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Supreme Court of the United States

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY, DIGITAL EQUIPMENT
CORPORATION and WYMAN-GORDON COMPANY,

Appellants,

vs

No. 76-1172

FRANCIS X. BELLOTTI, ATTORNEY GENERAL
and
COALITION FOR TAX REFORM, INC.,
and
UNITED PEOPLES, INC.,

Appellees.

Washington, D. C.
November 9, 1977

Pages 1 thru 51

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IN THE SUPREME COURT OF THE UNITED STATES

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:
THE FIRST NATIONAL BANK OF BOSTON, :
NEW ENGLAND MERCHANTS NATIONAL BANK, :
THE GILLETTE COMPANY, DIGITAL EQUIPMENT :
CORPORATION and WYMAN-GORDON COMPANY, :
:
Appellants :
:
v. : No. 76-1172
:
FRANCIS X. BELLOTTI, ATTORNEY GENERAL :
and :
COALITION FOR TAX REFORM, INC. :
and UNITED PEOPLES, IND., :
:
Appellees :
:
-----X

Washington, D. C.

Wednesday, November 9, 1977

The above-entitled matter came on for argument at
1:35 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

FRANCIS H. FOX, ESQ., 100 Federal Street, Boston,
Massachusetts 02110 Attorneys for Appellants

Thomas R. Kiley, First Assistant Attorney General,
Commonwealth of Massachusetts, One Ashburton Place, Boston,
Massachusetts, 02108 For Appellees

C O N T E N T SORAL ARGUMENT OF:page

FRANCIS H. FOX, ESQ.

On behalf of Appellants

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THOMAS R. KILEY,

First Assistant Attorney General of Massachusetts

On behalf of Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next on No. 76-1172, First National Bank of Boston, Et Al, versus Francis X. Bellotti, Et Al.

Mr. Fox, you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANCIS H. FOX, ESQ.

ON BEHALF OF APPELLANTS

MR. FOX: Mr. Chief Justice and may it please the Court:

This is an appeal from the Supreme Judicial Court of Massachusetts, a declaratory judgment action in which the Plaintiffs contest the validity of Chapter 55, Section 8 of the General Laws which forbids corporations from expending or contributing monies in an attempt to influence the vote on any question -- referendum question other than a question which materially affects the assets of the corporation.

It is specifically provided that no question which relates solely to individual taxes shall be deemed materially to affect the corporate assets.

In November, 1976 there was on the ballot a question which related solely to individual taxes, whether the Constitution should be amended to provide for graduated income taxes.

Plaintiffs wish to expend or contribute monies to oppose that referendum question by means of media ads and

the like.

They did not do so because of the severe criminal penalties attendant upon violation and the threat of prosecution.

Plaintiffs are five business corporations located in the state with deep and pervasive ties to the economy. For example, the plaintiffs banks have on loan to business corporations literally billions of dollars. Plaintiffs among them employ between 20,000 and 25,000 people in the state.

The management of each of the plaintiff corporations believed that the interests of the corporation would be materially affected by the referendum question in various ways the record spells out.

For example, the plaintiff banks believed that if the graduated tax were viewed as one more anti-business law in the state, it might detract from other businesses locating in the state or staying in the state and thus diminish the business of the banks.

Two of the plaintiffs, for example, employ highly-skilled and thus highly-paid engineers. They must thus compete with other states to attract these engineers to the state. They felt that a graduated income tax might make it more difficult to attract these kinds of people.

In any event, the management of each of the

plaintiffs did believe, the record finds, that the graduated tax would affect the business of the corporations.

The Supreme Judicial Court held, however, that since there was no finding that in fact the graduated tax would affect the interests of the plaintiffs. They were without First Amendment protection for their prospective speech here.

The Supreme Judicial Court upheld the statute. Plaintiffs appeal. Today we appeal arguing First Amendment, Due Process in that the statute makes use of a presumption yet is a criminal statute. Also the underlying standard itself is unconstitutionally vague, materially affecting the assets and Equal Protection in that a single ballot question is singled out for an absolute prohibition as to expenditures or contributions whereas any other kind of a ballot question has a different standard applied, one of materially affecting the assets.

Also on Equal Protection, the fact that business corporations are the only entities that are regulated by Section 8 from top to bottom, Section 8 regulates only business corporations, not partnerships, charitable corporations or other entities similarly situated.

Today I will address the mootness question. The election is over. The grad tax did --

QUESTION: Well, you did not have to include

charitable because if charitable corporations engage in politics they are no longer charity. Is that not what the Massachusetts law says?

MR. FOX: Well, the Massachusetts law does not restrict charitable corporations in any kind of a ballot question at all, Your Honor.

QUESTION: They can lobby?

MR. FOX: They can. On page 46 of the jurisdictional statement Appendix there is listed a number of organizations which have advocated a graduated income tax in the past. These are the Americans for Democratic Action, Council of Churches, this kind of a listing and whether they would run into tax problems or not, I do not know. But --

QUESTION: That is the question I was asking. Does not the state law prohibit this?

MR. FOX: No, it does not.

QUESTION: Are they necessarily corporations? I notice they are all listed. Are we to take it that at least you believe the organizations listed on page 46 are, in fact, corporations?

MR. FOX: No, I do not believe that they all are. I do not know. I think some of them may be. Some of them may not be. My purpose in listing them or referring to them is just on the mootness question, Your Honor, to indicate that it is likely to come back again.

I can say this, charitable corporations are not forbidden from contributing or expending as to referendum questions in Massachusetts. Whether tax considerations would indicate they not do it, I do not know.

I will address mootness, First Amendment and Equal Protection arguments this morning or this afternoon and rely on my brief for the other points.

QUESTION: In that discussion, would you be good enough to, if you know, tell us the status of the proposed amendments to the statute that we are dealing with?

MR. FOX: Yes, it is in the nature of a bill that is still pending in the legislature. It combined 13 separate bills that were introduced. An advisory opinion was requested. The Supreme Judicial Court declined to answer the questions.

QUESTION: They have the power there.

MR. FOX: They have the power to but they declined to for the very reason that this case is pending and the bill is wending its way through the legislative process. I have no idea whether it will pass or not.

I know it has not as yet passed.

QUESTION: And what does it provide?

MR. FOX: The bill would amend Chapter 55, Section 8 in other material respects to -- it would not touch the graduated income tax prohibition or the materially-affecting standard but it would put a \$1,000 limit on the amount that

corporations could contribute to any question if they are materially affected.

It would require that committees not take more than \$1,000. It would forbid outside-of-the-state corporations from making any contributions.

QUESTION: So it would not eliminate these restrictions and would add others.

MR. FOX: That is correct, Your Honor.

QUESTION: But does it not make it, the requirement of materiality, a little easier to fulfill for pending legislation, the two-thirds vote of the stockholders?

MR. FOX: No, I look at that as an additional requirement. If it is material, you must get two-thirds vote and you must meet the material-affecting standard as well. And you can only spend \$1,000.

And with a public corporation, Your Honor, that might mean that to get two-thirds vote, they might have to spend \$5,000 or \$6,000 to get the privilege to expend \$1,000 if it is materially-affecting. But those amendments are not before the Court except by way of, perhaps, relevance on the mootness question. I think they are not really relevant on that, either.

The election is over but the case is not moot because it comes within the capable of repetition yet evading review principle which, as enunciated for non-class actions

in Weinstein versus Bradford requires that there be a reasonable expectation that the same offending order will affect the same plaintiffs in the future and that the time within which to seek full review will be too limited to allow it.

In an analysis with respect to the facts in this case, it would require a reasonable expectation that there will be a grad tax on the ballot in the future, that the prohibitory legislation will remain intact, that that prohibition will affect these plaintiffs in the future and that the timing will preclude review.

Looking at the first question, will there be a graduated tax on the ballot in the future? I would point out that four times in the last 14 years the legislature has put this question on the ballot for the people. Each time they have done so by overwhelming votes -- votes in the order of 200 to 40, this kind of thing.

The statistics appear at footnote 5 of our brief.

The Legislature obviously feels certain financial pressures -- this and every other state legislature. There seems to be no abatement in those financial pressures.

Thirty-six out of the 50 states do have graduated taxes. There are public interest groups that advocate and have advocated the graduated income tax as being necessary.

While it is not mathematically certain what will happen in the future, I think there is a reasonable

expectation that with nothing to lose, the Legislature will once again put this question on the ballot to enable itself to get a more efficient taxing vehicle.

Will the prohibitory statute remain intact?

The efforts of the legislature to put this question before the people have been matched in that 14-year span by efforts to arrive at the right statutory formula that will completely preclude corporate spending in the campaign.

Earlier versions of the prohibition led to narrowing court constructions which allowed corporations to contribute. Having now arrived at a complete and utter ban as to any corporate contributions or expenditures, it is unlikely in the extreme that the legislature will soften or eliminate that ban.

As I have indicated, they may indeed expand the concept to make it more difficult as to other questions but the likelihood that they will change this absolute prohibition is remote.

Will these plaintiffs be affected in the future?

Well, the record of their opposition is a strong one. They contributed to oppose the grad tax in 1972. Three of them brought the case that gave corporations the right to do so. They brought this case in 1976. They appealed the decision even after the election was over in order to be able to win the right to contribute or expend in the

future.

They remain unalterably opposed to a graduated income tax and will oppose it whenever and wherever it comes up.

QUESTION: And there is a good possibility that First National will still be in business for a few years.

MR. FOX: I certainly hope so, Your Honor. They owe me some money.

The opposition of the plaintiffs will not cease, I think.

As far as the timing is concerned, I will rely primarily on my brief. We point out -- and in the reply brief we point out some of the scheduling and so forth that would be encountered by any kind of a test case.

This time it took the maximum time that we could have had to test. It was 18 months. Every time it has been on the ballot, which if four, there has been no time when more than 18 months was available.

There is no likelihood that there will be more than 18 months at any time in the future. Decisions of this Court have recognized that, for instance, two years is really too short a time to enable a full proceeding below and a full review by this Court.

Southern Pacific Terminal, the case which first enunciated the capable of repetition yet evading review

principle involved a two-year order of the ICC. Numerous election cases which this Court has decided after the election is over have involved biennial or quadriennial elections where in probably two, three or four years would have been available.

Just two further points on mootness. It is an election case. It is vital that these procedures be straightened out before the election. It is a First Amendment case. There is a statute on the books that prohibits speech and as Nebraska Press versus Stuart and other cases indicate, it is also very important that these matters be straightened out.

Going on to the First Amendment question of the argument here, there are numerous First Amendment issues. I would say numerous First Amendment errors, here.

QUESTION: The very first issue, is it not, Mr. Fox, is whether a corporation as such is protected by the First Amendment. I mean, we all know that the New York Times Company and that a producer of a movie or those corporations are and there are many cases so holding.

But are there any cases holding explicitly that corporations like the Riggs Bank or General Motors or your client, the First National Bank --

MR. FOX: No, that is where --

QUESTION: -- the First National Bank Corporation has a First Amendment right, at least to the same vigor as an

individual human being does?

MR. FOX: Well, not as to --

QUESTION: It is one thing that a corporation cannot have opinions. It is inanimate. Its agents can but --

MR. FOX: I had rather say that whatever positions or opinions the corporation may have must really be those of some individuals who are acting in their representational capacity.

QUESTION: Of its management.

MR. FOX: Yes. I would say that the Linmark Associates case, Your Honor, which did involve a corporate plaintiff and entailed a First Amendment holding, is evidence in that regard. The Virginia Pharmacy case I think could not possibly be applied to eliminate corporations from the ability to advertise drug prices.

I was about to suggest that while the Court below said that is the first question we must decide, I think that that is not so. The Court below construed Section 8 as creating two separate crimes. One is the crime of contributing or expending to influence the vote on the referendum question other than when it materially affects the assets of the corporation and the other is the crime of contributing or expending with respect to a referendum question pertaining solely to individual taxes without regard to whether that affects the corporate assets or not and the court is

very specific in that regard. Under this so-called "second crime" what must be shown by the prosecution to convict is that a contribution is made in an attempt to influence the vote on a matter pertaining solely to individual taxes, period. It is no part of the prosecution's task to show non-materiality to corporate purpose.

The Court below construed the First Amendment constitution -- not a statutory construction here but constitutional law as allowing a corporation to have First Amendment rights if it proved the affirmative of a very complicated economic principle, namely, that although the referendum question relates solely to individual taxes, it does, in fact, materially affect the corporation.

The Court held that if the corporation wished to prove that, then it would be afforded First Amendment protection for its speech.

We say that the analysis is inappropriate. We say that the analysis should be as follows: money is speech. Speech is protected unless and until it comes up against a compelling state purpose in carefully-drafted legislation which serves the purpose in the least-restrictive manner available.

In other words, the prohibition should be made to justify itself. The focus should be on the prohibition. The corporate speaker should not be made to justify his

prospective speech.

If one shifts the focus from the corporation -- and the Court below went into an artificial, I think, analysis of the rights of corporations, their nature and what are consistent with their existence and so forth -- if one takes the focus from that and scrutinizes the prohibition here, one will find that there is no compelling interest served by this prohibition and if there is any purpose served, it is not done in the least-restrictive way.

QUESTION: Mr. Fox, would it be constitutional for a state to provide that no corporation may publish a newspaper unless its articles of incorporation expressly grant it that power?

MR. FOX: I think not, Your Honor. I think if the state allows the creation and existence of an entity capable of communication, it cannot squelch that communication without running into serious problems under the First Amendment.

Ultra vires is a possible concern of the state but it is not served by this statute here which prohibits only expenditures as to one kind of a political question, the question relating to individual taxes.

Every other kind of a question, the relation to the corporate purpose has a different standard applied to it. But here you cannot contribute or expend, whether it is in

your articles of organization, whether it is absolutely necessary for your purpose at all, if it relates to individual taxes.

QUESTION: Well, I understand that about that statute but your submission is that a state may not limit a corporation to business other than newspaper publishing. Any corporation, once incorporated, has a right to publish a newspaper.

MR. FOX: I would say so, yes, Your Honor. I would say the state could go to that corporation -- or a stockholder could go to the corporation --

QUESTION: Even if they do not publish a newspaper, they publish annual reports and would you not think they would have First Amendment rights in their annual reports to their stockholders?

MR. FOX: Yes, Your Honor.

QUESTION: Do you think the corporation could be required to get the consent of two-thirds of its stockholders before it engages in a publishing activity?

MR. FOX: Do you mean a statute saying that any corporation wishing to communicate or publish should first get the vote of two-thirds?

QUESTION: Yes. First take that as a separate requirement and then take it as a requirement that a corporation, before it does anything, has to get the vote of

two-thirds of its stockholders.

MR. FOX: I would have less difficulty with the statute that says a corporation, before it does anything, must get two-thirds approval.

When the state comes in and says, "If you are going to do some communicating, some publishing, you must get two-thirds approval," I think there must be a compelling purpose found behind that and whatever it is, you must examine it to see if there is not a less-restrictive way of serving that purpose.

QUESTION: Would you have any difficulty at all with a requirement that a corporation, before it engage in any corporate act, obtain the consent of two-thirds of its shareholders? Any constitutional difficulty?

MR. FOX: I would have difficulty with it in that it seems to me that the primary emphasis on the First Amendment is in the right of the hearer to listen, the right of the public to hear and if you are going to restrict that, it should only be to serve a very compelling purpose and this would restrict it in some way because getting two-thirds vote may be a very difficult procedure.

QUESTION: Well, surely you would have no question about a statute that said in Massachusetts, there will be no corporations.

MR. FOX: No, I would not have any problem with

that. If they said, publishers may not incorporate, I would have problems with it.

QUESTION: Well, do you have any -- I take it that you disagree that a corporation may be prevented from communicating about a political issue that does not affect its interests.

MR. FOX: Well, ultra vires as a civil remedy is available, Your Honor --

QUESTION: Well, I am not --

MR. FOX: For shareholders to keep their corporations on the track. What I have trouble with --

QUESTION: Oh, so you do say that it is contrary to the First Amendment to limit the communications in that manner?

MR. FOX: Well, for the criminal law to prohibit a communication, I think -- I think it is possible for the criminal law to do so. I am just saying there must be one whale of a public purpose served before this Court would allow that to occur. Now, what --

QUESTION: In this case you say that it was unconstitutional for Massachusetts to say that you have to have -- the interests of the corporation have to be involved before you may communicate about an election issue.

MR. FOX: Well, of course, we are attacking the second sentence primarily which says you cannot contribute or

expend as to a referendum question relating to taxes, period.

QUESTION: What if we were to accept the legislative declaration that individual income taxes do not affect your interests at all?

MR. FOX: Well, I think that that is -- if the purpose is ultra vires, or to protect the corporate shareholder, it is an irrational device to serve that because it is not logical to assume that the only way in which corporate management could commit waste or commit acts of ultra vires is with respect to a referendum question pertaining to taxes.

QUESTION: Well, I know that is your opinion, but what if we assumed -- what if we agreed with the legislative declaration that individual income taxes do not involve the corporate interests and therefore the corporation may not communicate?

MR. FOX: Well, I think, if Your Honor please, we would have to identify the purpose served. If it is an ultra vires purpose, the purpose of protecting the shareholders, that it is assumed that a communication on individual taxes is corporate waste, I guess I would say that that that would violate equal protection under the Mosley principle where the State of Illinois cannot presume that non-labor picketing is more violent than labor picketing and so forth.

QUESTION: Do you think your position would have any bearing on the constitutionality of the Federal Practices

Act which forbids corporations from contributing in federal elections?

MR. FOX: No. No, it is no part of my purpose to attack that. As a personal opinion, I think perhaps it would be difficult.

QUESTION: You do not think the principle that you are furthering here would undermine the federal statute?

MR. FOX: No. Here's why. The purpose served by the federal statute is to avoid the fact or appearance of corruption. A candidate repaying his heavy contributors out of the public trust after he is elected is, as this Court held in Buckley and Valeo, a very high purpose. There is no equivalent purpose in a candidate or a campaign relating to referendum questions.

The prospect of corruption is non-existent. No one gets elected. There are no political debts created. Every court that has construed this kind of question since Buckley -- and there are four of them and they are on page one of our brief -- has so held, Your Honor. So that I would say that the Federal Court Practices Act serves a compelling purpose.

Whether it is necessary to restrict corporations to an absolute prohibition is a different question, even whether that federal statute is serving a compelling purpose.

QUESTION: I have a little problem, Mr. Fox, with

this corruption point and the rights of individuals. You have a campaign to get a graduated individual income tax and candidate Jones for governor, a candidate for governor, is a great exponent of that. Would you not be helping him?

MR. FOX: I think there could be circumstances where the particular --

QUESTION: That would be inevitable, would it not?

MR. FOX: But you see, the portions of the statute dealing with candidates -- and this is a highly-regulated area, at least in Massachusetts, could get indirect methods as well as direct but in this record there is absolutely no connection with a candidate or any partisan political issue as far as compelling purposes. Corruption cannot be won because there is not any likelihood of corruption. Avoiding undue influence of wealth is a purpose laid to wealth by this Court in Buckley versus Valeo where the Court said that the concept that one element of society may have its speech restricted in order to enhance the relative voice of another element of society is contrary -- alien to the First Amendment.

The purpose of serving the shareholders interest who does not want to see his corporation take a political position has been recognized by Court[?] [viac] in this Court to be a secondary purpose at best as far as corporate shareholders are concerned as distinguished from labor unions

J. Ash

where you might have compulsory union membership. You might have compulsory dues and union membership may be a precondition to employment.

Here labor unions are not regulated in the least but as far as a corporate shareholder is concerned, this purpose is definitely secondary and it is ill-served by a statute which expresses that concern only as to one and one only of the infinite number of referendum questions that may come up.

If I could go on to the Equal Protection portion of it -- before I do go on to that, if this Court is satisfied that the second sentence of the statute which prohibits expenditures as to a particular question is unconstitutional, I do not think the Court need draw a line around what is ultimately going to be First Amendment corporation free speech.

If the Court would look at the facts set forth between pages 15 and 27 of our Appendix here and rule that on these facts a corporation may not constitutionally be squelched from whatever communication it wishes to make regardless of the statute,

QUESTION: That is -- you are beginning with the second step, are you not? Really, as my brother Rehnquist suggested in his question and you agreed with him in your answer, Massachusetts or any other state can say to

individuals, "In this state, you cannot carry on business at all in corporate form."

MR. FOX: I think they could, Your Honor, yes.

QUESTION: And the corporation laws generally of each state set out the conditions under which individuals can associate together in order to carry out their joint endeavors in corporate form.

MR. FOX: Yes.

QUESTION: And maybe they can say to individuals, all of whom, of course individually are protected and have the rights guaranteed by the First Amendment, "You can in corporate form only carry out your individual rights subject to these." Those are the other conditions and is that not sort of like a time, place or manner restriction on how and where an individual can exercise his First Amendment rights.

MR. FOX: Well, the state cannot attach unconstitutional conditions to the grant of any privilege and if the state wished to serve the purpose of keeping corporations close to the track of their own business, perhaps a purpose --

QUESTION: Couldn't a state say, "In the state you can only incorporate for purposes of carrying on a grocery business and for no other"?

MR. FOX: Well, I think there would be equal protection problems. If the incorporated form is a valuable form and it is very meritorious to restrict it to one kind

of business or one element of society, it probably would be an equal protection violation and maybe a First Amendment.

What I say is, the state could come in and say, "Mr. Corporation, you should not be running newspapers. You should be selling shoes" and maybe get them in trouble as far as the selling shoes is concerned but they could not shut down the presses. Once you are going to communicate, the First Amendment is going to protect that communication.

If the shareholders want to bring a proceedings civilly to assure that this something is changed, maybe so. Criminal law should not go in.

QUESTION: Well, are you saying that the shareholders could not impose an advance obligation that you are not to go into certain activities or you are not to go beyond specific activities described in the charter without getting a two-thirds vote?

MR. FOX: I think the shareholders could do that, Your Honor. If the shareholders were to say, "We are going to hold --" if the shareholders were to hold the corporation to its purpose, it would seem to me that if the purpose gets off into communication, then there must be constitutionally a discretionary factor in management as to whether it is reasonably related to that purpose that the shareholders have set forth in the articles of organization.

Otherwise, you would have management avoiding

communications and there would be a chilling effect.

The two-thirds approval, if it applies across the board to all corporate activities, I would have no particular problem with it. Applying it to communication activities only, I would have problems. Applying it to one question, of a number of political questions, I would have even greater problems.

Thank you.

QUESTION: Mr. Fox, supposing that Massachusetts had these two statutes on the books; one, a prohibition, a criminal prohibition against a director who violated a resolution passed by a majority of the stockholders at the last meeting and spent corporate funds in violation of that resolution and then supposing that one of the corporations in this suit, at its last stockholders meeting, passed a resolution saying, "We are sick and tired of having the First National Bank of Boston spend money opposing this income tax and we adopt a resolution saying that no more money like that shall be spent."

Now, could the president of the bank be prosecuted criminally under that statute?

MR. FOX: No, Your Honor.

QUESTION: Why not?

MR. FOX: As I understood your hypothesis, the source was a resolution of the corporation, not a criminal

statute.

QUESTION: Well, the criminal statute says that any officer of a corporation who spends money contrary to a valid resolution of the stockholders may be criminally prosecuted.

MR. FOX: Yes and if the form in which the expenditure took place --

QUESTION: Violates --

MR. FOX: -- was a communicative form --

QUESTION: Yes.

MR. FOX: -- I see a problem with the First Amendment addressing that.

QUESTION: In other words, you think that if a president of a bank is simply on his own, so to speak, with respect to the stockholders, if he figures he wants to communicate something, 99 percent of the stockholders can tell him no and he has still got a First Amendment right to do it?

MR. FOX: Well --

QUESTION: And Massachusetts cannot punish him criminally for doing otherwise.

MR. FOX: The corporation -- you know, it is clear that the president of a corporation can speak his own mind and that is not even an issue here. Whether he can take out an ad in the paper using corporate funds, it seems to me that the legitimate interests of the shareholders would go no

further than finding whether that is necessary -- reasonably necessary to make a profit. If to make a profit the corporate managers determine that it is necessary to take a political stand and they take it, then it would seem to me the individual shareholder would have no particular cause for concern.

QUESTION: Then the State of Massachusetts cannot adjust that balance between shareholders and directors and managers?

MR. FOX: I think the State of Massachusetts could but my point would be this: If they are going to back whatever the shareholder's right might be with the criminal process, I think they would have to have an element of discretion vested in management to make the judgment call as to whether the particular expenditure is related to the business purpose or not because otherwise you would have corporate managers fearful of making any communicative act whatsoever lest they go to jail.

Now, this case here does not involve any shareholder rights. The Massachusetts court in Lustwerk indicated that ultra vires is available in this kind of a situation. That is a 1962 case. But it held -- I think the holding is that the decision on corporate management's part must be a reasonable one and if it is, you cannot nudge it.

If the state wanted to come in and beef that up

with criminal penalties, I think the only way they could do it would be to give a wide area within which management could make a decision that somebody might second-guess later but the First Amendment would not allow a jury to second-guess management's decision and put him in jail if it is arguably close to the corporate purpose.

QUESTION: What you are saying, in effect, is that the State of Massachusetts could not by statute place this hypothetical law as a condition for using the corporate form, for a bank in this case.

MR. FOX: I think that is true, Your Honor, that if -- if it is --

QUESTION: Even though they could abolish the use of corporations totally.

MR. FOX: I would think so. To disallow corporate funds to be used to communicate ideas would be unconstitutional under Equal Protection in its intersection with the First Amendment. I would have no doubt on that.

MR. CHIEF JUSTICE BURGER: Mr. Kiley.

ORAL ARGUMENT OF THOMAS R. KILEY, ESQ.

ON BEHALF OF APPELLEES

MR. KILEY: Mr. Chief Justice and may it please the Court:

The Appellants assert an absolute constitutional right to expend money to influence the outcome on a ballot

question which was presented to the voters in 1976 and which would have authorized the imposition of a graduated personal income tax in the State of Massachusetts.

I might add that their desires relate to a question that they would have no power to influence directly by voting.

We state that there is no such right and that only the taxpayers of the Commonwealth and their duly-elected representatives ought to be able to decide how they are taxed.

Despite the arguments that Mr. Fox has just earnestly advanced, we think there are real differences between corporations and individuals, between elections of officials and elections on referendum issues and the expression of voter sentiment contained in referendum votes and between the graduated income tax amendment which appeared on the 1976 ballot and other kinds of questions.

I think that before we reach those specific differences -- and I address myself to those -- I would like to reiterate a little bit about the way the Massachusetts statutory framework works.

In Massachusetts we have approximately 70 years of experience with a ban on corporate political contributions and roughly an equivalent amount of experience with questions appearing on the ballot.

Throughout the history of the Massachusetts statute, the prohibition against corporate contributions has been applied to questions presented to the voter under the initiative in referendum amendment and under Article 48 of our state constitution. That includes constitutional amendments like the grad tax.

Under the Massachusetts statutory framework, the popular initiative and referendum reserved to the people, that is, to the voters, the right to submit questions and laws to the voters for acceptance or rejection when the normal political processes do not work and it is this process, this narrow process that Massachusetts seeks to eliminate corporate influence from.

Throughout the 70-year period, as I say, we have had a history of interaction between the questions which appear on the ballot and the ban on corporate contributions but it has not been a static history.

Throughout our history we have evolved the statute and the statute now, we think, at least complies with constitutional standards.

For the last 14 years, there has been a dialog between our State Supreme Judicial Court and between the Legislature as to what it is that the Legislature can prescribe by way of corporate contributions.

We have carved out a process for the people

within which they can interact and at the same time strive to protect the rights of businesses to contribute to questions which in some way might materially affect them.

Under the Massachusetts statutory framework, individual citizens can contribute up to \$1,000 to a candidate, to a committee organized on behalf of a candidate, to a political party or to committees organized on behalf of questions which appear on the ballot.

Business corporations and any kind of business entity which carries on certain kinds of enumerated businesses, generally-regulated industries like banks, canals, railroads cannot contribute to candidates, cannot contribute to committees organized on their behalf, cannot contribute to political parties.

There is a narrow range of participation open to them under the Massachusetts framework and it permits them to contribute to questions which materially affect their business and only in those instances.

And I might add that when that narrow range of participation is open to them, unlike individual citizens they can contribute without limit and they may expend money without limit in order to protect the business interests.

Now, corporations are not totally excluded from the referendum process, the amendment to the constitution process. They have a number of roles that they can play in

the process.

In order for a constitutional amendment like the graduated income tax to appear on the Massachusetts ballot, it has to first be affirmatively voted on by two consecutive legislatures.

Now, that is not two legislative years, that is two separately-elected legislatures.

QUESTION: Well, the banks could not contribute to any of those legislators, could they?

MR. KILEY: Banks cannot contribute to the legislators in their quest for elective office. What they can do and what any business -- any artificial or natural entity in Massachusetts can do is contribute and expend money in a lobbying effort while the matter is being considered in the legislature. During the months immediately--

QUESTION: You mean that the bank here can contribute unlimited money to lobby in the legislature against a graduated tax?

MR. KILEY: I think that is correct, Your Honor.

QUESTION: Do you know any other state that allows that?

MR. KILEY: I am not familiar with the lobbying statutes of the several states. I am familiar with the election statutes of the several states. I can say that Massachusetts has a fairly unique statute in that regard,

the best one, in my position.

QUESTION: When you say "contribute," you mean to pay lobbyists, do you not?

MR. KILEY: To pay lobbyists. We do have --

QUESTION: Not pay anybody else.

MR. KILEY: We do have a comprehensive legislative agent kind of statute which does restrict the forms of communication on matters before the legislature.

QUESTION: And requires, I suppose, registration identification.

MR. KILEY: It is a standard kind of statute.

QUESTION: My question was, unlimited money.

MR. KILEY: Unlimited expenditures for legislative agents, yes.

QUESTION: Right.

QUESTION: General Kiley, is that only true if the graduated income tax materially affects the business of the corporation?

MR. KILEY: That is not.

QUESTION: On any issue, they can lobby without limit.

MR. KILEY: That is correct, Your Honor. Any artificial entity, any natural person in the Commonwealth is free to expend unlimited amounts of money while a matter is before the legislature.

QUESTION: I have just one small question. Why is it that a bank is allowed to spend unlimited money in the legislature to lobby for or against an act but cannot do it through the referendum?

MR. KILEY: My answer, Mr. Justice Marshall, is that in Article 48 of our State Constitution, we have carved out for the people a certain process by which they can respond and enact statutes and amend their constitution when the normal political processes are not available to them and untoward results are being produced by the legislature.

The initiative and referendum procedure which is at the heart of the issue in this case, was born of a populist movement around the turn of the century and was designed to return to the people the reins of government and to eliminate the big business influence in that narrow range of governmental interests.

QUESTION: But there is an ironic twist, is there not, in that the legislature overwhelmingly passed the income tax and then the people rejected it.

MR. KILEY: In the last two elections the -- you have in the record the votes of the legislatures. They are overwhelming. You have the fact that they were defeated.

You also know that the amount of money that was expended by corporations primarily in selling the particular position to the legislature was \$120,000 to \$7,000, or .

\$15,000 depending upon the way you --

QUESTION: To the legislature or to the voters?

MR. KILEY: No, that is to the voters. That is in advertising. That is in contributions to committees which favor or oppose the question in 1972. It was presented to the voters in 1972.

But this is not an absolute ban on corporate participation even while the people's process, the referendum process, was going on. In view of corporate management, there is the lower court opinion which makes clear it can be disseminated to the public in a wide variety of ways.

The banks may publish articles in the in-house publications. They may hold press conferences. They may use the economists that they have hired to make public statements. There is a whole host of methods for that corporate view to be disseminated to the public.

The only restriction that is operative during these months immediately preceding election is a prohibition against the expenditure of corporate funds to influence a vote which in this case may have affected the corporate management in their taxation but could not have affected the taxation of the corporations.

After the amendment passes, this is not a self-executing amendment. In order for a tax to be imposed, it would again have to go back to the legislature and the

legislature would have had to enact a graduated personal income tax and the --

QUESTION: Would there be a bar that you know of for the officers to give interviews to newspapermen and to broadcasting stations about the problem?

MR. KILEY: The lower court opinion, I think, in a narrowing construction of the statute makes perfectly clear that there is no prohibition. It is the contribution or expenditure of funds not in the natural course of business that is interdicted by the Massachusetts statute.

And again, after the amendment is passed when it is before the legislature, the Appellants' business corporations and regulated industries have a free hand in seeking to protect their interest when a specific tax is proposed so the prescription operates only in a very narrow time frame during what I have characterized as the people's process.

And in a really significant respect, the rights of corporations when they can participate in that process are even greater than those of individual citizens because they can spend or expend monies --

QUESTION: General Kiley, is it not true that if your position is correct, as a matter of constitutional law Massachusetts could withdraw the privilege of trying to influence the legislature by spending money?

MR. KILEY: I think that if my position on the

constitutional aspects of the case is correct, that Massachusetts can clearly eliminate the right of corporations to lobby except where their business interests are affected.

QUESTION: And as a matter of law, they can say that their business interests are not affected by an individual income tax.

MR. KILEY: I do not know whether the judgment in the particular statute would be as defensible as it is in the matter that is before this Court.

QUESTION: How would that be different? I do not understand how that would matter, whether that is the constitutional amendment or the statute.

MR. KILEY: In this particular question that was presented to the voters, we have a non-self-executing statement of authorization for the legislature which deals only with personal income as opposed to corporate income taxes.

Passing the question of whether or not a personal income tax can have an impact on the business property or assets of the corporation, we are still faced with the fact that in order for there to be any conceivable impact on the business itself, the legislature at some point would have to take an additional affirmative step and impose a tax.

QUESTION: With the votes in the record, there is not much doubt about that, what is going to happen when you get to that stage, is there?

MR. KILEY: There may be grave questions as to the form of the particular tax, the levels of taxation, the degrees of gradation.

QUESTION: General Kiley, why does your constitutional position limit you so that you have to allow a corporation to spend money when its own business interests are materially affected? Is there a constitutional right of self-defense?

MR. KILEY: I would start with the bald proposition that corporations have no First Amendment rights of free speech per se. I would agree with the Court below that to the extent that corporations do have any rights of speech, that they are an incident of the Due Process Clause of the 14th Amendment and stem from some right to protect their interests.

QUESTION: Then let me interrupt you. I realize you have not fully answered. How do you -- do you think that the incorporation of the First Amendment has more or less -- into the 14th -- has been preceded by a bodily incorporation so that the 14th Amendment now reads, "No state shall abridge the right of freedom of speech or of the press"? It is religious, not political. I mean, it is a political or constitutional question, not a religious one.

MR. KILEY: I recognize that Mr. Justice Rehnquist is alluding to a suggestion in some of the opinions that he

has written that the 14th Amendment may just embody the principle of free speech as it has been handed down through the 14th Amendment. It is not the position that I advance today.

QUESTION: No and certainly it is not the position the Court has taken but it seems to me that your case is on stronger grounds if you say that one must first pass through the person loophole of the 14th Amendment than if you say the 14th Amendment without any reference to any of its language says no state shall abridge the freedom of speech or freedom of the press.

MR. KILEY: I think that I would agree with you, Mr. Justice.

QUESTION: Yes. And which position do you take?

MR. KILEY: The position that I advance today is simply that the lower court has found that there is a right to protect businesses, whether it is under the Federal Constitution or the State Constitution and that we will abide by that decision by the lower court, under the State Constitution if not the federal.

QUESTION: But which position do you take with respect to the First and 14th Amendments to the Federal Constitution?

MR. KILEY: I would take a position --

QUESTION: Do you think you first have to show you are a person in order to take advantage of the First Amendment?

MR. KILEY: I would say that you do not and you would not simply because there is a right of speech when business interests are affected that is an incident to the Due Process Clause of the 14th Amendment as opposed to the privileges and immunities clause of the amendment.

QUESTION: May I back up just a minute? I want to be sure I understand your position. If the Appellants in this case had been able to show to the satisfaction of the Massachusetts court that their business interests were protected, is it your position that this case would have been decided differently by the Massachusetts Supreme Judicial Court?

MR. KILEY: I think that if you were to read the -- again, if you were to reread the first First National case in 1972, there is a suggestion to that effect in that opinion.

QUESTION: How about the opinion before us in this case? I am looking at language on page 8 of the Appendix of the jurisdictional statement. There is a flat sentence which says, "The legislature --" this, I think, by virtue of the 1972 Amendment -- "has specifically proscribed corporate expenditures of money relative to the proposed amendment."

MR. KILEY: And in --

QUESTION: There is other language in the opinion that also supports that view. It is very confusing, it seems to me. What is your position?

MR. KILEY: The challenge that was brought to the specific statute embodies a host of due process - equal protection kinds of challenges. The Appellants challenged the statute on its face and as applied to them and asserted that there was a constitutional right to contribute or expend money when there was a material effect.

Justice Leachos in his opinion appears to have agreed that the Fourteenth Amendment and the State Constitution confer that kind of right and finds that as applied to these particular defendants, this statute is not unconstitutional. He also appears to concur with the legislative judgment that a graduated income tax amendment on its face can have no impact on the business interests of specific corporations.

In accordance with the provisions of Rule 16 of this Court, I will turn just briefly and just by way of digression to the mootness arguments that have been raised in this particular case.

I agree with Mr. Fox that there is a doctrine which has been applied by this and other courts permitting it to review and decide cases which are capable of repetition yet evading review even after the specific controversy has passed.

We disagree as to the application of the principle to this particular case. We do not believe, as Mr. Fox asserts, that this case is likely to recur in any real sense.

In the 16 years since we have had our current form of amending the Constitution and in the 29 general elections that have passed, a graduated income tax question has appeared on the ballot but four times and three judicial challenges that eventuated challenging the corporate prescription against contributions to oppose or favor that tax.

But in each instance, the nature of the specific amendment, the form of the prescription embodied in Chapter 55, Section 8 and its precursors and the form of the specific challenge that a judicial challenge eventuated has varied. I would submit that it is sheer speculation to suggest that if a First Amendment argument is again raised and if the legislature of the Commonwealth of Massachusetts again puts a grad tax on the ballot and if corporations again want to oppose it, that these issues will arise between these parties, that there be these same issues or that it will be in this format.

Furthermore, in the second part of the analysis, the record amply illustrates this case, the First National Bank versus Belotti, did not arise in a time frame so short that complete Appellate review was impossible.

The Appellants could have brought their case, as the lower court noted in Note 15 of its Opinion, a full year before they did bring their case. Had they brought their case reasonably close to the date on which the controversy

arose and had they sought and obtained expedited review in light of the impending election, the Appellants clearly could have obtained plenary consideration by this Court within the available time frame.

Their delay and their delay only is the reason that they have not managed to obtain complete Appellate review in this case.

Under these circumstances, the capable of repetition yet evading review doctrine is inapposite and the case has become moot.

Turning once again to the First Amendment issues that have been raised, the Commonwealth has searched three basic interests which we think justify any incidental impact that this statute might have on any imagined First Amendment rights.

We start first from the proposition though, that corporations do not have First Amendment rights per se, that they are not natural persons and that they may be restricted to protection of the rights that are contained in their charters.

The Fourteenth Amendment is not inapplicable to these Appellants because they are artificial entities.

QUESTION: If this were a First Amendment case strictly speaking and in the Federal Government, you would not be dealing with any question of whether they were natural

persons because the First Amendment by its terms does not require that it be a person to take advantage of it.

MR. KILEY: I think, though, that this Court has never held that the First Amendment rights per se, the right of free speech per se, attaches to business corporations whose charters do not relate either to the press, the communication of ideas or the advancement of other First Amendment rights or, in the alternative, unless there has been some finding of a business interest.

The business corporations are simply quite different from natural persons and the opinions of this Court have held that they do not exercise other purely personal rights such as the privilege against self-incrimination, right of --

QUESTION: Let us see if I understand this. How do you explain the presence of the New York Times case?

MR. KILEY: It would be a case in which the New York Times, in its charter, as part of its business, was involved in the dissemination of news and was involved in the business of the First Amendment.

QUESTION: And how do you explain Doran against the Salem Inn?

MR. KILEY: Again, protection of arguably a business interest. Like the commercial speech case, I would assert that in every case in which a pure -- in which a

right of speech has been found, that there is either a business interest as in the commercial speech cases or that there is an idea of dissemination of First Amendment ideas.

QUESTION: I think in most of those cases, the First Amendment issue was not specifically raised in the sense, is it applicable or not to a corporation problem.

MR. KILEY: I think, Mr. Justice Blackmun, that Mr. Foxes answer to the Court was -- and I believe it was to Mr. Justice Stewart's question -- was as good an answer as could be provided. There are no cases which hold directly that the First Amendment right of free speech per se applies to business corporations as such.

The issue is -- this is, I would submit, a fairly unique case.

QUESTION: What would you say about the proposition that corporations could be organized in such a way that after the declaration of corporate purpose would be a statement generally, "And to engage in the dissemination of information and knowledge necessary for the well-being of the United States and the people thereof." Would that give them First Amendment rights then?

MR. KILEY: If that was also the charter of the New York Times I would clearly answer yes.

QUESTION: Well, I do not know what the New York Times charter says, but it must be something like that.

MR. KILEY: The reason that I would answer yes is that when an individual invests his money in a corporation like the New York Times or like the Boston Globe, there is the idea that his money will be utilized in the dissemination of certain ideas.

When an individual invests his money in Digital Corporation, in Wyman-Gordon, in the First National Bank, there is an expectation on the part of the individual that his funds -- that the corporation will exercise its best efforts to protect his investment and to enhance his investment and that to the extent that political contributions and political messages are not his views, that permitting corporations to make political statements is an opportunity for the corporation to -- the corporate management to abuse the trust placed in them on the one hand and at best; and at worst, to coerce contributions from their shareholders, to use their funds for purposes which are inimicable to their own constitutional and political beliefs and I think that that is antithetical to the real purpose behind the First Amendment.

I see my time is passing and I just want to make sure that I get to assert one time the three interests that we say the state has in restricting speech of this nature.

First, we think that the state has a legitimate interest in preserving the integrity of the referendum initiative and amendment processes as the people's forum.

Second, we think that there is a legitimate state interest in preventing even the appearance of impropriety as it relates to that process and by that I mean that we feel that we have the right to remove even the suggestion of a domination by corporations in the political sphere.

Now, that is not an imaginary evil. In 1972 the corporations -- many corporations banded together and spent \$120,000 to oppose the graduated income tax as opposed to \$7,000 or \$15,000 by the proponents.

Now, that is not the same undue influence argument that the Court, in Mr. Foxes view laid to rest in Buckley and Vallee. We are not saying that an individual who is a millionaire cannot use his funds to promote his political beliefs or that an individual who is talented in political debate cannot use his talents.

What we are asserting to the Court is that the state has a right of keeping corporations which do not belong in the initiative process in the first place from preventing a full and robust debate among those individuals who have a direct interest in the correct answering of the questions before the Court.

And the third interest that we assert to the Court is that the state has a legitimate interest in protecting the minority shareholders of these individual corporations and I would suggest to the Court that Cort versus

Ash has not said that protection of minority shareholders is a secondary interest at best, that Cort and Ash is a statutory construction case in which this Court did not find the existence of an implied civil right of action under the federal election.

QUESTION: I have trouble with your minority stockholder when you let him -- for the year-around they can spend all the money they want in the legislature. That is a little problem, is it not?

MR. KILEY: I would suggest only that perhaps we could limit their expenditures in the legislature as well but ---

QUESTION: But you do not have to cure all the evils.

MR. KILEY: Correct. And in fact, in the opinion below, Mr. Justice Leachos has indicated that in his view, protection of minority interests is a very important element of the Massachusetts statute.

QUESTION: General, may I come back to the question I asked you a little while ago? Will you take a look at page 19 of the Appendix of the Jurisdictional Statement?

MR. KILEY: Certainly.

QUESTION: This is the opinion of your court and that part of the opinion is addressing the vagueness argument and look at the second full paragraph that starts, "On consideration of these constitutional guidelines" which are

cases involving vagueness, the next sentence goes on to say this: "We recognize that the 'materially affects' limitation is general in nature." The court is thus saying it is not vague.

"But we also note that the statutory proscription in question here -- the prohibition against corporate expenditures on a referendum question solely concerning a personal income tax -- is both precise and definite."

Now, I read that plus the language I referred to earlier as indicating that your court would say that quite without regard to affect on the business or assets of a corporation, that money could not be spent.

Now, do you agree or disagree with that interpretation of this opinion?

MR. KILEY: With all due respect, I disagree.

QUESTION: You do. In other words --

MR. KILEY: I -- then it is --

QUESTION: Then your Massachusetts court has, in effect, almost conceded vagueness.

MR. KILEY: I think that it has not. I think that no reasonable man viewing the dialog between Supreme Court and legislature in this case could argue that this statute is vague.

Indeed, Mr. Fox, in his brief, concedes that this prescription was tailor-made to apply to him. I would submit

only that the language that Mr. Justice Powell reads from on page 19 has to be read in context with the language on page 12 of the jurisdictional statement where Justice Leachos cites Pierce versus Society of Sisters and talks about the rights of corporations if they do exist and where they stem from.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:42 o'clock p.m., the case
is submitted.]

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