No. 128935

IN THE
SUPREME COURT OF ILLINOIS

M. U., a minor, by and through her parents, KELLY U. and NICK U.,	)
Plaintiff - Appellee,	)
v.	)
TEAM ILLINOIS HOCKEY CLUB, INC., an Illinois not-for-profit corporation, and the AMATEUR HOCKEY ASSOCIATION OF ILLINOIS, INC., an Illinois not-for-profit corporation,	)
Defendants -Appellants.	)

On leave to appeal from the Appellate Court of Illinois, Second District, Appeal No. 2-21-0568. There heard on appeal from the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois, Case No. 2021-CH-0141. The Honorable **Bonnie M. Wheaton**, Judge Presiding.

BRIEF OF AMICUS CURIAE THOMAS MORE SOCIETY IN SUPPORT OF DEFENDANTS-APPELLANTS

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TABLE OF POINTS AND AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The Thomas More Society ("TMS") is a not-for-profit, national public interest law firm dedicated to restoring respect in law for life, family, and religious liberty. Based in Chicago, Illinois, the Thomas More Society defends and fosters support for these causes by providing high quality pro bono legal services from local trial courts to the United States Supreme Court. Throughout its history, the TMS has worked in support of religious liberty. TMS submits this amicus brief to address the profound impact of the Appellate Court's decision upon faith-based and other membership organizations. The Appellate Court misinterpreted the Illinois Human Rights Act ("IHRA") in a way that requires faith-based organizations, as well as innumerable other organizations which make temporary use of public accommodations, to surrender their rights to expressive association or face liability under the IHRA.

ARGUMENT

I. THE APPELLATE COURT ERRED IN INTERPRETING THE IHRA TO REACH ALL "PERSONS" WHO EVEN TEMPORARILY RENT OR OCCUPY "PUBLIC ACCOMMODATIONS". THAT INTERPRETATION CANNOT BE RECONCILED WITH THE LANGUAGE OF THE IHRA AND VIOLATES THE RIGHTS OF FREE ASSOCIATION GUARANTEED BY THE FIRST AMENDMENT.

A. The Appellate Court's Decision.

In *M.U. v. Team Illinois et al.,* 2022 IL App (2d) 210568, the Appellate Court adopted a novel interpretation of the Illinois Human Rights Act (775 ILCS 5/1-101.1, *et seq.*) ("IHRA" or "the Act"), that is divorced from previous Illinois precedent. *See, e.g., Gilbert v. Department of Human Rights*, 343 Ill. App. 3d 904 (1st Dist. 2003) (holding that a scuba diving instruction business could deny lessons to a person with a learning disability because the business was not a place of public accommodation); *Board of Trustees of S.*

Ill. Univ. v. Dept. of Human Rights, 159 Ill.2d 206 (1994) (holding a university not liable under the IHRA for unlawful race discrimination in administering a Ph.D. program because an academic program was not a place of public accommodation); *Baksh v. Human Rights Comm'n*, 304 Ill. App. 3d 995 (1st Dist. 1999) (holding that the IHRA's definition of a place of public accommodation was limited and did not include a dentist's office); *Cut 'N Dried Salon v. Dept. of Human Rights*, 306 Ill. App. 3d 142 (1st Dist. 1999) (holding that an insurance company was not a place of public accommodation because it is selective in accepting clients). The Appellate Court's interpretation expands the IHRA well beyond its intended scope, as indicated by its text, and invades the constitutionally protected expressive associative rights of all Illinois organizations which make any use of public accommodations.

The Appellate Court found that a highly selective, competitive hockey team, Team Illinois, is subject to the IHRA because it rents space for practices and games at an ice rink that qualifies a public accommodation with the meaning of the IHRA. *M.U. by & Through Kelly U. v. Team Illinois Hockey Club, Inc*., 2022 IL App (2d) 210568, ¶ 39. Team Illinois bills itself as a hockey program that is open only to the very best players and which emphasizes winning. Its website states:

> Since the Club's inception excellence has been the standard from day one. Thousands of players have benefitted from Team Illinois' commitment to excellence and have used their experience to help prepare them for success both personally and professionally.
>
> Our teams have captured 6 USA Hockey National Championships, 7 National Runner Ups, and has won approximately 100 State Championships over the years.
>
> Team Illinois has competed nationally and internationally in the top tournaments across North America over 4 decades. Our teams have won countless tournament Championships, with two of our teams (10U and 12U)

> capturing tournament championships in 2016 at the CCM World Invitational in Chicago. tihockey.com/history/ (last visited March 8, 2023).

Team Illinois' website asserts it "participates in the finest, most competitive AAA league in the United States." tihockey.com/facility (last visited 3/8/2023).

Team Illinois's website further states:

> AAA Hockey comprises the very best players in both the United States and Canada. This level of hockey typically draws very dedicated and committed players and families. The commitment to AAA hockey requires being on the ice 5-7 days per week, includes extensive travel, and also requires a monetary commitment far above the recreation level. Most AAA teams will play anywhere between 55-85 games per year and practice 2-4 times per week. AAA hockey is available for both boys and girls." tihockey.com/about (last visited 3/8/2023)

After M.U.'s mother advised her Team Illinois coach that she was struggling with mental health and suicidal thoughts, Team Illinois temporarily removed M.U. from her Team Illinois Hockey team roster. She was removed pending receipt of a doctor's note clearing her for further participation. *M. U.*, 2022 IL App (2d) 210568, ¶¶ 6-7. The Appellate Court found that that Team Illinois violated the IHRA by excluding M.U. from team activities on the basis of unlawful discrimination stemming from her disability. *Id.* at ¶ 41.

B. The Appellate Court's Interpretation Of The IHRA Expands Its Scope Far Beyond Its Text.

The Appellate Court determined that because Team Illinois is a "person," as broadly defined by the IHRA,[1] which rented and operated space at a public ice rink (a place

[1] 775 ILCS 5/1-103(L) provides that a "person" under the IHRA "includes one or more individuals, partnerships, associations or organizations, labor organizations, labor unions, joint apprenticeship committees, or union labor associations, corporations, the State of Illinois and its instrumentalities, political subdivisions, units of local government, legal representatives, trustees in bankruptcy or receivers."

of public accommodation)[2] for its practices and games, it was subject to the IHRA. *Id.* at ¶ 39. The Appellate Court itself noted, "The parties do not identify, and our research has not revealed, any Illinois case where the defendant was not also the place of public accommodation whose facilities, goods, or services were allegedly denied to the plaintiff." *Id.* at ¶36. Undaunted, the Appellate Court embraced an interpretation which encompasses within the scope of the IHRA any "person" as broadly defined by the IHRA (*see* 775 ILCS 5/1-103(L)), who occupies or rents a public accommodation for any period of time. *M.U.*, 2022 IL App (2d) 210568, ¶¶ 35, 39.[3]

The IHRA prohibits "any person" from "deny[ing] or refus[ing] to another the full and equal enjoyment of…any public place of accommodation" "on the basis of unlawful discrimination." 775 ILCS 5/5-102. The Appellate Court found that a public accommodation retains its character as a public accommodation even when it is rented for the use of a private person or organization, subjecting such "persons" to the requirements

[2] As the Appellate Court noted (*id.* at ¶26), the IHRA does not define "public accommodation" but rather sets forth a non-exhaustive list of examples of public accommodations. *See* 755 ILCS 5/5-101(A).

[3] As set forth in the Appellate Court's decision, M.U. alleged:

> Team Illinois "leases and operates the Seven Bridges Ice Arena" (Seven Bridges) in Woodridge, in addition to other related facilities, for its activities and services. Seven Bridges is open to the public and includes "an ice rink with space for spectators, locker rooms, training facilities, concessions, offices for Team Illinois, and other related facilities." Most of Team Illinois's activities, such as hockey tryouts, practices, and games, are held at Seven Bridges. *Id.* at ¶5.
>
> M.U. further alleged, the "'plain language of the Act prohibits discrimination by any person involving public accommodations[,] like a hockey arena.'" *Id.* at ¶22.

of the IHRA and liability for excluding people from protected categories in connection with such uses. *See, e.g.*, *M. U.*, 2022 IL App (2d) 210568, ¶37.

The stunning overreach of the Appellate Court's ruling is evident by the endless list of examples which demonstrate the absurd consequences flowing from its interpretation of the IHRA. For example, all of the following circumstances would result in liability under the IHRA as interpreted by the Appellate Court: churches which rent forest preserve spaces for their church picnics who decline to welcome Satanists; female rape support group meetings held in a hospital meeting room which exclude male participants; Girl Scouts selling cookies from an assigned space on grocery store property who refuse to allow unrelated adult men to join their sales efforts; and families that rent space at public pools for a son's birthday party who seek to limit the guest list to male friends of the birthday boy.

C. The Appellate Court's Atextual Interpretation Renders The IHRA Unconstitutional.

In addition to lacking textual support, the Appellate Court's unwarranted expansion of the IHRA cannot be reconciled with the rights of free association guaranteed by the First Amendment. As interpreted by the Appellate Court, the IHRA infringes the settled free association rights of citizens belonging to innumerable civic groups across the state—including religious, cultural, youth and sports groups. So construed, the IHRA chills, if not completely freezes, the free speech rights of citizens who belong to any group that must choose to forego any use of places of public accommodation in order to maintain group identity, or expand admission to those with viewpoints or characteristics entirely opposed to the group's purpose.

In *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the U.S. Supreme Court analyzed whether the Minnesota Human Rights Act ("MHRA")[4] violated the First and Fourteenth Amendment rights of Jaycee club members by requiring the all-male club to admit female members. While ultimately concluding that the MHRA did not infringe that group's constitutional free association rights, based on the group's unique membership policies,[5] the Court provided important guidance in interpreting such acts, ignored by the Appellate Court, but necessary to safeguard the free association rights afforded by the U.S. Constitution. In *Roberts*, the Court reaffirmed that the Constitution protects freedom of association in "two distinct senses." *Roberts,* 468 U.S. at 618. First, the Constitution protects "choices to enter into and maintain certain intimate human relationships" because the freedom to associate in intimate relationships is "a fundamental element of personal liberty." *Id.* at 617-618. These "highly personal relationships," which "act as critical buffers between the individual and the power of the State," (*id.* at 618-619) include "marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 631 (O'Connor, J., concurring) (citing *Paul v. Davis*, 424 U.S. 693, 713

[4] The language of the MHRA construed by the Court in *Roberts* was nearly verbatim to that of the IHRA. But, in *Roberts*, the Court addressed the actual language of the statute and not an interpretation like that adopted by the Appellate Court in this case, which extends the statute's reach to any "person" who even temporarily rents or operates a place of public accommodation.

[5] In *Roberts*, the Court recognized that Jaycee clubs were large and unselective and allowed women and other non-members to attend meetings and participate in many club activities. The Court noted, "numerous non-members of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs, awards ceremonies, and recruitment meetings." *Roberts*, 468 U.S. at 621. The same cannot be said of the members of Team Illinois; only Team Illinois members were allowed to participate in practices and play in games. *M. U.*, 2022 IL App (2d) 210568, ¶39.

(1976)). Although the Court declined to precisely identify the contours of such relationships, it noted that they are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620.

The second "distinct sense" in which the Constitution guarantees the freedom of association is as a "correlative freedom to engage in group effort" as part of an individual's "freedom to speak, to worship, and to petition the government for the redress of grievances." *Id.* at 622. Freedom of association in this sense is required to "vigorously protect[] [First Amendment Rights] from interference by the State" and "shield[] dissident expression from suppression by the majority." *Id.* Moreover, as the Court would clarify in later cases, a group's protected speech underlying a claim of free association rights may take on a variety of forms and purposes. *See, e.g., City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("[T]he right of expressive association extends to groups organized to engage in speech that does not pertain directly to politics."); *Salvation Army v. Dep't of Cmty. Affs. of State of N.J.*, 919 F.2d 183, 200 (3d Cir. 1990) (holding that free association rights restrain government action "even when the challenged action is not specifically directed to the exercise of [a First Amendment] right.")

In *Roberts*, the Court additionally explained that a government unconstitutionally infringes free association rights when it interferes with internal organization or affairs by means of "a regulation that forces the group to accept members it does not desire." *Roberts*, 468 U.S. at 623. This is because forced inclusion "may impair the ability of the original members to express only those views that brought them together." *Id.* The Court concluded, "Freedom of association therefore plainly presupposes a freedom not to associate." *Id.*

Although free association rights are not absolute, and may be justifiably infringed in service of "compelling state interests…that cannot be achieved through means significantly less restrictive of associational freedoms" (*id.*), associational rights are generally protected by the Constitution. Antidiscrimination laws may only infringe associational rights, including the "freedom not to associate," when those associational rights constitute "acts of invidious discrimination," which necessarily present "unique evils that government has a compelling interest to prevent." *Id.* at 628.

Subsequent to *Roberts*, in *Boy Scouts of America. v. Dale,* 530 U.S. 640 (2000), the Supreme Court considered whether New Jersey's public accommodations law could require the Boy Scouts to admit a gay rights activist as an adult member.[6] The Court began by noting that free association rights were "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-648. According to the Court, the Boy Scouts engaged in expression deserving free association rights under the First Amendment, because "[e]ven the training of outdoor survival skills [may be] expressive" when the activity is intended to develop values such as "good morals [and] a desire for self-improvement" in children. *Id.* at 650 (quoting *Roberts,* 468 U.S. at 636 (O'Connor, J., concurring)).

Having established that the Boy Scouts held free association rights secured by the Constitution, the Court addressed whether New Jersey's forced inclusion of a gay rights

[6] The applicable New Jersey statute considered by the Court in *Dale* stated in relevant part, "All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation." N.J. Stat. Ann. § 10:5–4. Notably, the New Jersey statute included an exemption reciting, "Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private." N.J. Stat. Ann. § 10:5–5.

activist would unlawfully infringe those rights. The Court found that it did. Rejecting any inquiry into the nature of the Boy Scouts' objections to homosexuality stating, "it is not the role of the courts to reject a group's expressed values because they disagree with those values" (*id.* at 651), the Court accepted the Boy Scouts' assertion that including a gay rights activist (Dale) would impair the Boy Scouts' ability to advocate their viewpoints on moral conduct. *Id.* at 651-653. And because the "state interests embodied in New Jersey's public accommodations law" did not justify "such a severe intrusion on the Boy Scouts' rights to freedom of expressive association," the Court concluded that New Jersey could not force the Boy Scouts to include Dale as a member. *Id.* at 659. According to the Supreme Court, "the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Id.* at 660.

The Appellate Court's interpretation of the IHRA conflicts with the U.S. Supreme Court's decision in *Dale.* Applying the Appellate Court's interpretation of the IHRA to the circumstances presented in *Dale*, if the Boy Scouts were to host a weekend camping trip at a camp site qualifying as a place of public accommodation, they would be unable, without violating the IHRA, to restrict access to non-members falling within any protected classification (see 775 ILCS 5/1-103(Q)) who advocated positions relating to sexuality opposed by the Boy Scouts.

In *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), the Seventh Circuit held that the free association rights of Christian Legal Society ("CLS") members were unlawfully infringed by a university nondiscrimination policy forcing the Society to include those who did not subscribe to the Society's viewpoints. In *Walker,* students at the

Southern Illinois University at Carbondale Law School ("SIU") sued the university after it revoked CLS's official student organization status. *Id.* at 857. CLS required members to subscribe to a "statement of faith and agree to live by certain moral principles" including abstention from sexual activity outside of a traditional marriage. *Id.* at 857-858. SIU found CLS's membership requirement to violate SIU's nondiscrimination policy, which prohibited discrimination on the basis of sexual orientation. *Id.* at 858. CLS lost the ability to reserve rooms for private meetings, with the result that "other students and faculty were free to come and go from the room" during CLS meetings. *Id.* CLS could no longer exercise its freedom not to associate.

The Seventh Circuit determined that this pressure to forego its identity in order to meet in otherwise-available physical spaces was a clear violation of the CLS members' free association rights. The Seventh Circuit recognized, "[i]t would be hard to argue…that CLS is not an expressive association" that enjoyed free association rights. *Id.* at 864. After observing that "[t]he government violates the Free Speech Clause of the First Amendment when it excludes a speaker from a speech forum the speaker is entitled to enter" (*id.* at 865), the court concluded that "CLS has shown it likely that SIU has violated its First Amendment freedoms." *Id.* at 867.[7]

[7] In a similar case, the Supreme Court held that a CLS chapter at Hastings College of Law in California *could* condition use of its communication channels on adherence to the school's nondiscrimination policy. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez,* 561 U.S. 661 (2010). That case is distinguishable, however, because the Supreme Court upheld the policy as a viewpoint neutral restriction on access to a limited public forum of the Hastings college communication channels, including newsletters, bulletin boards, emails, and organization fairs. *Id.* at 669-670. In fact, Hastings continued to allow CLS to utilize Hastings facilities for meetings and activities despite CLS lacking an official registration with the school. *Id.* at 673. The Supreme Court allowed Hastings to "dangl[e] the carrot of subsidy" because it was not "wielding the stick of prohibition." *Id.* at 683.

In this case, however, the Appellate Court's interpretation of the IHRA would require CLS to open its meetings, held at any place of public accommodation, to persons belonging to any protected classification who openly advocated against the moral principles embraced by CLS, or face liability under the IHRA.

By failing to protect for free association rights and instead "forc[ing] [a] group to accept members it does not desire" (*Roberts,* 468 U.S. at 623), the Appellate Court's flawed interpretation of the IHRA collides with the U.S. Constitution and binding precedent interpreting it. In this case, the members of the highly selective Team Illinois had a constitutionally-protected right to free association that entitled them to exercise collective speech without including someone who could impede that free expression (*e.g.*, by including someone with medical concerns potentially impacting their ability to compete at the highest level and win). *See e.g.*, *Roberts*, 468 U.S. at 622 ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of…educational…and cultural ends."); *Dale,* 530 U.S. at 656 ("Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law…runs afoul of the Scouts' freedom of expressive association. We conclude that it does."). *See also*, *Rotary Int'l*, 481 U.S. at 548-549 (implying that Rotary Club members did enjoy a right of free expressive association, but one which was not infringed by forcible inclusion of women as required by California law); *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1 (1988) (acknowledging that an "association might be able to show that it is organized for specific expressive purposes and

that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion").

II. THE APPELLATE COURT ERRED IN DISREGARDING THE IHRA'S "PRIVATE CLUB" EXEMPTION.

The Appellate Court also erred in failing to address why Team Illinois is not an exempted "private club" as defined by 775 ILCS 5/5-103. That provision states:

> Nothing in this Article shall apply to: (A) Private Club. A private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the establishment are made available to the customers or patrons of another establishment that is a place of public accommodation.

Team Illinois is not open to the public. It is open only to members who have been accepted onto the team. The Appellate Court erroneously concluded that Team Illinois was "open to the public" because it allowed members of the public to *try out* for the team (*M. U.*, 2022 IL App (2d) 210568, ¶39), but that conclusion wholly ignores the fact that only accepted select individuals were allowed to become members of Team Illinois. More specifically, the Appellate Court regarded "earning a spot to play in competitive athletics for Team Illinois" to be "a privilege that Team Illinois makes available to the public." *Id.* But even though the Appellate Court recognized that "the opportunity to actually play in competitive hockey games as a member of the team" is only available "*if selected"* (*id.*) (emphasis added), it failed to distinguish *playing as a member* from persons from the general public simply trying out for the team. Team Illinois fully satisfies the IHRA's "private club" definition, because its games are limited to its members.

CONCLUSION

For the above and foregoing reasons, the Court should reverse the Appellate Court's decision and instead construe the IHRA in a manner consistent with its text and with First Amendment-protected free association rights.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Thomas Brejcha, certify that the foregoing Brief Amicus Curiae Of The Thomas More Society conforms to the requirements of Supreme Court Rules 341(i) and 345. The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 3,843 words.

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