September Term, 1984
STEWART BAINUM, JR. and BARBARA BAINUM RENSCHLER	*	
	*	

* * * * *

O R D E R

Court having considered the Motion of the American Civil Liberties Union Fund to submit a brief as Amicus Curiae, urging affirmance of the judgment below, it is this 11th day of January, 1985

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, granted.

Robert C. Murphy
Chief Judge

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1984

No. 119

BURNING TREE CLUB, INC.,

Appellant,

v.

STEWART BAINUM, JR. and
BARBARA BAINUM RENSCHLER,

Appellees.

Appeal from The Circuit Court for
Montgomery County Pursuant to
Certiorari to the Court of Special Appeals
(Irma S. Raker and Calvin R. Sanders, Judges)

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FUND TO SUBMIT A BRIEF, AS AMICUS CURIAE, URGING AFFIRMANCE OF THE JUDGMENT BELOW

The American Civil Liberties Union Fund of the National Capital Area ("ACLU Fund") hereby moves for permission to submit the attached brief as amicus curiae.

The ACLU Fund is a non-profit organization dedicated to the protection of civil liberties of American citizens. It consistently takes stands against all forms of unwarranted and illegal discrimination, including discrimination on the basis of sex, and supports those seeking to eradicate such discrimination. To further these goals, the ACLU Fund, as amicus curiae, has previously submitted a brief

in the court below, in support of Appellees' motion for summary judgment, and now requests permission, as amicus curiae, to submit the attached brief to this Court, urging affirmance of the judgment below. Counsel for Appellant has stated it does not anticipate opposing the ACLU Fund's motion.

Respectfully submitted,

Jeffrey F. Liss*/
Daniel H. Maccoby
Bruce R. Stewart

WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

Volunteer Attorneys for the
ACLU Fund of the National
Capital Area

Of Counsel:

Edward L. Genn, Esq.*/
Brown, Genn, Brown, & Karp
1319 Eighteenth Street, N.W.
Washington, D.C. 20036

Volunteer Attorney for the
Montgomery County Chapter of the
Maryland Civil Liberties Union.

Elizabeth Symonds
ACLU Fund of the National
Capital Area
600 Pennsylvania Avenue, S.E.
Washington, D.C. 200003

*/ Member, Maryland Bar

RCF

January 7, 1985

Thomas P. Ondeck, Esquire
Attorney at Law
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

Re: Burning Tree Club, Inc. v.
Stewart Bainum,Jr. et al.
No. 119, Sept. Term, 1984

Dear Mr. Ondeck:

Enclosed herewith in reference to the above entitled case is a self-explanatory order signed by the Court on January 4, 1985.

Very truly yours,

Clerk

ALC/jf
Encl:
cc: George E. Webster, Esquire
Eileen M. Stein, Esquire
Benjamin R. Civiletti, Esquire

BURNING TREE CLUB, INC.	*	IN THE
	*	
	*	COURT OF APPEALS
v.	*	OF MARYLAND
	*	
	*	No. 119
	*	September Term, 1984
STEWART BAINUM, JR. et al.	*	
	*	

* * * * *

O R D E R

Upon consideration of the motion of the National Club Association for leave to proceed as amicus curiae and to file a brief herein as amicus curiae, and there being no objection to the motion, it is this 4th day of January, 1985

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, granted.

Chief Judge

IN THE COURT OF APPEALS OF MARYLAND

BURNING TREE CLUB, INC. Appellant, v. STEWART BAINUM, JR., ET AL., Appellees.	No._____ September Term, 1984

MOTION OF THE NATIONAL CLUB ASSOCIATION FOR LEAVE TO PROCEED AS AMICUS CURIAE AND TO FILE BRIEF OF THE NATIONAL CLUB ASSOCIATION

The National Club Association ("NCA") hereby respectfully moves for permission to proceed as amicus curiae, and specifically for leave to file the attached brief amicus curiae. Counsel for appellant Burning Tree Club and for appellees have represented that they do not object to the appearance of the National Club Association as amicus curiae.

The National Club Association seeks to appear as amicus curiae in this case for the following reasons:

(1) The National Club Association is the national trade association representing the legal, legislative and business interests of more than 1,000 private social, recreational and athletic clubs, 20 of which, including Burning Tree Club, are located in the State of Maryland.

The National Club Association's member clubs nationally have more than 900,000 members.

(2) The National Club Association is dedicated to the protection of private social rights.

(3) The issues in the instant case raise questions concerning the preservation and continued vitality of private social rights in this country. and

(4) The National Club Association filed a brief as amicus curiae with the Circuit Court for Montgomery County during that court's review of this matter.

WHEREFORE, the National Club Association respectfully requests that this Court grant it leave to participate as amicus curiae, and to file the attached brief of the National Club Association as amicus curiae.

Respectfully submitted,

Thomas P. Ondeck

Attorney for National Club Association

Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 298-8290

George D. Webster*
Of Counsel

Webster, Chamberlain & Bean
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-9500

*/ Member of the Maryland Bar.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 1984, the foregoing motion of the National Club Association for Leave to Proceed as Amicus Curiae and to File Brief of the National Club Association as Amicus Curiae, Brief of the National Club Association as Amicus Curiae, and proposed Order were served by mailing copies thereof, first-class postage prepaid, to each of the following counsel for the parties and amici:

Eileen M. Stein, Esq.
Stein & Huron
7504 Bybrook Lane
Chevy Chase, Maryland 20815

Benjamin R. Civiletti, Esq.
Venable, Baetjer and Howard
1800 Mercantile Bank & Trust Bldg.
Two Hopkins Plaza
Baltimore, Maryland 21201

Thomas P. Ondeck

No. 119-1984T. Am

BURNING TREE v. BRINO

ANT'S BR.

61 pp = $292.80

JT. REC. EXT. (ONE VOC.)

132 pp = $633.60

9

VENABLE, BAETJER AND HOWARD

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RICHARD M. VENABLE (1839-1910)
EDWIN G. BAETJER (1868-1945)
CHARLES McH. HOWARD (1870-1942)

WRITER'S DIRECT NUMBER IS

(301) 244-7587

WASHINGTON, D.C. OFFICE
VENABLE, BAETJER, HOWARD & CIVILETTI
SUITE 704
1301 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
(202) 783-4300

December 7, 1984

Alexander L. Cummings
Clerk
Court of Appeals of Maryland
Court of Appeals Building
361 Rowe Boulevard
Annapolis, Maryland 21401

Re: Burning Tree Club, Inc. v.
Stewart Bainum, Jr., et al.
September Term, 1984, No. 119

Dear Mr. Clerk:

Enclosed for filing in the above-referenced case are 30 copies of the Joint Record Extract and 30 copies of Brief of Appellant, Burning Tree Club, Inc. In addition, the messenger has one extra copy of each; please stamp those copies and return.

Thank you for your assistance.

Very truly yours,

Leslie A. Vial

LAV:amk
Enclosures
cc: Eileen M. Stein, Esq.
Stephen H. Sachs, Esq.
Jeffrey F. Liss, Esq.

RCF

December 24, 1984

Sally B. Gold, Esquire
Attorney at Law
Hylton & Gonzales
418 Equitable Building
10 North Calvert Street
Baltimore, MD 21202

Re: Burning Tree Club, Inc. v. Stewart Bainum, Jr. and
Barbara Bainum Renschler
No. 119, Sept. Term, 1984

Dear Ms. Gold:

Enclosed herewith in reference to the above entitled case is a self-explanatory order signed by the Court on December 21, 1984.

Very truly yours,

Clerk

ALC/jf
Encl:
cc: Benjamin R. Civiletti, Esquire
Eileen M. Stein, Esquire
Diana G. Motz, Esquire

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1984

No. 119

BURNING TREE CLUB, INC.

Appellant

v.

STEWART BAINUM, JR. and BARBARA BAINUM RENSCHLER

Appellees

Appeal from the Circuit Court for Montgomery
County Pursuant to Certiorari to the
Court of Special Appeals
(Irma S. Raker and Calvin R. Saunders, Judges)

ORDER

Having read and considered the Motion for Leave to File An Amicus Brief by the E.R.A. Impact Project, and any opposition thereto, it is this 21st day of December, 1984

ORDERED that said Motion be and is hereby GRANTED and that the Brief of Amicus Curiae be and is hereby due no later than January 21, 1985.

Judge

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1984

No. 119

BURNING TREE CLUB, INC.

Appellant

v.

STEWART BAINUM, JR. and BARBARA BAINUM RENSCHLER

Appellees

Appeal from the Circuit Court for Montgomery County Pursuant to Certiorari to the Court of Special Appeals
(Irma S. Raker and Calvin R. Saunders, Judges)

MOTION FOR LEAVE TO FILE AN AMICUS BRIEF

The E.R.A. Impact Project, by its attorney, Sally B. Gold, respectfully requests leave to participate in the litigation as an amicus and as reasons therefor states the following:

1. At issue in this case is the constitutionality of Section 19(e)(4), Article 81, Maryland Code

Annotated, which provides certain tax exemptions for country clubs whose facilities are operated with the primary purpose of benefiting members of a particular sex.

2. The statute and the State's involvement in administering that statute violate the Maryland Equal Rights Amendment, Article 46 of the Declaration of Rights (hereinafter called the "E.R.A.").

3. The E.R.A. Impact Project (hereinafter called the "Project"), a joint project of the NOW Legal Defense and Education Fund and the Women's Law Project, has a particular interest in state equal rights amendments.

4. The Project was begun in 1979 for the purpose of interpreting and implementing state equal rights amendments. It provides a clearinghouse of state court equal rights amendment decisions and related information. It has developed an index and reference guide on state equal right amendments. It publishes articles on the impact of state equal rights amendments on family law and other areas. It conducts litigation relating to state equal right amendments, and it coordinates, on a national level, information and support for state equal rights amendments.

5. The Project conducted a training session for attorneys on the meaning and implementation of the Maryland

E.R.A. in Baltimore in October, 1982 and it participated as an amicus before the Maryland Court of Appeals in recent litigation involving that E.R.A.

6. The NOW Legal Defense and Education Fund, one of the Project's founders, is a non-profit organization founded in 1970 by the National Organization for women, which as a national membership of over 145,000 women and men and more than 700 chapters throughout the country. The Women's Law Project, the other founder, is a non-profit organization incorporated in 1974 with the specific goal of working toward fuller understanding of and conformance to equal rights principles in both the federal and state context.

7. Because of the Project's nationwide scale and the services described above, it believes that it will be able to add substantially to this litigation.

8. The Project was granted leave to participate as an amicus below and did so.

9. The Project has been advised that the Appellant does not intend to file any opposition to this Motion.

WHEREFORE, the E.R.A. Impact Project respectfully requests that it be granted leave to participate as an amicus in this litigation.

Respectfully Submitted,

E.R.A. Impact Project
132 West 43rd Street
New York, New York 10036

Sally B. Gold
Hylton & Gonzales
418 Equitable Building
10 North Calvert Street
Baltimore, Maryland 21202
(301) 547-0900
Local Counsel

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1984

No. 119

BURNING TREE CLUB, INC.

Appellant

v.

STEWART BAINUM, JR. and BARBARA BAINUM RENSCHLER

Appellees

Appeal from the Circuit Court for Montgomery County Pursuant to Certiorari to the Court of Special Appeals
(Irma S. Raker and Calvin R. Saunders, Judges)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of December, 1984, copies of the foregoing Motion for Leave to File an Amicus Brief and proposed Order were mailed, postage prepaid, to Leslie Vial, Esquire, Venable, Baetjer & Howard, Two Hopkins Plaza, Baltimore, Maryland 21201 and Eileen M. Stein, Esquire, Stein & Huron, 7504 Bybrook Lane, Chevy Chase, Maryland 20815.

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WILLIAM A. HYLTON, JR.
LOUISE MICHAUX GONZALES
SALLY B. GOLD
KEITH S. RHODES

December 19, 1984

Alexander L. Cummings, Clerk
Court of Appeals of Maryland
Courts of Appeal Building
361 Rowe Boulevard
Annapolis, Maryland 21401

Re: Burning Tree, Inc. v. Bainum, et al.
September Term, 1984, No. 110

Dear Mr. Cummings:

Enclosed please find for filing in the above-captioned matter an original and seven copies of the Motion for Leave to File an Amicus Brief and proposed Order.

Please bring this to the court's attention. Thank you for your cooperation.

Sincerely,

Sally B. Gold

Sally B. Gold

SBG:das

Enclosures

cc: Leslie A. Vial, Esquire
Eileen Stein, Esquire

December 24, 1984

Diana G. Motz, Esquire
Assistant Attorney General
7 North Calvert Street
Baltimore, Md 21202

Re: Burning Tree Club, Inc. v. Stewart Bainum, Jr.
and Barbara Bainum Renschler
No. 119, Sept. Term, 1984

Dear Ms. Motz:

Enclosed herewith in reference to the above entitled case is a self-explanatory order signed by the Court on December 21, 1984.

Very truly yours,

Clerk

ALC/jf
Encl:
cc: Eileen M. Stein, Esquire
Benjamin R. Civiletti, Esquire

BURNING TREE CLUB, INC.	*	IN THE
Appellant	*	COURT OF APPEALS
v.	*	OF MARYLAND
STEWART BAINUM, JR. and BARBARA BAINUM RENSCHLER	*	September Term, 1984
Appellees	*	No. 119

* * * * * * *

ORDER

Upon consideration of the motion of the State of Maryland and the State Department of Assessments for leave to file an amicus curiae brief in the above entitled case, it is, this 21st day of December, 1984.

ORDERED, by the Court of Appeals of Maryland, that the motion is granted and that the movants' amicus curiae brief be filed no later than the date the Appellees' brief is scheduled to be filed.

Robert C. Murphy
Chief Judge

BURNING TREE CLUB, INC.	*	IN THE
Appellant	*	COURT OF APPEALS
v.	*	OF MARYLAND
STEWART BAINUM, JR. and BARBARA BAINUM RENSCHLER	*	September Term, 1984
Appellees	*	No. 119

* * * * * *

MOTION FOR LEAVE TO FILE AMICUS BRIEF

The State of Maryland and the Department of Asessments and Taxation, by their undersigned attorneys, move for leave to file a brief of amicus curiae in the above captioned case. In support of their motion, they assert:

1. This case raises the constitutionality of the anti-discrimination scheme for tax-supported country clubs set forth in §19(e)(4) of Article 81 of the Maryland Code and, more particularly, the constitutionality of the exemption from that statute for a "club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex."
2. This Court has held that the Department of Assessments and Taxation administers this statute, see State v. Burning Tree Club, 301 Md. 8, 25 (1984). The Department, along with the State of Maryland, was a defendant below. In the circuit court, the State defendants argued that while the exemption for a single-sex country club was violative of the Equal Rights Amendment and other provisions of the Maryland Constitution, this exemption was severable from the remainder

of the anti-discrimination scheme. Thus, the State Defendants, contrary to the position of Burning Tree Club, Inc., urged below and proposes to argue to this Court in support of the severability of the challenged exemption and the constitutionality of the remainder of the law.

3. The constitutional issues raised in this case -- including the alternative ground likely to be pressed by Appellees that tax support for a discriminatory club serves no public purpose and thus, violates Article 15 of the Declaration of Rights, -- may have a profound effect on the administration of the property tax law. Movants also believe their views on the constitutionality of §19(e)(4) will be of assistance to the Court.

For these reasons, the State and the Department of Assessments and Taxation pray that their motion be granted, that they be permitted to file an amicus brief, and that such brief be filed on the date on which Appellees' brief is scheduled to be filed.

Respectfully submitted,

STEPHEN H. SACHS
Attorney General

Diana G. Motz RAZ
DIANA G. MOTZ
Assistant Attorney General

Kaye Brooks Bushel RAZ
KAYE BROOKS BUSHEL
Assistant Attorney General

LINDA H. LAMONE
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104 Legislative Services Building
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December 1984, a copy of the foregoing Motion for Leave to File Amicus Brief was mailed, postage prepaid, to Benjamin R. Civiletti, Esquire, J. Phillip Jordan, Esquire, Leslie A. Vial, Esquire, and James A. Dunbar, Esquire, Attorneys for Appellant, Suite 704, 1301 Pennsylvania Avenue, N. W., Washington, D. C. 20004 and 1800 Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201; and Eileen M. Stein, Attorney for Appellees, 7504 Bybrook Lane, Chevy Chase, Maryland 20815.

ROBERT A. ZARNOCH
Assistant Attorney General

IN THE COURT OF APPEALS OF MARYLAND

BURNING TREE CLUB, INC.,

Appellant,

v.

STEWART BAINUM, JR., et al.,

Appellees.

No. 119
September Term, 1984

BRIEF OF THE NATIONAL CLUB ASSOCIATION, AMICUS CURIAE

Thomas P. Ondeck

Attorney for National Club Association

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The National Club Association respectfully submits this brief, as amicus curiae, in support of appellant Burning Tree Club.

INTEREST OF AMICUS

The National Club Association ("NCA") is the national trade association representing the legal, legislative and business interests of more than 1,000 private social, recreational and athletic clubs, 20 of which, including the Burning Tree Club, are located in the State of Maryland. NCA's member clubs nationally have more than 900,000 members.

Many of NCA's member clubs admit both men and women as members. Some member clubs are all male, and some are all female. All are united, however, in the view that a private club's membership policy is its own business and not the government's.

Because a ruling for the plaintiffs in this lawsuit would establish a precedent adversely affecting private social rights, the NCA respectfully submits this brief to show why such a decision would be improper as a matter of law and unwise as a matter of policy.

QUESTIONS PRESENTED

This brief addresses the following three questions:

(1) Does the Maryland Equal Rights Amendment prohibit a private club from limiting its membership to persons of one sex,

because the club receives a state tax benefit in return for its agreement not to develop its land, where the benefit is equally available to clubs whose membership is all-male, all-female, or of both sexes?

(2) Does the Maryland Equal Rights Amendment prohibit the legislature from establishing a tax benefit for private clubs that agree not to develop their land, where the benefit is equally available to clubs whose membership is all-male, all-female, or of both sexes?

(3) Does the United States Constitution prohibit the State of Maryland from denying a private club a tax exemption for which it is otherwise qualified, simply because the club has exercised its federal constitutional right to limit its membership to persons of one sex?

INTRODUCTION

Appellant Burning Tree Club is a private country club whose membership is restricted to men. Under state law, Burning Tree receives a tax benefit in return for its contractual promise to maintain its land as open space. In their complaint, plaintiffs (one male and one female resident of Montgomery Country) asserted that Burning Tree's receipt of this tax benefit rendered its membership policy "state action" and thus unlawful under the Maryland Equal Rights Amendment. Under this theory, plaintiffs

sought an injunction compelling Burning Tree to admit women on an equal basis with men.

Alternatively, plaintiffs argued that even if Burning Tree's membership policy was not itself unlawful, the state statute authorizing the receipt of a tax benefit by a single-sex club violated the Maryland Equal Rights Amendment. Under this theory, plaintiffs sought a declaration that Article 81, section 19(e) of the Maryland Code was unconstitutional, and an injunction prohibiting its continued implementation.

The Circuit Court for Montgomery County (Irma S. Raker, J.), adopted this latter argument and issued the requested injunction against the implementation of section 19(e). Then, finding that in the absence of section 19(e) the Club's membership policy was not "state action," the court denied the requested injunctive relief ordering Burning Tree to admit women. Bainum v. Maryland, Equity No. 85397 (1984) (hereinafter "Mem. Op.").

The essential basis of plaintiffs' case is easily summarized, as is the reason why it should have been dismissed. Plaintiffs deny that they "challenge the right of organizations which receive no State support to engage in discriminatory membership policies, however offensive or obnoxious they may be." 1/ But their lawsuit belies this statement, for under plaintiffs' theory, there is probably not a single private organ-

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1/ Plaintiff's Memorandum in Opposition to Defendant Burning Tree's Motion for Summary Judgment (hereinafter "Pl. Opp.") at 2.

ization in the country that would be considered free of "state support."

Plaintiffs' first argument is that the receipt of any tax benefit (no matter how unrelated to an organization's discriminatory practices), or the applicability of any government regulation, inspection or certification (no matter how unintrusive), constitutes "state support" for discrimination. Their alternative argument is that any government aid or benefit to a private party that discriminates makes the government itself a discriminator. But in our society, virtually everyone is subject to taxation or government regulation, or receives some government benefit. Thus, this lawsuit is just a thinly-disguised attempt to outlaw private sex discrimination altogether. Neither the federal nor the Maryland Constitution permits, much less requires, such a result.

Because we assume that plaintiffs will renew both of their arguments in this appeal, and because as an amicus we will have no opportunity to reply to plaintiffs' brief, we address both arguments here. The erroneous reasoning of the Circuit Court is specifically analyzed in part II-C, to which the Court's attention is respectfully directed.

ARGUMENT

I. BURNING TREE'S MEMBERSHIP POLICY DOES NOT VIOLATE THE EQUAL RIGHTS AMENDMENT

A. Burning Tree's Membership Policy Is Not Unlawful Unless It Is "State Action"

The Maryland Equal Rights Amendment prohibits only sex discrimination that is imposed "under the law." 2/ As in the proposed federal Equal Rights Amendment, 3/ and the federal and state Equal Protection clauses, 4/ this language means that the prohibition applies only to government action, or to private conduct that can fairly be treated as "state action."

Plaintiffs have conceded the truth of this basic proposition, admitting that there must be a "requisite element of state

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2/ The full text of the Maryland E.R.A. is as follows: "Equality of rights under the law shall not be abridged or denied because of sex." Declaration of Rights, Art. 46.

3/ The proposed federal E.R.A. provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

4/ The Equal Protection clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Article 24 of the Maryland Declaration of Rights provides that "no man ought to be . . . deprived of his life, liberty or property, but by the . . . Law of the land." This Court has held that Article 24 implicitly contains an equal protection guarantee similar to that of the Fourteenth Amendment. See Board of Supervisors of Elections v. Goodsell, 284 Md. 279, 396 A.2d 1033 (1979).

action" in any claim under the E.R.A., [5] and acknowledging "the right of organizations which receive no state support to engage in discriminatory membership policies, however offensive or obnoxious they may be." [6]

Plaintiffs have argued that the requisite element of state action is present here by virtue of Burning Tree's receipt of a tax benefit. Because this theory would stretch the concept of "state action" far beyond its recognized boundaries -- indeed, to the point of meaninglessness -- it is necessary to examine the purpose served by the "state action" requirement in order to appreciate its importance and the damage that would be inflicted upon civil liberties if plaintiffs' theory were to be accepted by the courts.

B. The "State Action" Concept Is Vital To The Protection Of Civil Liberties

The concept of "state action" is a central principle of constitutional law. It marks the boundary line between official conduct -- as to which a democratic government owes to its citizens the rights of fairness, equal treatment, and due process; and private conduct -- as to which a democratic government ordinarily owes to its citizens the right to be left alone.

5/ Pl. Opp. at 5 (emphasis added). The Court below acknowledged this requirement, see Mem. Op. at 6, as has the Attorney General, see Opinion 83-031, 68 Op. A.G. 77-78 (1983).

6/ Pl. Opp. at 2.

This "essential dichotomy," Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974), "preserves an area of individual freedom by limiting the reach" of the law. It "require[s] the courts to respect the limits of their own power as directed against . . . private interests." Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (1982). 7/

Our government was established by "We the People, 8/ and in our society the government serves the people rather than vice versa. This means that when the government acts, it has an obligation to act fairly towards the people it serves -- with due process and with equal justice; without arbitrary or capricious behavior. Thus, for example, the government cannot permit those with whom it agrees to speak while silencing others, 9/ cannot favor the religious beliefs of some over the beliefs (or non-beliefs) of others, 10/ cannot make distinctions based on arbi-

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7/ Justices White, Brennan, Marshall, Blackmun and Stevens joined in the majority opinion quoted in the text. Justices Powell, Rehnquist and O'Connor, dissenting, noted their complete agreement with the quoted statement. See 457 U.S. at 950.

8/ U.S. Constitution, Preamble.

9/ See, e.g., Cox v. Louisiana, 379 U.S. 536, 556-58 (1965) (city cannot prohibit civil rights march while permitting other marches and parades].

10/ See, e.g., Stone v. Graham, 449 U.S. 39 (1980) (public schools may not post ten commandments in classrooms).

trary or irrational criteria, 11/ and cannot impose its will on its citizens except in accordance with established and adequate procedural safeguards. 12/

Private individuals and organizations, by contrast, have no such obligations. If they did, then, for example, a house owner could not allow a candidate she supported to place an election poster on her front lawn without allowing all other candidates to do the same, a civic association could not begin its meetings with a reading from the Bible, a grocery store could not hire the manager's niece in preference to a better qualified non-relative, or a parent could not take back a teenager's keys to the family car without "due process of law."

It is precisely to preserve these private freedoms -- including the freedom to discriminate and the freedom to be arbitrary and capricious -- that the "state action" dividing line exists. For this reason, as the NAACP has pointed out, "the 'extension of constitutional guarantees to the authentically private choices of man is wholly unacceptable, and any constitutional theory leading to that result would have reduced itself to absurdity.'" Bell v. Maryland, 378 U.S. 226, 312-13 (1964)

11/ See, e.g., Jimenez v. Weinberger, 417 U.S. 628, 637 (1974) (arbitrary distinction between legitimate and illegitimate children struck down).

12/ See, e.g., U.S. Constitution, Amendment V ("No person shall . . . be deprived of life, liberty, or property, without due process of law").

(Goldberg, J., joined by Warren, C.J., and Douglas, J., concurring) (quoting from the brief filed by the NAACP).

The philosophical hallmark of a totalitarian society is the disappearance of this distinction between the state and private life. The idea that all private conduct is the government's business and subject to the government's control is the philosophy exemplified in George Orwell's novel 1984 and is the antithesis of civil liberty. "Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties." Bell v. Maryland, 378 U.S. at 313.

Thus, the "state action"/private action dichotomy is one of the foundation stones of our Bill of Rights. Its preservation -- not only as an abstract concept but as a meaningful boundary line between conduct for which the government is genuinely responsible and conduct for which it is not -- is as essential to the protection of our civil liberties as is the enforcement of the substantive guarantees of the Constitution.

C. Burning Tree's Receipt Of A Tax Benefit For Maintaining Open Space Does Not Make Its Membership Policy "State Action"

Under any conception of "state action" that genuinely serves the vital purpose outlined in the previous section, Burning

Tree's membership policy is not state action. Plaintiffs' attempt to so label it is not only factually unreasonable, but is demonstrably contrary to the caselaw. 13/

Plaintiffs' only argument on this point has rested on the implicit proposition that if Burning Tree receives any sort of government benefit for any reason, then the Club's membership policy becomes state action. This is not the law.

In two 1982 "state action" cases, the Supreme Court emphasized that plaintiffs must "show that 'there is a sufficiently close nexus between the State and the challenged action of the [private] entity. . . .' The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (first and third emphases added]. Thus, in Blum, the Court held that private nursing homes' decisions to discharge or transfer Medicaid patients were not state action because the state was not involved in making those decisions, even though the state was extensively involved in the overall operation of the

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13/ Both plaintiffs and defendants relied below exclusively on federal caselaw on the question of "state action." This brief will follow suit. Plaintiffs have suggested that this Court may be free to ignore those decisions, see Pl. Opp. at 22 n. 12, but that proposition is questionable. See United States v. Mandel, 415 F. Supp. 997, 1024 (D. Md. 1976), aff'd, 602 F.2d 653, reh'g. denied, 609 F.2d 1076 (4th Cir. 1979); Merrick v. State, 283 Md. 1, 389 A.2d 328, 331 and n. 6 (1978). In any event, we submit that the decisions of the United States Supreme Court on this subject are well-reasoned and persuasive.

nursing homes and their care for Medicaid patients. (For example, the homes were licensed and extensively regulated, and the state paid for the medical expenses of more than 90% of the patients. Id. at 1005-1011.)

Similarly, in Rendell-Baker v. Kohn, 457 U.S. 830 (1982), the Court reviewed a private school's decision to discharge five teachers who had written a letter to a local newspaper criticizing the school's director. The Court held that the school's action was not state action, despite the fact that the school was extensively regulated by the State (even to the extent of being required to follow certain personnel procedures) and received between 90% and 99% of its funds from the State, id. at 823-33, because the State was not directly involved in the discharge decisions themselves. 14/

Plaintiffs' argument -- that because Burning Tree receives a differential tax assessment in return for its contractual promise not to develop its land, the state has become responsible for the Club's membership policy -- does not even come close to meeting this standard. The only "nexus" plaintiffs can point to between the open space tax benefit and Burning Tree's membership policy is that if the differential tax assessment were denied, the Club

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14/ Justice White, concurring, noted that "the critical factor is the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put forth by the State." 457 U.S. at 844 (emphasis added).

might have to change its policy or raise its dues. [15] This may be. But it is not the kind of nexus required by the cases just cited. If the state withdrew its funding from the private school in Rendell-Baker or its Medicaid funding from the nursing home involved in Blum, the effect would be even greater; those institutions would go bankrupt. Yet this provided no basis for the Court to conclude that state action was present in those cases.

If an elderly man who receives special tax benefits for being over 65 [16] regularly hosts stag poker parties, can we say that the government is subsidizing his parties and that his conduct "may fairly be viewed as that of the State"? [17] Perhaps the state could coerce the old man to stop hosting such parties by threatening to revoke his tax benefits, and perhaps Burning Tree could be coerced into altering its membership policy by revoking its right to receive a differential tax assessment under Section 19(e). But under the law, such a generalized connection is simply not enough. "That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity." Blum, 457 U.S. at 1011.

15/ See Pl. Opp. at 23; Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment (hereinafter "Pl. Mem.") at 26.

16/ See Internal Revenue Code § 151, 26 U.S.C. § 151.

17/ Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

Realizing that the facts did not support their case, plaintiffs relied below on a verbal smokescreen to try to hide their weakness. With progressively greater illogic, they characterized the "open space" tax benefit as providing "affirmative support" for the Club's membership policy, [18] as making the State "a party to" and "a partner in" the membership policy, [19] and as providing "overwhelming encouragement" for and "placing its imprimatur on" the Club's membership policy. [20] Finally, overreaching themselves, plaintiffs asserted that the open space tax benefit at issue was provided to Burning Tree "because of its sex-based discrimination," [21] and that Burning Tree was "required to exclude women" in order to receive its tax benefit. [22]

Nowhere, however, have plaintiffs explained how the open space tax exemption has anything to do with Burning Tree's membership policy. Their argument is pure ipse dixit -- it does because they say it does. But the fact is clear enough, and indisputable: Burning Tree receives this tax benefit simply in return for contracting to maintain its land undeveloped. Burning Tree, like any other club, is eligible for the benefit whether its members are all men, all women, or men and women. Burning

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18/ Pl. Opp. at 3, 12, 31, 36, 41, 45, 49.

19/ Pl. Opp. at 2, 15.

20/ Pl. Opp. at 23, 21.

21/ Pl. Opp. at 27 n. 15.

22/ Pl. Mem. at 14.

Tree will not lose its tax benefit if it decides to admit women; therefore the State is providing no incentive or encouragement for it to continue its discriminatory policy. Because there is no specific connection between the tax benefit and the Club's membership policy, Burning Tree's membership policy is not state action.

This conclusion also accords with sensible public policy. If the receipt of a tax benefit for a particular purpose meant that all of an organization's policies and activities became "state action," there would be nothing left of the state action concept. Churches are exempt from property taxes; 23/ does that mean that the Catholic Diocese of Baltimore must now ordain women priests because Maryland has adopted the Equal Rights Amendment? Most farmers receive crop subsidies or government aid of some sort; 24/ does that mean that a farmer, like the head of a State agency, cannot employ his son in preference to a better qualified stranger? Newspapers in many states are exempt from various sales or property taxes; 25/ does that mean that a news-

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23/ See Md. Code Ann. Art. 81 § 9(c).

24/ See, e.g., Md. Code Ann. Art. 81 § 19(b) (preferential rate of assessment); Md. Code. Ann. Agriculture § 2-603 (preferential interest rate on loans).

25/ See, e.g., Md. Code Ann. Art. 81 § 12(b) (sales tax exemption).

paper's editorial policy is "state action" -- requiring equal access for opposing views? 26/

Long ago, Chief Justice John Marshall recognized that "the power to tax involves the power to destroy." McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316, 431 (1819). Plaintiffs' theory would establish the opposite -- that simply by refraining from taxing, government can transform all private organizations into government agencies, subject to governmental standards of conduct.

D. The Existence Of The "Primary Purpose Provision" Does Not Make Burning Tree's Membership Policy "State Action"

Plaintiffs also argued below that "the State's action relative to the primary purpose provision" 27/ compels the conclusion

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26/ Compare Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (holding that no such right of access can exist under the First Amendment).

27/ Article 81, section 19(e) provides in relevant part:

> (4)(i) For the purposes of this subsection a country club shall mean an area of not less than 50 acres, on which is maintained a regular or championship golf course of nine holes or more and a clubhouse, and which has a dues-paying membership of not less than 100 persons who pay dues averaging at least $50 annually per member, with the use of the club being restricted primarily to members, their families and guests, provided that the fact that the club facilities may be used by persons or groups other than members or their guests does not disqualify a club under this subsection. In order to qualify under this section, the club may not practice or allow to be practiced any form of discrimination in granting membership or guest privileges based upon the race, color, creed, or sex, or national origin

that Burning Tree's membership policy is state action. The logical and legal basis for this contention is as weak as for the contention that receipt of a tax benefit equals state action.

The "primary purpose provision" simply sets out one of the criteria applied by the state in determining whether a particular country club is or is not eligible for the open space tax benefit. The determination whether or not a club "is operated with the primary purpose . . . to serve or benefit members of a particular sex" may require an investigation by state authorities, just as the determination whether or not a club meets the other criteria of Section 19(e) -- that it covers at least 50 acres, that it has at least 100 members, that its use is restricted primarily to members and their guests, etc. -- may require an investigation by State authorities.

As a matter of logic, such action by the State cannot make a private party into a "state actor." And as a matter of law, it is clear that it does not.

Like taxation, state inspection and regulation are pervasive in our society. Every building is subject to inspection for fire

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> of any person or persons. The determination as to whether or not any club practices discrimination shall be made by the office of the Attorney General after affording a hearing to the club. The provisions of this section do not apply to any club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex, nor to the clubs which exclude certain sexes only on certain days and at certain times. . . .

(Emphasis added).

safety and building code compliance. 28/ Every taxpayer is subject to audit. 29/ Every employer is required to comply with a multitude of regulations regarding the wages, hours, health, safety, and working conditions of its employees. 30/ Private schools must comply with detailed state regulation of its curriculum and certification of its teachers. 31/ If, as plaintiffs have asserted, such regulatory activities render the state the "partner" of the regulated entity and transform the regulated entity into a "state actor," 32/ then there will be few if any private activities that can escape that designation. 33/

28/ See, e.g., Md. Code Ann. Art. 38A § 8 (powers of Fire Marshall).

29/ See, e.g., Md. Code Ann. Art. §§ 220-221.

30/ See generally Md. Code Ann. Art. 100 (Work, Labor and Employment).

31/ See, e.g., Md. Code Ann. Education § 2-206 (authority of State Board of Education).

32/ See Pl. Opp. at 15, 22-27.

33/ More than fifty years ago, Professor Handler was able to write:

> Entry into various fields of endeavor is guarded by numerous licensing restrictions. Licenses are demanded of physicians and surgeons, dentists, optometrists, pharmacists and druggists, nurses, midwives, chiropodists, veterinarians, certified public accountants, lawyers, architects, engineers and surveyors, shorthand reporters, master plumbers, undertakers and embalmers, real estate brokers, junk dealers, pawnbrokers, ticket agents, liquor dealers, private detectives, auctioneers, milk dealers, peddlers, master pilots and steamship engineers, weighmasters, forest guides, motion picture operators, itinerant retailers on boats, employment agencies, commission merchants of farm pro-

The case of Moose Lodge v. Irvis, 407 U.S. 163 (1972), is squarely on point. Moose Lodge, like Burning Tree, is "a private club in the ordinary meaning of that term." Id. at 171. Like Burning Tree, it "quite ostentatiously proclaims the fact that it is not open to the public at large." Id. at 175. And like Burning Tree, it engaged in discrimination that would have been unlawful if its action were "state action" -- in Moose Lodge's case, it "refus[ed] to serve food and beverages to a guest by reason of the fact that he was a Negro." Id. at 171-72.

Plaintiff Irvis, a Black man who was refused service, claimed that the State of Pennsylvania's issuance of a liquor license to Moose Lodge, and the extensive regulation that accompanied that license, made Moose Lodge's conduct "state action." The State's involvement with Moose Lodge's food and beverage service was indeed "pervasive": the Lodge "must make such physical alterations in its premises as the [state liquor] board may require, must file a list of the names and addresses of its mem-

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> duce, and manufacturers of frozen desserts, concentrated feeds, and commercial fertilizers. No factory, cannery, place of public assembly, laundry, cold storage warehouse, shooting gallery, bowling alley and billiard parlor, or place of storage of explosives can be operated nor can industrial house work be carried on without registration or license. Licenses are also required for the sale of minnows, use of fishing nets, and the operation of educational institutions, correspondence schools, filling stations and motor vehicles. Motion pictures cannot be exhibited unless licensed, and canal boats must be registered.
>
> M. Handler, Cases and Materials on Trade Regulation 3-4 (1931 ed.) (footnote omitted). The list could be extended almost without limit today.

bers and employees, and must keep extensive financial records. The board is granted the right to inspect the licensed premises at any time." Id. at 176. Furthermore, because Pennsylvania law imposed a limit on the number of liquor licenses that could be issued in a given municipality, the fact that Moose Lodge had a license might present another, non-discriminatory club from obtaining a license. Id.

But, the Supreme Court concluded, "[h]owever detailed this type of regulation may be . . . it cannot be said too in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise. . . We therefore hold that . . . the discriminatory guest policies of Moose Lodge [are not] 'state action.'" Id. at 176-77 (emphasis added).

This holding unambiguously disposes of plaintiffs' argument here, for Pennsylvania's involvement in Moose Lodge's food and beverage service was far greater than Maryland's involvement in Burning Tree's membership policy. Under the "primary purpose provision," all the State can do is examine a club's practices and make a finding as to whether or not they comply with the statute. This does not make the State "in any realistic sense" a partner" in the club's practices any more than the IRS becomes a "partner" in a person's tax avoidance practices when it audits his tax return and determines whether or not he violated the tax laws. The fact "[t]hat the State responds to" Burning Tree's membership practices by granting or withholding a tax benefit

"does not render [the state] responsible for those actions." Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) (first emphasis added). 34/ And, in any event (as already noted), the State's response to Burning Tree's membership policy is the same whether the membership policy is all-male, all-female, or male and female.

Moose Lodge also illustrates the kind of state involvement that, by contrast, does justify a finding of "state action." That portion of the case involved the application of section 113.09 of the Pennsylvania State Liquor Control regulations, which affirmatively required that a club with a liquor license "shall adhere to all the provisions of its constitution and bylaws." 35/ Because Moose Lodge's bylaws required race discrimination in the service of guests, the result was that "the sanctions of the State" compelled the Lodge to enforce those Bylaws and thus to practice discrimination. 36/ The Court therefore held that Mr. Irvis "was entitled to a decree enjoining the enforcement of § 113.09 of the regulations . . . insofar as that regulation requires compliance by Moose Lodge with provisions of

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34/ When a man and a woman get married, the government responds to that action by granting them a more favorable tax rate than they must pay as single taxpayers. See Internal Revenue Code § 2, 26 U.S.C. § 2; Md. Code Ann. Art. 81 § 289(c). Apparently plaintiffs would conclude from this that the couple's decision to marry was "state action."

35/ 407 U.S. at 177 n. 4.

36/ Id. at 178-79.

its constitution and bylaws containing racially discriminatory provisions. He was entitled to no more." 37/

Thus, if Maryland law required Burning Tree to restrict its membership to one sex, state action could be found. But Article 81, section 19(e) -- including the "primary purpose provision" -- imposes no such requirement. The open space tax benefit is equally available to clubs with all-male, all-female, and mixed memberships. Burning Tree could change its membership policy tomorrow and would suffer no lose of benefits under section 19(e). The case law provides no support for plaintiffs' suggestion that under this circumstances a club's membership policies are "state action." 38/

For these reasons, plaintiffs' demand for an injunction ordering Burning Tree to change its membership policy must be rejected. The Circuit Court's decision denying that relief was

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37/ Id. at 179 (emphasis added).

38/ The area of state aid to private education provides an apt analogy. Private schools are subjected to far more extensive, intrusive, and coercive state involvement than the State's fact-finding with respect to Burning Tree. Even religiously affiliated schools must make required reports and meet minimum standards for the granting of diplomas and certificates, see Md. Code Ann. Education § 2-206. And such schools receive state financial support far greater and more direct than that received by Burning Tree -- they are entirely exempt from property taxation, Md. Code Ann. Art. 81 § 9(c), and may also receive cash grants from the government, so long as government funds themselves are not used for sectarian purposes. Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976). Yet such schools are not "state actors"; they remain free, for example, to discriminate on the basis of religion in a way that the state cannot. See Montgomery County Code § 27-19(4).

correct, and would have been correct even in the absence of its injunction prohibiting enforcement of section 19(e).

II. ARTICLE 81, SECTION 19(e) OF THE MARYLAND CODE DOES NOT VIOLATE THE EQUAL RIGHTS AMENDMENT

A. The Amendment That The State's Provision Of A Tax Benefit Is Unconstitutional Is No Different From The Argument That Burning Tree's Receipt Of The Same Benefit Is Unconstitutional

Recognizing that their attempt to have Burning Tree's membership policy labeled "state action" was far-fetched, plaintiffs urged alternatively that the State should be enjoined from implementing the section of the tax law that provides the Club with its open space tax benefit. The Circuit Court agreed with this argument. But although this branch of plaintiffs' attack was directed against State officials rather than Burning Tree, the underlying theory of both arguments is precisely the same, and both should be rejected for the same reasons.

In their claim against Burning Tree, plaintiffs argued that the Club's receipt of an open space tax benefit so involved the State in the Club's membership policy that the Club's membership policy was "state action" and had to be judged by the standards applied to governmental conduct. As demonstrated above, this argument fails because there is not an adequate connection between the tax benefit and the membership policy.

In their claim against the State, plaintiffs argued that the State's provision of an open space tax benefit to the Club so

involved the State in the Club's membership policy that the act of providing the tax benefit became sex discrimination. Again, the argument must fail because there is simply not an adequate connection between the tax benefit and the memership policy.

Whether one says that a cup is half full or half empty doesn't change the quantity of liquid in the cup. Focusing on the State's role in this relationship rather than on Burning Tree's role does not change the nature of the relationship. The fact remains that by providing a tax benefit to Burning Tree in return for the Club's promise to maintain open space, the State has not so involved itself in the Club's membership policy that it is engaging in conduct forbidden by the Equal Rights Amendment. Thus, just as a homeowner who installs insulation in her attic does not, by receiving a tax credit for that activity, 39/ convert the operation of her household into "state action," the government is similarly not forbidden from giving her that tax credit just because she chooses to employ only women on her household staff.

The practical consequences of adopting this prong of plaintiffs' argument would be as drastic and as undesirable as the consequences of adopting their theory of "state action." As shown above, under plaintiffs' view of "state action" any private organization that received any kind of state benefit for one

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39/ See Internal Revenue Code § 44C, 26 U.S.C. § 44C; Md. Code Ann. Art. 81 § 12F-5.

particular purpose would be considered a "state actor" with respect to all of its activities, however unrelated. The result would be that virtually every private organization would be considered a "state actor," and therefore would be compelled to adhere to governmental standards of conduct or else to give up its state benefits.

Plaintiffs' theory in their claim against the State is just the flip side of the same argument. Under their theory, a state would be prohibited from providing any benefit to a private organization that, in any of its unrelated activities, did not conform to the state's "public policy" or engaged in activities in which the State could not itself engage. Since virtually every private organization receives some government benefit, the result would be identical: nearly all private organizations would be compelled to adhere to "public policy" in every way or lose their benefits, no matter how unrelated.

In sum, if receipt of the open space tax benefit does not convert Burning Tree's discrimination into state action, then the granting of that same benefit cannot convert the State's action into sex discrimination.

Plaintiffs' claim against the State is thus simply a second attempt, by a different route, to mislead the court into ignoring

the "under the law" requirement of the Equal Rights Amendment. 40/

B. Section 19(e) Does Not Become Unconstitutional Because It Provides a Tax Benefit to an Organization that Discriminates

We take no issue with plaintiffs' abstract statement of the law: "States may not provide affirmative support to acts of private discrimination which they would not themselves be constitutionally permitted to undertake." 41/ But the cases cited in plaintiffs' briefs below and in the Circuit Court's opinion do not support the rather different proposition on which their plaintiffs' argument and the Court's decision really rest: that a state may not provide any benefits to an organization that discriminates, even if the state benefits are used for a purpose unrelated to the organization's discriminatory practices. To the contrary, the decided cases make it plain that this proposition is not the law." The Court[s have] not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its resources on [forbidden] ends." Hunt v. McNair, 413 U.S. 734, 743 (19__).

Plaintiffs relied below chiefly on Bob Jones University v. United States, 461 U.S. 574, 103 S. Ct. 2017 (1983), and Norwood

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40/ Of course the implementation of the statute is action "under the law." The question is, is it discrimination?

41/ Pl. Mem. at 7.

v. Harrison, 413 U.S. 455 (1973), to support their claim that the Equal Rights Amendment prohibits the State from granting tax benefits to an organization that discriminates on the basis of sex. Carefully read, however, none of these cases stands for that proposition. The Circuit Court properly declined to adopt this faulty reasoning on its own.

1. The Bob Jones Case

According to plaintiffs, Bob Jones held that an organization may not receive a tax benefit when its actions are contrary to "public policy." See Pl. Opp. at 9-12; Pl. Mem. at 16-19. Even if this were the meaning of Bob Jones, it would not affect Burning Tree's eligibility for the open space tax benefit, because Burning Tree is not acting contrary to any public policy. And, as will be shown below, the Supreme Court's decision in Bob Jones is neither so simplistic nor so broad.

(a) Burning Tree Is Not Violating Any Public Policy

Assuming that plaintiffs' interpretation of Bob Jones is correct, it would bar tax benefits to Burning Tree if the Club were acting in violation of "public policy." But plaintiffs have identified no public policy that Burning Tree is violating.

There is, of course, a Maryland public policy against governmental sex discrimination. This policy is embodied in the State Equal Rights Amendment and its prohibition of discrimina-

tion "under the law." There is also public policy against certain specific kinds of private sex discrimination -- e.g., in employment, 42/ in housing, 43/ in access to public accomodations. 44/ But there is no general public policy against private sex discrimination. Plaintiffs have pointed to none; when they attempted to do so all they could come up with was the E.R.A. and some specific statutes of the kinds just cited. See Pl. Mem. at 18. But in fact, this proves that there is no general policy against private sex discrimination, for if there were such a policy, then there would be no need for specific legislation prohibiting private discrimination in employment, housing, public accomodations, and other specific, limited areas.

In particular, plaintiffs have not identified -- because they cannot -- any source of a public policy against sex discrimination in membership by private clubs. To the contrary, all sources of public policy uniformly indicate that it is public policy to permit such discrimination. This is true at the

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42/ See Md. Code Ann. Art. 49B § 14 et seq.; Montgomery County Code § 27-19.

43/ See Md. Code Ann. Art. 49B § 19 et seq.; Montgomery County Code § 27-12.

44/ See Md. Code Ann. Art. 49B § 5; Montgomery County Code § 27-9.

federal, 45/ state, 46/ and local 47/ levels; it has been recognized by both federal 48/ and state 49/ courts. Plaintiffs' argument is only an unsupported and incorrect assertion that it is against public policy to permit such private discrimination.

Thus, nothing in the Bob Jones decision -- even assuming that decision to be as broad as plaintiffs would have it -- supports the denial of tax benefits to Burning Tree.

45/ See, e.g., 42 U.S.C. § 2000e(b) (excluding private clubs from the coverage of Title VII [employment discrimination]); 42 U.S.C. § 2000a(e) (excluding private clubs from the coverage of Title II [public accommodations]).

46/ See, e.g., Md. Code Ann. Art. 49B § 5 (exemption for private clubs).

47/ See, e.g., Montgomery County Code § 27-8 (prohibition on discrimination in places of public accommodation limited to places whose facilities or services "are offered to and enjoyed by the general public"); District of Columbia Code § 1-2502(24) ("place of public accommodation" defined to exclude "any institution, club, or place of accommodation which is in its nature distinctly private" [emphasis added]).

48/ See, e.g., Moose Lodge v. Irvis, supra; Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974) (Elks Lodge); Solomon v. Miami Women's Club, 359 F. Supp. 41 (S.D. Fla. 1973) (Federation of Florida Women's Clubs. Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984), is not to the contrary. That decision rested on the factual predicate that the Minnesota Jaycees was a "public business facility" and not a private club. See 104 S. Ct. at ___. The Court explicitly recognized that a private club would enjoy a constitutionally protected "freedom of intimate association." See id. at ___; and see pp. ___ - ___, infra.

49/ See, e.g., Stevens v. Watson, 16 Cal. App. 3rd 629 (1971), cert. denied, 407 U.S. 925 (1972) (discriminatory golf club entitled to retain favorable tax status).

(b) Bob Jones Does Not Mean What Plaintiffs Say It Does

The question in Bob Jones was whether private schools that practiced racial discrimination could qualify for tax-exempt status and deductibility of contributions under sections 501(c)(3) and 170 of the Internal Revenue Code. 103 S. Ct. at 2021. The Court ruled that they could not. The basis of that decision, as the Court explained, was not that the Constitution or any general principles of law so required, see 103 S. Ct. at 2032 n. 24, but that the common law of charitable trusts, incorporated by Congress into the cited sections of the tax code, included a requirement that a charitable trust "must serve a public purpose and not be contrary to established public policy." Id. at 2026. As the Court made clear, this requirement is the quid pro quo for "the special privileges that have long been extended to charitable trusts." Id. The Court, finding that racial discrimination "exerts a pervasive influence on the entire educational process," id. at 2032 (emphasis by the Court), concluded that a school that practices racial discrimination "cannot be viewed as conferring a public benefit within the 'charitable' concept discussed earlier, or within the Congressional intent underlying § 170 and § 501(c)(3)." Id. at 2031 (footnote omitted).

The Court went out of its way to indicate that its ruling, like its reasoning, extended only to the law of public charities or charitable trusts. The Court specifically noted that it was

not deciding the issue of whether the constitutional prohibition on discrimination by the government required denial of tax exempt status to racially discriminatory private schools. 103 S. Ct. at 2032 n. 24. 50/ Out-of-context quotations can be used to make it appear that the Court's ruling requires all recipients of all tax benefits to act in accordance with "public policy," see Pl. Opp. at 9-12; Pl. Mem. at 16-19, but are entirely misleading.

The Court also specifically disclaimed reaching another conclusion that plaintiffs relied on below. The Court explained that racial discrimination so perverts education that a discriminatory school cannot be deemed charitable, 103 S. Ct. at 2030; 2035 n. 29, and it noted: "we need not decide whether an organization providing a public benefit and otherwise meeting the requirements of § 501(c)(3) could nevertheless be denied tax-exempt status if certain of its activities violated a law or public policy." 103 S. Ct. at 2031 n. 21. Thus, even in the special context of charitable trusts, the Court was unwilling to say that an organization other than a school could not qualify for full tax-exempt status because it did not act in accordance with public policy. A fortiori, the Bob Jones decision does not indi

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50/ Justice Rehnquist reached this question and stated his view that it did not: "the statute is facially neutral; absent a showing of a discriminatory purpose, no equal protection violation is established. Washington v. Davis, 426 U.S. 229, 241-244 (1976)." 103 S. Ct. at 2045 n.4 (Rehnquist, J., dissenting on other grounds).

cate that a tax benefit of the kind received by Burning Tree is subject to any general "public policy" limitations. 51/

Burning Tree Club is not a charitable trust or a public charity and has never pretended to be one. Contributions to the Club are not tax-deductible. The open space tax benefit at issue in this case, unlike the tax-exempt status at issue in Bob Jones, does not require that its recipient be a charitable organization. The requirements of Article 81, Section 19(e) of the Maryland Code are clear enough; they set out in plain language the standards that must bet met to obtain an open space tax benefit. The status of being a public charity, with its attendant "public policy" element, is not one of the standards set forth in section 19(e). 52/

51/ This Court has noted the "public policy" purposes of the tax benefit at issue here: "to provide open spaces and provide recreational facilities and to prevent the forced conversion of such country clubs to more intensive or different uses as a result of economic pressure." State of Maryland ex rel. Attorney General v. Burning Tree Club, Inc., No. 138, Slip Op. at 1 (Oct. 2, 1984) (quoting 1965 Maryland Law ch. 399). Nothing in Bob Jones indicates that sex discrimination by country clubs "so perverts" the preservation of open space that a single-sex club "cannot be deemed" to come within the benefit of the law. Manifestly, the Maryland General Assembly is of the view that the relevant public policy is equally served by all-male, all-female, or mixed-sex clubs.

52/ A more extensive discussion of the law of charitable trusts and its "public policy" element can be found in Green v. Connolly, 330 F. Supp. 1150 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971). Green was the decision that originally ordered the IRS to withdraw tax exempt status from racially discriminatory schools. See Bob Jones, 103 S. Ct. at 2021-22.

In this respect, the open space tax benefit resembles the vast majority of tax benefits created by both federal and state governments. Corporations are not required to be charities in order to take advantage of, e.g., investment tax credits, 53/ tax credits for increasing research activities, 54/ or credits for doing business in an "enterprise zone." 55/ Individuals do not have to be charities to receive tax credits for political contributions, 56/ child care expenses, 57/ or energy-saving investments. 58/ Indeed, these and most tax benefits are available even if an organization is operated for profit, rather than not-for-profit like Burning Tree. Plaintiffs' cause would, obviously, be served by importing the "public policy" criterion into Section 19(e). Just as obviously, however, it is not there.

2. Norwood v. Harrison

Plaintiffs' reliance on Norwood v. Harrison, 413 U.S. 455 (1973), is equally misplaced. As Burning Tree Club demonstrated below, Norwood was, both on its face and as it has been inter-

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53/ See Internal Revenue Code § 38, 26 U.S.C. § 38.

54/ See id. § 44F, 26 U.S.C. § 44F.

55/ See Md. Code Ann. Art. 81 § 291A (Supp. 1983).

56/ See Internal Revenue Code § 41, 26 U.S.C. § 41.

57/ See id. § 44A, 26 U.S.C. § 44A.

58/ See id. § 44C, 26 U.S.C. § 44C; Md. Code Ann. Art. 81 § 12F-5.

preted by the Supreme Court in subsequent decisions, limited to the principle that a state cannot subvert a court-ordered desegregation of its public school system by providing financial aid to "segregation academies" set up to enable white students to flee the public schools. 59/

In addition to that demonstration, which will not be repeated here, both the Bob Jones decision and the Supreme Court's recent ruling in Grove City College v. Bell, 465 U.S. ____, 104 S. Ct. 211 (1984), prove that Norwood cannot mean what plaintiffs have argued that it meant.

In Plaintiffs' view, Norwood held that the Constitution bars the government from providing financial assistance to organizations that discriminate in a manner in which the government could not itself discriminate. See Pl. Memo at 11-13. But in Bob Jones, the Court was at pains to note that it had never decided that very issue: "amici . . . argue that denial of tax-exempt status to racially discriminatory schools is independently required by the equal protection component of the Fifth Amendment. In light of our resolution of this case, we do not reach that issue. Bob Jones, supra, 103 S. Ct. at 2032 n. 24 (emphasis

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59/ See Memorandum of Defendant Burning Tree in Opposition to Motion of Plaintiffs for Summary Judgment and Reply of Defendant Burning Tree to Plaintiffs' Memorandum in Opposition to Defendant Burning Tree's Motion for Summary Judgment, at 17-21.

added). 60/ Obviously, if the Court has not decided whether the Constitution requires the denial of tax benefits to racially discriminatory schools, then, a fortiori, it has not decided whether the Constitution requires the denial of benefits to sexually discriminatory private clubs. 61/

This conclusion is emphatically confirmed by the Court's decision last spring in Grove City College v. Bell, 465 U.S. ___, 104 S. Ct. 124 (1984). The question in that case was whether Title IX's statutory prohibition of sex discrimination by educational institutions receiving federal financial assistance 62/ applied to the entire institution or only to the specific programs receiving such assistance. The Court held that the prohibition applied only to the specific programs receiving financial assistance, and not to the entire institution. 104 S. Ct. at _____. In other words, a college or university may receive direct federal financial assistance for one program while practicing sex discrimination in other programs. Id. (Of course,

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60/ The equal protection component of the Fifth Amendment, rather then the Equal Protection Clause of the Fourteenth Amendment, was involved in Bob Jones because a federal rather than state activity was at issue. Of course "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976).

61/ The Bob Jones Court did not speak out of ignorance of Norwood; both opinions were written by Chief Justice Burger, and the Bob Jones decision cited and quoted Norwood extensively. See 103 S. Ct. at 2029, 2030, 2035 n. 29.

62/ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

the government cannot engage in sex discrimination at public colleges, see Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)). However, if plaintiffs' interpretation of Norwood (and Bob Jones) were correct, the Constitution would forbid any federal financial assistance to a private college that engaged in sex discrimination. It is hardly necessary to spell out the conclusion: the whole dispute in Grove City College would have been moot, and the Supreme Court's decision meaningless, if the Constitution prohibited what Title IX permits. It is flatly impossible to credit plaintiffs' interpretation of Norwood and Bob Jones in the wake of the Grove City College decision. 63/

For these reasons, plaintiffs' claim that Section 19(e) is unconstitutional because it provides a benefit to an organization that discriminates is without merit, and were properly eschewed by the Circuit Court. 64/

63/ Again, Norwood had not just slipped the Court's mind when it was ruling on the Grove City case. Norwood is cited in the Court's opinion. 52 U.S.L.W. at 4286.

64/ Of course the Supreme Court in Bob Jones, Norwood, and Grove City, was concerned with discrimination prohibited by the Fourteenth Amendment to the federal Constitution, while this Court is concerned here with discrimination allegedly prohibited by the Maryland Equal Rights Amendment. But we do not believe, and plaintiffs have never suggested, that the E.R.A. prohibits sex discrimination more stringently than the Fourteenth Amendment prohibits race discrimination.

C. The "Primary Purpose Provision" Does Not Render Section 19(e) Unconstitutional

The preceding sections have shown that neither the Equal Rights Amendment nor generalized considerations of "public policy" make the provision of tax benefits to a private single-sex club unconstitutional. Plaintiffs argued, however, and the Court below agreed, that something within Section 19(e) itself renders the provision of such benefits unconstitutional. This is an interesting argument indeed, since Section 19(e) does nothing more than permit such benefits to be granted and received. Somehow, the legislature, in enacting legislation specifically intended not to deprive single-sex clubs of tax benefits, in said to have accomplished just the opposite.

Plaintiffs and the lower court focussed on the "primary purpose provision" of Section 19(e) as the key to this paradoxical conclusion. Mem. Op. at 7, 10; Pl. Opp. at 6-7, 13-14, Pl. Mem. at 11-13. The Circuit Court called it an "unusual statutory scheme." Mem. Op. at 7. That provision, however, is nothing more than a garden-variety exception clause, common in virtually all civil rights legislation. 65/

For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., is the primary federal prohibition on race, sex, and other discrimination in employment. It contains

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65/ The text of the "primary purpose provision" is set out at footnote ___.

exceptions for (i.e., it permits discrimination by) employers with fifteen or fewer employees and for private clubs. See 42 U.S.C. § 2000e(b). Title II prohibits discrimination in public accomodations. 42 U.S.C. § 2000e et seq. It, too, contains an exception for (i.e., it permits discrimination by) private clubs. See 42 U.S.C. § 2000a(e). And Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (prohibiting sex discrimination in educational programs receiving federal financial assistance], contains an exception almost identical to the "primary purpose" provision for institutions of higher education "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex." See 20 U.S.C. § 1681(a)(5). The same is true of state and local legislation. See, e.g., Md. Code Ann. Art. 49B § 20 (exemption for dwellings "planned for, or occupied exclusively by, individuals of one sex"); § 5 (exception for private clubs); Montgomery County Code § 27-8 (same).

It is unlikely that there is a single anti-discrimination statute in existence that does not contain some exceptions. Amicus knows of none, and none were cited below by plaintiffs or by their numerous amici. The "primary purpose provision" is simply an exception to an anti-discrimination statute, indistinguishable from the examples just given.

Plaintiffs asserted below that the primary purpose provision "requires the State . . . to provide State funding for private acts of sex discrimination," and that it is only "because of its

discriminatory membership policies" that Burning Tree can receive open space tax benefits. 66/ Indeed, plaintiffs asserted that because of this provision "Burning Tree Club has been . . . required . . . to exclude women." 67/

This is palpable fiction. The undisputed history of Section 19(e) shows that the "primary purpose provision" does not operate in the way plaintiffs pretend. Burning Tree became eligible for the open space tax benefit in 1965, when Section 19(e) was first enacted. It was eligible regardless of its membership policy. In 1974, Section 19(e) was amended to require, as a condition of eligibility, that a club not discriminate in any of several enumerated ways. However, the legislature simply chose not to make sex discrimination in admissions by a single-sex club one of the disqualifying forms of discrimination. Thus, Burning Tree remained eligible for the differential tax assessment. And this was still true after 1974, regardless of whether it admitted only men, only women, or men and women. Thus the "primary purpose provision" has affected neither Burning Tree's membership policy, nor its eligibility for open space tax benefits, in any way.

The cases cited on this point by plaintiffs and relied upon by the Circuit Court, see Mem. Op. at 8, 10, are useful because they show, by contrast, the kinds of situations in which statutes

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66/ Motion of Plaintiffs for Summary Judgment, at 1; Pl. Mem. at 4 (emphasis in original).

67/ Pl. Mem. at 14 (emphasis added). See also id. at 24 ("the State . . . has practically commanded it").

do coerce discrimination and are thus unconstitutional. In Shelley v. Kraemer, 334 U.S. 1 (1948], the judicial enforcement of racially restrictive real estate covenants prevented a willing buyer and a willing seller from transferring property. Only the government stood in their way. Similarly, in Loving v. Virginia, 398 U.S. 1 (1967), a state anti-miscegenation law prohibited a willing man and woman from marrying. Again, only the government stood in their way. And in Moose Lodge v. Irvis, 407 U.S. 163 (1972), the only portion of the case on which the Court granted relief was where the state's regulations ordered the Lodge to enforce its racially restrictive bylaws. If the Lodge had been free to enforce or ignore those bylaws, no relief would have issued. See 407 U.S. at 177-79.

This case presents no such situation. The power of the State is not preventing anybody from doing anything. Burning Tree Club is doing what it wants to do, and plaintiff Barbara Bainum Renschler is being denied consideration for membership at the Club by the Club's own policy, unchanged since 1922 and uncoerced by the State.

In asserting that the effect of the "primary purpose provision" is to compel and require discrimination, plaintiffs bite off more than they would like to chew. By plaintiffs' argument, Title VII of the Civil Rights Act of 1964 is unconstitutional because in permitting employers with fewer than fifteen employees to discriminate, it "requires the State" to treat such employers on a par with nondiscriminating employers. And Title IX would be

unconstitutional because under its exception for single-sex schools, a school is "required . . . to exclude women" in order to remain within the terms of the exception.

This is silly. These federal statutes, like Section 19(e), simply stop short of banning all discrimination that could be banned. They are not unconstitutional -- and neither is Section 19(e) -- because they fail to prohibit some conduct that some would like to see prohibited. The logic is quite simple. If (as we have shown) the E.R.A. does not require all state benefits to be cut off from single-sex private clubs, then there cannot be anything unconstitutional about a statute that simply leaves that constitutional situation unchanged. See Crawford v. Los Angeles Board of Education, 458 U.S. 527, 538 (1982) (repeal of state anti-discrimination law does not amount to discrimination). 68/

Because the E.R.A. does not apply to private conduct, the legislature was not required to add an anti-sex-discrimination provision into Section 19(e). If the legislature had never added such a provision, Burning Tree would clearly have been entitled to continue receiving its tax benefits. Plaintiffs' objection seems to be that, when it prohibited certain restrictive membership policies by recipients of Section 19(e) benefits, the legis-

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68/ It is certainly open to question whether Reitman v. Mulhey, 387 U.S. 369 (1967), relied upon by the Court below, see Mem. Op. at 9-10, retains much vigor in the wake of Crawford. See 458 U.S. at 539 nn. 22-23 (approvingly quoting Harlan, Jr., dissenting in Reitman); id. at 547 (Marshall J., dissenting).

lature explicitly and affirmatively enacted an exception to that prohibition. See, e.g., Pl. Opp. at 2, 5; Pl. Mem. at 3. But the Supreme Court has answered that objection: "It is quite immaterial that the State has embodied its decision not to act in statutory form." Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 165 (1978) (emphasis added). When examining a challenged statutory enactment which is "a limitation on a reform measure," the "principle that calls for the closest scrutiny of distinctions in laws denying fundament rights . . . is inapplicable." Rather, the courts "are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone further than it did.'" Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) (emphasis in original).

If the Equal Rights Amendment forbids the State from granting any benefits to private organizations that discriminate based on sex, then Section 19(e) was unconstitutional two years before the primary purpose provision was enacted. 69/ If the E.R.A. does not go so far, 70/ then it cannot be unconstitutional for

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69/ Indeed, with respect to discrimination based on race, religion, and national origin (and perhaps other things), Section 19(e) would have been unconstitutional under Article 24 of the Declaration of Rights from the day it was adopted.

70/ The fact that the same 1972 legislature that approved the State Equal Rights Amendment also considered (and in 1974 adopted) the anti-discrimination provisions of Section 19(e) is certainly strong evidence that the E.R.A. itself was understood not to prevent state aid to private parties that discriminated, for if the E.R.A. did, there would have been no need to enact Section 19(e). The understanding of the legislature that approved the amendment is entitled to great

Section 19(e) also not to go so far. Either way, the conventional exception clause that plaintiffs call the "primary purpose provision" cannot have any effect on the outcome of the argument.

Plaintiffs and the Circuit Court try to paint the "primary purpose provision" as somehow different and worse then the run-of-the-mill exception clause. Their efforts are unavailing.

First, plaintiffs have suggested that because the "primary purpose provision" was adopted as an amendment to the 1974 anti-discrimination amendments to Section 19(c), this fact of legislative history somehow damns the provision. See Pl. Opp. at 13. Is it plaintiffs' contention that the exception clauses to the federal civil rights legislation cited above are unconstitutional if they were not contained in the very first drafts of those bills introduced in Congress? Plaintiffs have cited no support for such an amazing proposition.

Second, plaintiffs argued, and the court below seems to have agreed, see Mem. Op. at 10, that it is arbitrary to bar open space tax benefits to clubs that admit women but discriminate against them in some lesser way, while allowing single-sex clubs that exclude women altogether to receive the benefits. See Pl. Opp. at 14; Pl. Mot. at 24. This may strike plaintiffs as strange, but it strikes most of society as perfectly sensible and it is commonplace in the law. Even the Maryland and Montgomery County Human Relations Laws contain such provisions. See Md.

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weight in interpreting its meaning. See Marsh v. Chambers, 463 U.S. ___, 103 S. Ct. 3330, 3334 (1983).

Code Ann. Art. 49B § 20 ("Nothing in the provisions of this subtitle shall be construed to bar any person from refusing to sell, rent or advertise any dwelling which is planned exclusively for, or occupied exclusively by, individuals of one sex, to any individual of the opposite sex, on the basis of sex"); Montgomery County Code § 27-8 (exception for places of public accomodation "which make distinctions based upon sex including such facilities as private schools . . ."). 71/ It is important to resist facile thinking in this sensitive area of the law. It is unfortunate that plaintiffs did not do so. 72/

71/ There are many similar examples. See, e.g., Title IX, 20 U.S.C. § 1681(a)(5), ("in regard to admissions this section shall not apply to any . . . institution of undergraduate higher education which . . . traditionally and continually from its establishment has had a policy of admitting only students of one sex"); District of Columbia Human Rights Act, D.C. Code § 1-2521 ("Nothing in this chapter regarding sex discrimination in admission policy shall apply to any private undergraduate college or to any private preschool, elementary or secondary school").

72/ Similarly, despite plaintiffs' constant equation of sex and race discrimination, the law does not always equate the two. The very existence of all-white private schools is unlawful, see Runyon v. McCrary, 427 U.S. 160 (1976), but, even under the Maryland E.R.A., all-female schools not only may exist but may receive direct State financial support. See 65 Op. A.G. 92 (1980) (upholding State funding for Goucher College). Plaintiffs here have expressed their satisfaction with that state of affairs. See Pl. Opp. at 18-19 and n. 10. Likewise, separate dormitories or restrooms for white and black people would be considered an abomination, but the suggestion that the E.R.A. would require sex-integrated dormitories or bathrooms is regarded as a calumny by proponents of the E.R.A. See Equal Rights Amendment Extension: Hearing before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 95th Cong., 2d Sess. 139 (1978) (statement of Thomas I. Emerson).

Third, plaintiffs argued that the State's involvement in determining whether a club meets the statutory criteria that its "facilities are operated with the primary purpose . . . to serve or benefit members of a particular sex" is "odious and obnoxious," and that this is a reason to find the provision unconstitutional. Pl. Opp. at 41. The Circuit Court relied hereby on this reasoning, stressing that Section 19(e) "requires the Maryland State Attorney General to enforce certain country club's [sic] private rules and practices of discrimination against women," Mem. Op. at 10 (emphasis added), and emphasizing that it was this "certification procedure by the Attorney General [that] distinguishes this statute from the more typical tax exemption statute." Id. at 7. But this Court has already noted that the Attorney General plays no such role, but "merely is a fact-finder." State of Maryland ex rel. Attorney General v. Burning Tree Club, Inc., supra, Slip. Op. at 19. Neither plaintiffs nor the Court below could explain why it was any different for the Attorney General to make such a factual determination than it is for the federal Equal Employment Opportunity Commission to make the same determination, as it does under Title VII's private club exception, see 42 U.S.C. § 2000e(b); or for the U.S. Department of Education to make the same determination, as it does under Title IX's exemption for single-sex schools, see 20 U.S.C. § 1681(a)(5); or for the State of Maryland to make the same determination, as it must under the State Human Relations Law,

Md. Code Ann. Art. 49B §§ 5 (private clubs exception); 20 (single-sex exception). 73/

None of the purported distinctions between section 19(e) and these other state and federal statutes hold water. The "primary purpose provision," like countless other exceptions clauses in civil rights bills, is constitutionally unexceptional.

D. Plaintiffs' Suit Does Not Support But Undercuts the Public Policy Of Maryland

If plaintiffs prevail in this suit, the impact will certainly fall heavily on the members of Burning Tree Club. Either they will have to raise their dues substantially, or they will have to change their membership policy. While these consequences may be serious for the Club's members, it is fair to say that they will not be of great moment to the public at large.

The consequences of a ruling for plaintiffs will not, however, be limited to its impact on the members of Burning Tree. Its more serious impact will be on the ability of the State of Maryland to use its tax system as a powerful but flexible mechanism of public policy.

For good or ill, the tax laws have become a prime tool of public policy in American society. Legislatures, both federal and state, enact taxes, tax credits, tax deductions, tax exemp-

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73/ Of course, if the statute were invalid on this ground, the simple solution would be to sever and jettison only the inspection and certification requirement, leaving the substance of the "primary purpose provision" intact.

tions and tax deferments as a means of stimulating, discouraging, and shaping private conduct to conform to public desires. 74/ In many ways, this is a more sophisticated and delicate means of promoting public policy than the use of criminal law sanctions or positive statutory or regulatory commands, for it does not demand uniformity of conduct by the entire populace; rather, each taxpayer can measure the value to himself of taking advantage of a tax benefit (or the cost of paying a tax) and determine his course of conduct accordingly.

This use of the tax laws is widespread at both the federal and state levels. 75/ In Maryland, for example, the legislature has established tax incentives to accomplish the public policies of encouraging the use of solar and geothermal energy, 76/ preserving buildings of historic value and encouraging the construc-

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74/ See Bittker & Stone, Federal Income Taxation (5th ed. 1980) at 2 ("the income tax has . . . had an effect on the allocation of resources in our economy and, indeed, perhaps on our way of life in its broadest sense. For example, the federal tax encouragement of owning a home as compared to renting an apartment and the tax incentives granted to the oil industry and, indirectly, to the extensive use of the automobile, may have been among the determining factors in the development of metropolitan areas").

75/ See id. at 3 (Recent federal tax statutes have established "incentives for low income housing, pollution control, political gifts, removal . . . of barriers to the handicapped and elderly, for the creation of employee stock ownership plans, for the presentation of certain historic structures, and for job creation. . . . In 1977 and 1978, the President's and Congress' energy programs were heavily based on a various tax disincentives and incentives").

76/ See Md. Code Ann. Art. 81 § 12F-5.

tion of architecturally compatible structures, 77/ and stimulating the growth of business in economically depressed areas, 78/ among others. One of the important public policies that the legislature has encouraged in this way is the preservation of open space -- not only by country clubs, but in any form. 79/ In doing so, it is in good company, for "practically all states have enacted some form of tax relief which accords . . . preferential treatment" to undeveloped land. Mandelker & Cunningham, Planning and Control of Land Development 1272 (1979). 80/

A ruling for plaintiffs in this case will seriously interfere with the legislature's ability to use tax law as an instrument of public policy in Maryland. If anyone who accepts a tax benefit for solar energy, historic preservation, job creation or open space purposes will thereby become a "state actor" (plaintiffs' first theory), it is certain that few private taxpayers will avail themselves of such benefits. Similarly, if the State is prohibited from making such benefits available to private taxpayers who do not conform in every aspect of their

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77/ See id. §§ 12G; 281A.

78/ See id. § 291A (Supp. 1983).

79/ See id. § 12E.

80/ See generally Wright & Gitelman, Land Use 1136-74 (3rd ed. 1982) (chapter on Tax Policy and Land Use Control); Coughlin & Benning, Saving the Garden: The Preservation of Farmland and Other Environmentally Valuable Land (1977); Neilson, Preservation of Maryland Farmland: A Current Assessment, 8 U. Balt. L. Rev. 429 (1979).

behavior to some other "public policy" that any plaintiff can find, there will be few eligible recipients of state tax benefits. In either event, the real losers are the people of Maryland, for the policy objectives of the legislature will be less well served if the use of tax incentives to advance those objectives is so limited.

Basically, plaintiffs would have the Court rule that the (non-existent) public policy against sex discrimination by private organizations must override all other public policy objectives established by the legislature. Nothing in the Constitution, in federal or state court decisions, or in logic supports such a conclusion. Plaintiffs may believe that the eradication of sex discrimination in the membership of private clubs is the public policy of Maryland, indeed its most important public policy, but there is no evidence that the people of the State agree.

III. BURNING TREE CANNOT BE PENALIZED FOR EXERCISING ITS CONSTITUTIONAL RIGHTS

The Circuit Court cursorily dismissed Burning Tree's constitutional claim in a single paragraph, Mem. Op. 10-11, on the ground that the State "is not required to provide affirmative support to private discrimination." Id. at 11. Of course it is not. But the State is forbidden to penalize a private person or organization for exercising a constitutional right. Thus, although the State need not provide tax benefits to any country clubs, it may not provide them to some and withhold them from

others if the sole distinction between the two groups is the fact that those who lose the benefit are exercising a constitutional right.

A. Burning Tree's Decision To Limit Its Membership To Men Is Constitutionally Protected

Justice William O. Douglas, joined by Justice Thurgood Marshall, has written:

> My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

Moose Lodge v. Irvis, 407 U.S. 163, 179-180 (1972) (Douglas & Marshall, JJ., dissenting) (footnote omitted). Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974).

Even more recently, in Roberts v. United States Jaycees, 104 S. Ct. ____ (1984), the Supreme Court recognized that the Fourteenth Amendment protects the "freedom of intimate association." 104 S. Ct. at _____. The Court rejected the Jaycees' claim to such protection on the ground that they were "neither small nor selective," id. at ____, but noted that "size, purpose,

policies, selectivity [and] congeniality" are pertinent factors in determining the applicability of this freedom. The Court has previously recognized that "it is the constitutional right of every person to close his ... club to any person or to choose his social intimates ... solely on the basis of personal prejudices .... These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties. Bell v. Maryland, 370 U.S. 226, 313 (Goldberg, J., joined by Warron, C.J., and Douglas, J., concurring). 81/

Thus, as plaintiffs appeared to acknowledge below, see Pl. Opp. at 2, 32, the members of Burning Tree Club are exercising a constitutionally protected right in maintaining their single-sex membership policy.

B. The State Cannot Deprive Burning Tree Of A Generally Available Benefit For Which It Is Qualified Because It Chooses To Exercise Its Constitutional Rights

As the Supreme Court has twice reaffirmed within the past year, "the government may not deny a benefit to a person because he exercises a constitutional right." Regan v. Taxation With Representation, ____ U.S. ____, 103 S. Ct. 1997, 2001 (1983), citing Perry v. Sinderman, 403 U.S. 593 (1972) and Speiser v.

81/ Hishon v. King & Spaulding, 104 S. Ct. ____ (1984), cited by the Circuit Court (Mem. Op. at 11), is thus irrelevant to this discussion because, and that case confirmed, there is no constitutional rights for a large law firm to engage in sex discrimination in employment.

Randall, 357 U.S. 513 (1958); FCC v. League of Women Voters, 104 S. Ct. ____, ____ (1984).

The decision in Speiser is directly on point and is controlling here. That case involved a California constitutional amendment requiring persons receiving state property tax benefits to certify that they did not advocate the forcible overthrow of the government. The Supreme Court struck down the requirement, reasoning that "[t]o deny an exemption to claimants who engage in speech is in effect to penalize them for the same speech." 357 U.S. at 518. Likewise, to deny open space tax benefits to Burning Tree because its members exercise their rights of association and privacy is to penalize them for exericising those rights.

Plaintiffs attempted to deal with Speiser below. They relied on Regan v. Taxation With Representation, which, they claimed, held that a legislature's "decision to limit the award of preferential tax treatment to only those clubs that do not discriminate in membership does not offend the First Amendment." Pl. Mem. at 40. Of course, if that were Regan's holding, then Speiser was simply overruled, for California's action in Speiser was a "decision to limit the award of preferential tax treatment to only those persons that [sign loyalty oaths]." In fact, Regan did not overrule Speiser but reaffirmed its vitality. See 103 S. Ct. at 2001 (majority opinion); id. at 2004 n. * (Blackmun, J., concurring). And the Court in Regan went out of its way to explain why its decision did not undercut Speiser and

does not support plaintiffs' argument here. Indeed, the Regan decision provides strong support for Burning Tree.

Regan involved a challenge by an organization called Taxation With Representation ("TWR") to its being denied a federal tax status under which persons who made contributions to it would be permitted to deduct those contributions on their federal income tax returns. This status was denied because TWR engaged in substantial lobbying activities. The Court ruled that Congress' choice not to subsidize TWR's lobbying activities did not violate TWR's constitutional rights.

The Court explained that the facts in Regan did not "fit[] the Speiser-Perry model" because the tax code "does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies." 103 S. Ct. at 2001 (emphasis added). The Court pointed out (and Justices Blackmun, Brennan, and Marshall, concurring, emphasized) that simply by setting up a separate corporation, TWR could continue to obtain tax deductible status for all of its non-lobbying activities. See id. at 2000, 2004-05.

By contrast, if the tax code had "deprive[d] an otherwise eligible organization of its tax-exempt status . . . for all its activities, whenever one of those activities is 'substantial lobbying,'" both Speiser and the Constitution would have been violated. 103 S. Ct. at 2004 (concurring opinion) (emphasis

added). The full Court confirmed this distinction last spring in FCC v. League of Women Voters, 104 S. Ct. ___ (1984), holding that the government could not refuse to continue payments to public broadcasting station because the station chose to editorialize. The Court noted that, under Regan, the FCC could refuse to subsidize the editorializing itself, but could not cut off payments to the stations as a whole. See 104 S. Ct. at ___.

For the reasons the Supreme Court explained in Regan and League of Women Voters, plaintiffs' attempt to deprive Burning Tree of an "independent benefit" for which it is "otherwise eligible," on account of its intention to exercise its constitutional rights, puts this case squarely within "the Speiser-Perry model."

This distinction between Regan and Speiser, carefully explained by the Supreme Court, was assiduously ignored by plaintiffs below. By nothing more than endless repetition, they hope to lead the Court to conclude that the open space tax benefit is not an "independent benefit" for which Burning Tree is qualified, but that it is somehow intimately related to Burning Tree's membership policy, so that receipt of the benefit equals support for the membership policy.

But the Court need not be as obtuse as plaintiffs choose to be. The very heart of Regan is the recognition that a tax benefit supports or subsidizes only the particular activity at which it is directed -- in Regan, lobbying activities; here, the preservation of open space. Plaintiffs' basic contention -- that

the State's provision of the open space tax benefit to Burning Tree equals support for the Club's membership policy and thus involves the State in sex discrimination -- is, therefore, directly contrary to the central teaching of Regan. And as the Supreme Court recognized in Regan, withdrawal of such an "independent benefit" for which Burning Tree is "otherwise qualified" would run squarely afoul of Speiser and of the rule that "the government may not deny a benefit to a person because he exercises a constitutional right." 103 S. Ct. at 2001.

This vital principle extends far beyond the issues in the present case. For example, in the field of abortion rights, it is precisely this principle that prevents a state legislature that supports the so-called "right-to-life" from penalizing an indigent woman's right to choose to have an abortion. 82/

In Maher v. Roe, 432 U.S. 464 (1977), the Supreme Court affirmed "the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." 432 U.S. at 474. Thus, the Court ruled, the State of Connecticut was not required to pay for abortions for indigent women. Similarly, in Harris v. McRae, 448 U.S. 297 (180), the Court ruled that the "Hyde Amendment," which

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82/ The National Club Association takes no position on the abortion issue. The discussion in the text is not intended to indicate support for any particular point of view on that question, but to show that plaintiffs' argument in this case is inconsistent with the protection of a wide range of constitutional rights.

cut off federal funding for most abortions, was not unconstitutional. But in both cases, the Court noted that any effort to do what plaintiffs are attempting to do here would present a very different circumstance. See Maher, 432 U.S. at 474 n. 8 ("if Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits . . . strict scrutiny might be appropriate under . . . the penalty analysis"); McRae, 448 U.S. at 317 n. 19 ("A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy") (emphasis added). Justice Blackmun has noted the connection between these principles in the abortion field and in the area of First Amendment rights. See Regan, 103 S. Ct. at 2004 n. *. Thus, if Bob Jones and Regan mean what plaintiffs contend, and if plaintiffs' theory prevails in this case, the precedent will have been established that will permit a state to cut off all government benefits from women choosing to have an abortion, if abortions are contrary to the "value judgment" -- in other words, the "public policy" -- of the state.

To the same effect as Maher and McRae, the Court held in Poelker v. Doe, 432 U.S. 519 (1977), that the City of St. Louis was not constitutionally required to provide abortions at public hospitals. Under plaintiffs' theory, St. Louis (and any other local government that decided its "public policy" was anti-abor-

tion) could withdraw all government assistance from hospitals that performed abortions. How many hospitals would continue to perform abortions in the face of a sanction like that?

We should hesitate before embracing such a doctrine, whose consequences might be as distasteful in some cases as they would be pleasing in others. If the First Amendment protects "the thought that we hate," United States v. Schwimmer, 279 U.S. 644, 655 (1928) (Holmer, J., dissenting), it must also, on occasion, protect the association of which we disapprove. 83/

CONCLUSION

At bottom, the parties' positions in this case rest on fundamentally differing conceptions of the proper relationship between the government and the individual in our society.

83/ Plaintiffs are quite right that the analysis in the text is not limited to sex discrimination. If a club that discriminates on the basis of race, religion, or national origin is truly private, its right to continue its discriminating conduct free from government retaliation is affirmatively protected by the Constitution. See Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., Waren, C.J., and Douglas, J., concurring); id. at 318, 332 (Black, Harlan and White, JJ., dissenting). If this were not the case, Maryland would be free to outlaw the Sons of Italy, the B'nai B'rith, the Black Muslims, the Daughters of the American Revolution, and the Women's National Democratic Club, among many others. However, contrary to plaintiffs' exaggerations (see Pl. Opp. at 31), this does not mean that the anti-discrimination provisions of Section 19(e) are entirely invalid. To the contrary, they can be constitutionally applied to clubs which, like most, are not truly private. See, e.g., Tillman v. Wheaton-Haven Recreation Area, 410 U.S. 431, 438-39 (4th Cir. 1973) (rejecting club's "truly private" defense under Title II).

In Plaintiff's view, society is entitled to impose its values -- that is, the values of today's majority -- on the private activities of individual citizens unless those citizens are virtual hermits. Any contact by which society can get its hooks into a private organization -- a tax benefit, a license, a contract, even an investigation -- justifies the majority in imposing its "public policy" on those who disagree. In the words of Professor Lawrence Tribe, "by signing on the dotted line as a recipient of tax benefits, one is enlisted as a foot soldier in the national agenda." 84/

We strongly disagree. While agreeing fully that the State may not practice or command sex discrimination, we believe that it poses a far greater danger to basic constitutional values for society to require universal conformity than for society to tolerate the unpopular activities of those who disagree with prevailing local mores.

In their eagerness to change Burning tree's membership policies, plaintiffs are urging this Court to adopt legal theories that are unsupported by precedent and are wholly at odds with fundamental conceptions of civil liberty. Bearing in mind Justice Brandeis' famous warning --

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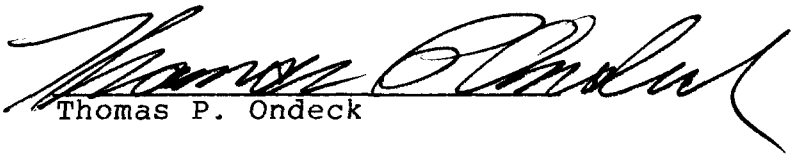
84/ Administration's Change in Federal Policy Regarding the Tax Status of racially Discrinatory Private School: Hearing before the House Committee on Ways and Means, 97th Cong., 2d Sess. 63 (1982) (testimony of Lawrence Tribe).

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning, but without understanding. 85/

-- this Court should reverse the decision below and reject plaintiffs' ill-conceived lawsuit.

Respectfully submitted,



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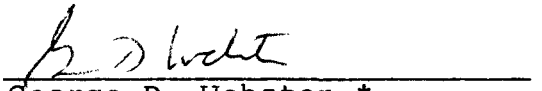

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85/ Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

*/ Member of the Maryland Bar.

File — No. 119-1984T.

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J. PHILLIP JORDAN

November 9, 1984

Alexander L. Cummings, Clerk
Court of Appeals of Maryland
Courts of Appeal Building
361 Rowe Boulevard
Annapolis, Maryland 21401

Re: Burning Tree Club, Inc v. Stewart Bainum, Jr. and Barbara Bainum Renschler,
No. 199, September Term, 1984

Dear Mr. Cummings:

This letter will confirm my conversation with you this morning and my subsequent conversation with your deputy early this afternoon.

The parties have agreed, through counsel, to expedited consideration of this case, with counsel for Appellees requesting that the expedited schedule not require Appellees' brief to be filed before the week of January 7, 1985. It is my understanding from you that the Court also desires expedition and would like to hear the case at its February sitting, which is February 5-8. Based on my previous discussions with Appellees' counsel, who is on vacation and unavailable until November 19, I can represent that the parties agree to the following schedule:

(1) The case will be argued to the Court on Thursday, February 7.

(2) Appellees' brief will be filed on Tuesday, January 8, which is the last date that allows the necessary thirty (30) days before the argument date.

(3) Appellant's brief will be filed on or before December 7.

Whether Appellant's brief is filed on December 7, or before that date, Appellant agrees to allow Appellees' brief to be filed on January 8, which allows Appellees more than the thirty days provided by Rule 830.a.2. I also understand that Appellant will be permitted to file a reply brief within twenty (20) days after the date of filing of Appellees' brief, as provided by Rule 830.a.3.

It is my understanding that you will enter an order setting out the above schedule.

Thank you for your cooperation in this matter.

Very truly yours,

J. Phillip Jordan

J. Phillip Jordan
Counsel for Appellant,
Burning Tree Club, Inc.

JPJ:kgt

cc: Eileen Stein, Esquire,
Counsel for Appellees

6034a

To be filled in by Clerk, Court of Special Appeals

PHC NO. 719 S.T. 1984

COURT OF SPECIAL APPEALS

OF MARYLAND

CIVIL APPEAL PREHEARING INFORMATION REPORT

NOTICE
Pursuant to Md. Rule 1023 this form must be completed and sent to Clerk, Court of Special Appeals, Courts of Appeal Bldg., Annapolis, Md. 21401

1. Title of case: Stewart Bainum, Jr., and Barbara Bainum Renschler v. State of Maryland and State Department of Assessments and Taxation and Burning Tree Club, Inc.
   a. Which party is Appellant in Court of Special Appeals:

   Burning Tree Club, Inc.

2. Names, addresses, and telephone numbers of counsel:

   For Appellant: Benjamin R. Civiletti, J. Phillip Jordan, Leslie A. Vial, James A. Dunbar, VENABLE, BAETJER & HOWARD, 1800 Mercantile Bank & Trust Bldg., Two Hopkins Plaza, Baltimore, MD 21201; David Macdonald, Suite 16, 966 Hungerford Drive, Rockville, MD 20850

   For Appellee: Eileen M. Stein, 7504 Bybrook Lane, Chevy Chase, MD 20815

3. Trial court:
   a. (Orphans) Court for
      (Circuit) Court for Montgomery County
   c. Docket (Equity) No.: 85397
      (Law)

   b. Jury/Non-jury

   d. Trial Judge: Hon. Calvin R. Sanders
      Hon. Irma Raker

4. Type of case (e.g., automobile negligence, breach of contract, domestic, product liability, property dispute, tax, UCC, zoning, etc.)

   SEE ATTACHMENT

5. Trial

   a. Duration of trial: one hour on demurrer; one and one-half hours on summary judgment

   b. Number of exhibits in evidence:

6. Judgment

   a. Date of judgment being appealed: (If date is other than that shown on docket, please explain.)
      November 23, 1983
      September 13, 1984
   b. Describe judgment: (Attach copy of any written opinion by the trial court.)
      Oral order of November 23, 1983 (overruling demurrer)
      Order of September 13, 1984, granting summary judgment to Plaintiffs
   c. Did judgment finally dispose of all claims by and against all parties? If not, explain why judgment is appealable. (See Md. Rule 605a; Courts art., §§12-301, 12-303.)

      YES

7. Date appeal noted: October 11, 1984

ant-12/7 - argument in Feb
ca-47
1/8 Set. Feb. 7 - 1st case

BURNING TREE CLUB, INC.	*	In the
	*	Court of Appeals
	*	of Maryland
v.	*	Petition Docket No. 477
	*	September Term, 1984
STEWART BAINUM, JR. and BARBARA BAINUM RENSCHLER	*	(PHC No. 719, Sept. Term, 1984 Court of Special Appeals)
	*	

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, in the above entitled case, it is this 2nd day of November, 1984

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, granted and a writ of certiorari to the Court of Special Appeals shall issue and said case shall be transferred to the regular docket as No. 119, September Term, 1984; and it is further

ORDERED that counsel shall file briefs and printed record extract in accordance with Rules 828 and 830, appellant's brief and record extract to be filed on or before forty (40) days from the date the record is docketed in this Court.

/s/ Robert C. Murphy
Chief Judge

BURNING TREE CLUB, INC.	*	In the
	*	Court of Appeals
	*	of Maryland
v.	*	Petition Docket No. 477
	*	September Term, 1984
	*	(PHC No. 719, Sept. Term, 1984
STEWART BAINUM, JR. and BARBARA BAINUM RENSCHLER	*	Court of Special Appeals)
	*	

WRIT OF CERTIORARI

STATE OF MARYLAND, to wit:

TO THE HONORABLE THE JUDGES OF THE
COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS, Burning Tree Club, Inc. v. Stewart Bainum, Jr. et al., PHC No. 719, September Term, 1984, is pending before your Court, and the Court of Appeals is willing that the record and proceedings therein be certified to it.

YOU ARE HEREBY COMMANDED to cause them to be sent without delay to the Court of Appeals of Maryland, together with this writ, for the said Court to proceed thereon as justice may require.

WITNESS, the Chief Judge of the Court of Appeals of Maryland this 2nd day of November, 1984.

/s/ Alexander L. Cummings
Clerk
Court of Appeals of Maryland