

The Burger Court Opinion Writing Database

Moose Lodge No. 107 v. Irvis
407 U.S. 163 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

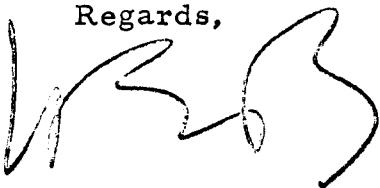
April 20, 1972

Re: No. 70-75 - Moose Lodge No. 107 v. Irvis and
Liquor Control Board of Pennsylvania

Dear Bill:

This will confirm reassignment to you for an
opinion in the above.

Regards,



Mr. Justice Rehnquist

Copies to the Conference

17

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 8, 1972

Re: No. 70-75 - Moose Lodge No. 107 v. Irvis

Dear Bill:

Please join me.

Regards,

W. Rehnquist

Mr. Justice Rehnquist

Copies to the Conference

*By
bill*
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 22, 1972

MEMORANDUM TO THE CONFERENCE:

In No. 70-75 - Moose Lodge v. Irvis, I voted to reverse on the exception of "a private club" made by Congress in the 1964 Act.

On further study I have decided that that ground is not tenable - so I am changing my vote to affirm.

W. O. D.

3rd DRAFT

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Rehnquist

6/17/72

SUPREME COURT OF THE UNITED STATES

No. 70-75

Moose Lodge No. 107, } On Appeal from the United
Appellant, } States District Court for the
v. } Middle District of Pennsyl-
K. Leroy Irvis et al. } vania.

[May —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

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.¹ The associational rights which our system honors permits 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.

¹ It has been stipulated that Moose Lodge No. 107 "is, in all respects, private in nature and does not appear to have any public characteristics." App. 23. The cause below was tried solely on the theory that granting a Pennsylvania liquor license to a club assumed to be purely private was sufficient State involvement to trigger the Equal Protection Clause. There was no occasion to consider the question whether, perhaps because of a role as a center of community activity, Moose Lodge No. 107 was in fact "private" for equal protection purposes. The decision today, therefore, leaves this question open. See Comment, Current Developments in State Action and Equal Protection of the Law, 4 Gonzaga L. Rev. 233, 271-286.

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To: The Chief Justice
✓ Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

Circulated: 6-7-72

No. 70-75

Recirculated:

Moose Lodge No. 107, On Appeal from the United
Appellant, States District Court for the
v. Middle District of Pennsylvania.
K. Leroy Irvis et al.

[June —, 1972]

MR. JUSTICE BRENNAN, dissenting.

When Moose Lodge obtained its liquor license, the State of Pennsylvania became an active participant in the operation of the Lodge bar. Liquor licensing laws are only incidentally revenue measures; they are primarily pervasive regulatory schemes under which the State dictates and continually supervises virtually every detail of the operation of the licensee's business. Very few, if any, other licensed businesses experience this complete state involvement. Yet the Court holds that that involvement does not constitute "state action" making Moose Lodge's refusal to serve a guest liquor solely because he was a Negro a violation of the Fourteenth Amendment. The vital flaw in the Court's reasoning is in its complete disregard of the fundamental value underlying the "state action" concept. That value is discussed in my separate opinion in *Adickes v. Kress & Co.*, 398 U. S. 144, 190-191 (1970):

"The state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for

Wm. D. Jones
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P. 6

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 70-75

Recirculated: 6-8-75

Moose Lodge No. 107, } On Appeal from the United
Appellant. } States District Court for the
v. } Middle District of Pennsyl-
K. Leroy Irvis et al. } vania.

[June —, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE /
MARSHALL joins, dissenting.

When Moose Lodge obtained its liquor license, the State of Pennsylvania became an active participant in the operation of the Lodge bar. Liquor licensing laws are only incidentally revenue measures; they are primarily pervasive regulatory schemes under which the State dictates and continually supervises virtually every detail of the operation of the licensees business. Very few, if any, other licensed businesses experience this complete state involvement. Yet the Court holds that that involvement does not constitute "state action" making Moose Lodge's refusal to serve a guest liquor solely because of his race a violation of the Fourteenth Amendment. The vital flaw in the Court's reasoning is its complete disregard of the fundamental value underlying the "state action" concept. That value is discussed in my separate opinion in *Adickes v. Kress & Co.*, 398 U. S. 144, 190-191 (1970):

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By
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 2, 1972

70-75 - Moose Lodge v. Irvis et al.

Dear Bill,

I am glad to join your opinion for the Court in this case. Although the opinion probably makes it clear enough already, I wonder whether it might not be a good idea, in this sensitive area, to emphasize explicitly that neither the State nor any of its agencies has in any way approved, endorsed, accepted, or supported the racially discriminatory constitution, by-laws, or practices of the appellant. Compare Public Utilities Commission v. Pollak, 343 U.S. 451, at 462.

Sincerely yours,

R. G.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 5, 1972

Re: No. 70-75 - Moose Lodge No. 107
v. Irvis

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 7, 1972

Re: No. 70-75 - Moose Lodge No. 107 v. Irvis

Dear Bill:

Please join me in your dissent.

Sincerely,


T.M.

Mr. Justice Brennan

cc: Conference

8

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1972

Re: No. 70-75 - Moose Lodge No. 107 v. Irvis

Dear Bill:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

23
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1972

Re: No. 70-75 Moose Lodge v. Irvis

Dear Bill:

Please join me.

Sincerely,

W. Rehnquist

Mr. Justice Rehnquist

cc: The Conference



To: The Chief Justice
Mr. Justice Blackmun
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, W.

1st DRAFT

Circulated: 6-1-72

SUPREME COURT OF THE UNITED STATES

No. 70-75

Moose Lodge No. 107, } On Appeal from the United
Appellant, } States District Court for the
v. } Middle District of Pennsyl-
K. Leroy Irvis et al. } vania.

[June —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Irvis, a Negro, was refused service by appellant Moose Lodge, a local branch of the national fraternal organization located in Harrisburg, Pennsylvania. Appellee then brought this action under 28 U. S. C. § 1983 for injunctive relief in the United States District Court for the Middle District of Pennsylvania. He claimed that because the Pennsylvania liquor board had issued appellant Moose Lodge a private club license which authorized the sale of alcoholic beverages on its premises, the refusal of service to him was "state action" for the purposes of the Equal Protection Clause of the Fourteenth Amendment. He named both Moose Lodge and the Pennsylvania Liquor Authority as defendants, seeking injunctive relief which would have required the defendant liquor board to revoke Moose Lodge's license so long as it continued its discriminatory practices. Appellee sought no damages.

A three-judge district court, convened at appellee's request, upheld his contention on the merits, and entered a decree declaring invalid the liquor license issued to Moose Lodge "as long as it follows a policy of racial discrimination in its membership or operating policies

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

2nd DRAFT

Circulated: 6 - 2 - 72

Recirculated: _____

No. 70-75

Moose Lodge No. 107, On Appeal from the United
Appellant, States District Court for the
v. Middle District of Pennsyl-
K. Leroy Irvis et al. vania.

[June —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Irvis, a Negro, was refused service by appellant Moose Lodge, a local branch of the national fraternal organization located in Harrisburg, Pennsylvania. Appellee then brought this action under 42 U. S. C. § 1983 for injunctive relief in the United States District Court for the Middle District of Pennsylvania. He claimed that because the Pennsylvania liquor board had issued appellant Moose Lodge a private club license that authorized the sale of alcoholic beverages on its premises, the refusal of service to him was "state action" for the purposes of the Equal Protection Clause of the Fourteenth Amendment. He named both Moose Lodge and the Pennsylvania Liquor Authority as defendants, seeking injunctive relief that would have required the defendant liquor board to revoke Moose Lodge's license so long as it continued its discriminatory practices. Appellee sought no damages.

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From. Rehnquist, J.

3rd DRAFT

Circulated:

SUPREME COURT OF THE UNITED STATES

No. 70-75

Moose Lodge No. 107, | On Appeal from the United
Appellant,
v.
K. Leroy Irvis et al. | States District Court for the
Middle District of Pennsylvania.

[June —, 1972]

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