

ORIGINAL

In the

Supreme Court of the United States

JOHN R. LARSON, ETC., ET AL)

Appellants,)

v.)

PAMELA VALENTE, ET AL.)

NO. 80-1666

Washington, D. C.

December 9, 1981

Pages 1 thru 49

ALDERSON  REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 JOHN R. LARSON, ETC., ET AL., :
4 Appellants, :
5 v. :
6 PAMELA VALENTE, ET AL. :
7 - - - - -

8 Washington, D. C.
9 Wednesday, December 9, 1981

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:01 o'clock a.m.

13 APPEARANCES:

14 LARRY SALUSTRO, ESQ., Special Assistant Attorney
15 General of Minnesota, St. Paul, Minnesota; on
16 behalf of the Appellants.
17 BARRY A. FISHER, ESQ., Los Angeles, California;
18 on behalf of the Appellees.

19
20
21
22
23
24
25

1	<u>C O N T E N T S</u>	
2	<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
3	LARRY SALUSTRO, ESQ.,	
4	on behalf of the Appellants	3
5	BARRY A. FISHER, ESQ.,	
6	on behalf of the Appellees	23
7	LARRY SALUSTRO, ESQ.,	
8	on behalf of the Appellants - rebuttal	48
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Larson against Valente.

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

ORAL ARGUMENT OF LARRY SALUSTRO, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. SALUSTRO: Mr. Chief Justice, and may it please the Court, this case involves the narrow issue of the constitutionality under the establishment clause of an exemption provision in Minnesota's Charitable Solicitation Act. The provision in question exempts from the financial disclosure requirements otherwise applicable to charitable organizations in the Act those religious organizations and societies which solicit more than half of their contributions from their members and from their affiliates.

The appeal presents the question whether the establishment clause prohibits a state from tailoring a regulatory program to allow coverage of some religious organizations where the application of the law to religious organizations is based on criteria unrelated to matters of religious belief or dogma.

Plaintiffs in this case are the Holy Spirit Association for the Unification of World Christianity, Incorporated, and four of its members. Defendants are the

1 two state officials in the state of Minnesota responsible
2 for enforcing the provisions of Minnesota's Charitable
3 Solicitation Act.

4 I will discuss the provisions declared
5 unconstitutional, the procedural history of the
6 establishment clause issue in the court below, and why this
7 Court should reverse the decision of the court of appeals.

8 QUESTION: Where are the provisions set out
9 completely?

10 MR. SALUSTRO: The provisions of the --

11 QUESTION: Minnesota law.

12 MR. SALUSTRO: -- Minnesota law are set out
13 completely in the jurisdictional statement.

14 QUESTION: Not just the provision that you are
15 talking about.

16 MR. SALUSTRO: Provision of the entire Charitable
17 Solicitation law set out as an appendix to the
18 jurisdictional statement.

19 QUESTION: Thank you.

20 MR. SALUSTRO: Through financial disclosure, the
21 state of Minnesota seeks to inform charitable contributors
22 of the organizations that are soliciting contributions from
23 them. The state seeks to protect contributors from fraud
24 and from misrepresentation by those organizations as to the
25 identity of the organization, the purpose of the

1 organization, and the use to which funds are put by that
2 organization.

3 Through a series of six exemptions, Minnesota has
4 determined that disclosure is not always necessary to
5 effectuate the state's objectives. One of these six
6 exemptions is the exemption for religious organizations and
7 societies that solicit more than half of their contributions
8 from their members and affiliates, and the narrow issue here
9 is the application of the establishment clause to that
10 provision. The procedural history here --

11 QUESTION: Mr. Salustro, what is the rationale for
12 treating religious organizations differently from patriotic
13 and fraternal ones?

14 MR. SALUSTRO: The criteria used in religious
15 organizations and in fraternal and patriotic organizations,
16 the criteria for exemption is the same, namely, the extent
17 to which they solicit contributions from the general
18 public. The only difference is that the point of the -- the
19 point on the line where the exemption is drawn is different
20 for those organizations.

21 This has the result of exempting more religious
22 organizations than fraternal and patriotic organizations, so
23 to that extent it is a more --

24 QUESTION: You think it exempts more religious
25 organizations?

1 MR. SALUSTRO: Yes, unquestionably. It exempts
2 more religious organizations.

3 QUESTION: Is that a fact?

4 MR. SALUSTRO: It's not a fact, but I think it is
5 a mathematical certainty, because the fraternal and
6 patriotic organizations that raise any of their money from
7 the general public outside their membership lose their
8 exemption. The religious organizations can raise up to 50
9 percent of the money from -- up to 50 percent of the money
10 from the general public and not lose the exemption, so it is
11 a more beneficial, a more hands-off treatment of religious
12 organizations as a class than fraternal and patriotic
13 organizations as a class, although the criteria used is
14 exactly the same.

15 QUESTION: Counsel, the point raised by Justice
16 Blackmun is one that I would like to pursue with you also,
17 because I don't understand the answer.

18 What is the reason for the different treatment of
19 these types of organizations? What is the reason that is
20 advanced by the state for that difference?

21 MR. SALUSTRO: Well, the reason that is advanced
22 by the state is that the state of Minnesota wants to be more
23 careful about extending its regulatory program to religious
24 organizations. Where the state interest in those
25 organizations is small, then it is concerned about extending

1 its regulatory program to fraternal organizations.

2 There are -- we have a very different interest in
3 religious organizations among themselves in this program.

4 The purpose of the program is to provide information to
5 donors and contributors who don't have that information.

6 There are a wide range of kinds of charitable -- of
7 religious charitable organizations. There are religious
8 charitable organizations that solicit exclusively from
9 members of the public, 100 percent from the general public.

10 As far as our interest in providing information to
11 donors that don't have it, we have a very great interest in
12 disclosure by those organizations. On the other hand, there
13 are organizations that solicit only from members who are
14 intimately familiar with the finances of the organization,
15 at the other end of the spectrum. We have much less
16 interest in requiring disclosure, public disclosure from
17 those organizations because the members who are the donors
18 of those organizations already have that information
19 available to them or can get it.

20 QUESTION: Are there not more hurdles to get over
21 when you are dealing with a religious organization? That
22 is, a religious organization has all the protection of the
23 speech and press clauses, I would assume, and in addition to
24 that it has the protection of the religion clauses which are
25 not necessarily available to fraternal and patriotic

1 organizations. Is that not so?

2 MR. SALUSTRO: Yes, sir, that is correct, Your
3 Honor. What I was trying to explain is that we have a
4 different -- we have a relatively lower interest in some
5 religious organizations and the exemption provision is
6 different because we want to leave organizations alone where
7 our interest is so small. There is no doubt that there are
8 many cases by this Court, many charitable solicitation cases
9 by this Court, and what we are talking about here is
10 solicitation from the general public, and in a number of
11 those cases, the Court has -- the Court has looked at
12 disclosure type programs and distinguished the kind of
13 regulation that disclosure type programs have from
14 prohibitory regulation, and in the Cantwell case and in the
15 Schaumburg case, and in some other cases where the Court has
16 looked at this particular question, it has determined that
17 disclosure kind of regulation does not have to meet the same
18 tests as regulation which has the effect of directly
19 prohibiting organizations and members of organizations from
20 soliciting contributions from the general public.

21 QUESTION: You also have a category in your law of
22 charitable organizations generally.

23 MR. SALUSTRO: Charitable organizations, yes.

24 QUESTION: Different from fraternal and patriotic.

25 MR. SALUSTRO: They are different --

1 QUESTION: Well, it says charitable organizations
2 are exempt if they didn't receive more than \$10,000 from the
3 public.

4 MR. SALUSTRO: Charitable organizations as far as
5 that exemption is concerned includes the entire list of
6 organizations. It includes religious organizations. It
7 includes fraternal organizations. It includes all
8 organizations soliciting contributions for charitable
9 purposes. A \$10,000 limitation -- or exemption is available
10 to all organizations. It is available to religious ones who
11 are not exempted by the other provision. It is available to
12 fraternal and patriotic ones who are not.

13 So, any of the organizations --

14 QUESTION: But charitable organizations generally
15 can raise up to \$10,000 from the public without
16 registering. Is that it? And fraternal organizations can't
17 raise any from the public without registering it?

18 MR. SALUSTRO: Fraternal -- any organization,
19 charitable, fraternal, religious, can raise \$10,000 from the
20 public without registering.

21 QUESTION: That isn't what Subparagraph D says
22 about fraternal and patriotic organizations.

23 MR. SALUSTRO: Fraternal and patriotic
24 organizations have two different criteria for being exempt.
25 One criteria is that they raise all of their money from

1 their members. The other criteria is, and completely
2 independent, that they raise less than \$10,000. The same is
3 true with religious organizations. There are two different
4 possibilities of being exempt. One is raising most of their
5 money from their membership or affiliates. Two, raising up
6 to \$10,000.

7 QUESTION: In any event, you suggest that you
8 treat religious societies the most favorably. They get the
9 most favorable treatment as compared to charitable
10 organizations generally?

11 MR. SALUSTRO: They are treated better than
12 fraternal or patriotic organizations --

13 QUESTION: Or charitable.

14 MR. SALUSTRO: -- even though the --

15 QUESTION: Or charitable generally.

16 MR. SALUSTRO: Yes, or charitable, even though the
17 criteria for the exemption in question is the same, and has
18 nothing to do with religion. We think that based on --
19 well, there are two different parts of the analysis of the
20 exemption provision. One is the decision that there is
21 going to be an exemption provision for religious
22 organizations. That kind of decision takes -- takes into
23 consideration that the state has some leeway in treating
24 religious organizations somewhat better, somewhat more
25 liberally, somewhat more at a distance than other kinds of

1 organizations, and the Court said in the Walz case and the
2 Court said in some other cases that there is some leeway for
3 the state to do that without necessarily violating the
4 establishment clause. So, that criteria of religious
5 organization is there.

6 The second question is, once it is determined that
7 there will be a religious exemption, how should the
8 exemption be structured, and in Minnesota's case, what we
9 have done here is used a secular criteria to structure the
10 exemption. The criteria has nothing to do with religion,
11 with religious values, with the content of free speech. The
12 value is purely secular, whether the organization solicits
13 from the general public. It is not only secular, it is tied
14 to the purposes of the Act, which is providing information
15 to people that don't have information that receive
16 solicitations from charitable organizations.

17 QUESTION: May I ask you a question right on that
18 point? Suppose you have two religious organizations, each
19 of which raises \$500,000 every year, and for one of them
20 that is substantially all they raise; for another, they also
21 raise internally \$600,000. Why should the state interest be
22 different for those two organizations? It is the same
23 amount of soliciation of funds from the public.

24 MR. SALUSTRO: The state's interest is different
25 in this exemption, and your question is correct. One of

1 those organizations will be exempt and one not, and that is
2 the way --

3 QUESTION: Isn't the state interest the same for
4 the two? There is precisely the same amount of soliciation
5 from the public.

6 MR. SALUSTRO: No, we think that there is a
7 difference in that one organization is raising most of its
8 money from the general public. One organization is raising
9 most of its money internally, and that goes to the extent to
10 which the organization can raise money from the public and
11 take advantage of the opportunity if it chooses to to engage
12 in misrepresentation.

13 It is very correct that if dollar --

14 QUESTION: Don't they both have the same
15 opportunity to misrepresent?

16 MR. SALUSTRO: If dollar figures, if dollar
17 criteria would be different, then you could ask me, what
18 about the dollars here and the dollars there, and doesn't
19 that mean that one organization raises 95 percent of its
20 funds internally and another raises 5, and it doesn't make
21 any sense.

22 It is our position that this is a reasonable way
23 to do it. There are other reasonable ways to do it, but the
24 standard that we have to find with this particular criteria
25 is whether the line we have chosen is not rational, whether

1 it is arbitrary, whether it is invidious, and that comes out
2 of the United States versus Gillette test, United States
3 versus Gillette case, and it is not arbitrary, and it is not
4 invidious merely because there are other ways it could have
5 been done, but had one of those other ways been chosen, the
6 dollar way, then you would have exactly the same opportunity
7 to ask me that kind of question.

8 QUESTION: In other words, your answer, as I
9 understand it, is, you've got to draw the line some place,
10 and so this is as good as any other line. That is the only
11 reason for drawing this particular line, as I understand
12 your argument.

13 MR. SALUSTRO: No, I think the line can be -- the
14 line is justified as being drawn here because it is the
15 place where a charitable organization relies primarily on
16 public funding rather than primarily on internal funding,
17 and whether primarily public funding is a tiny amount of
18 money or whether it is a large amount of money, that fact
19 remains that now this organization relies more on the
20 general public to raise its funds than it does internally.

21 QUESTION: When you say internal funding, you mean
22 members or communicants or whatever it may be?

23 MR. SALUSTRO: We mean members and we mean
24 affiliated organizations.

25 We are not saying that the state does not care

1 about fraud committed by organizations on the members of the
2 organization. That is not the question. But this
3 legislative solution goes to providing information to people
4 that don't have it and don't have the opportunity to get
5 it. Without public disclosure, the general public does not
6 have the opportunity to get that information. That is why
7 it is important that it be supplied as far as the general
8 public is concerned. With members, members have the
9 opportunity to get it, and it is not that we are not
10 concerned about fraud --

11 QUESTION: That was not my question. I understand
12 your argument about members. I am talking about non-members
13 who contribute \$500,000 every year to an organization that
14 gets \$600,000 from its own membership. They don't have any
15 different access to information than if they were in the
16 other category, do they?

17 MR. SALUSTRO: No, that's correct. That's
18 correct, Your Honor. That's correct.

19 QUESTION: Well, what is the explanation? I
20 haven't heard it quite yet. Why shouldn't the same public
21 that is without that information, why shouldn't they have it
22 with respect to the \$500,000, that is less than half of what
23 the organization raises?

24 MR. SALUSTRO: The point is drawn at the place
25 that it is drawn.

1 QUESTION: I know. That is restating your
2 position, but you haven't said why, or what the
3 justification is.

4 MR. SALUSTRO: We have a continuum. It is clear
5 that at one end of the continuum organizations raise their
6 money solely from members, and it's our position that we can
7 stay away from that end as far as extending this regulatory
8 program because we don't have a sufficient interest arguably
9 to reach that end of the spectrum. As we move up this way --

10 QUESTION: Well, why don't you have? I know you
11 keep saying that, but --

12 MR. SALUSTRO: Because --

13 QUESTION: Suppose two organizations raise
14 \$500,000 from ten people, from ten people. The same ten
15 people give the same amount of money to two organizations.
16 And in the one case you will say those ten people must have
17 information about the organization and in the other case
18 they aren't told a thing. They don't have to be told a
19 thing, as long as the money they give is less than half of
20 the organization's funding.

21 MR. SALUSTRO: That result comes out of the
22 particular criteria that are used. We don't think, although
23 the result appears unusual, we don't think it is arbitrary.
24 We don't think it is invidious, and we don't think it is
25 drawn on any basis of religion.

1 QUESTION: I know that. I grant you -- I
2 understand your assertion, but you haven't explained why you
3 distinguish between those two organizations yet. But I
4 guess you have said about as much as you can. Is that it?

5 QUESTION: Well, aren't you also saying that where
6 you are talking about any organization that receives a
7 certain percentage of its funding from members or
8 communicants that it is more likely to be controlled or -- I
9 can't think of the exact word I want to use, but subjected
10 to internal discipline by its own membership than, say, an
11 organization which gets 1 percent of its funding from its
12 own members and solicits 99 percent from the outside?

13 MR. SALUSTRO: Yes, Your Honor, exactly. This is
14 a charitable solicitation law. We are worried about
15 matching representations about what is going to be done with
16 funds contributed to what actually is done with the funds
17 that are contributed. Members are going to be aware of what
18 is done with the funds contributed, and members are not
19 going to be in the same position of vulnerability as far as
20 representations made, this is what I am going to do with
21 your money, as are strangers to the organizations. Members
22 have controls. Members have the ability to see books.
23 Members can ask questions. Members have a general idea of
24 whether the people that are running the organization are
25 trustworthy.

1 QUESTION: Well, Mr. Salustro, presumably those
2 same reasons apply to non-religious charitable groups, right?

3 MR. SALUSTRO: Yes. Yes, they do.

4 QUESTION: And yet you apply a different standard
5 to those entirely. So it is just difficult to understand
6 how the state can justify the 50 percent line within the
7 religious charitable organization category but not the
8 others, because your arguments would apply equally well to
9 the other types of charitable organizations, would they not?

10 MR. SALUSTRO: They would, Your Honor, and it is
11 the position of the state that it can, as far as requiring
12 information from organizations, it is the position of the
13 state that it can be more liberal with religious
14 organizations, that it can keep its distance somewhat from
15 religious organizations where the state interest is not as
16 pronounced, and that comes out of the Walz case, among other
17 cases.

18 The state can accommodate religious values. It
19 comes out of the religion clauses. It doesn't necessarily
20 come out of the First Amendment. We think we could do the
21 same thing with other First Amendment organizations, and in
22 fact we do with the \$10,000 limitation. We don't treat them
23 identically. They can both have First Amendment rights; if
24 one organization raises less than \$10,000, it is exempt.

25 And that is a discrimination that is made on the

1 same kind of criteria we use here. It is a reasonable
2 criteria. The lines are not drawn arbitrarily or
3 invidiously, and we can treat those kinds of organizations
4 differently. We don't have to put them all in one boat.
5 And that is what we do with religious organizations, but it
6 happens that a little bit some more of them are going to be
7 exempt because we are not interested in extending regulatory
8 programs to religious organizations where we don't think we
9 have that interest, and we don't think that the
10 establishment clause requires us to extend regulatory
11 programs to religious organizations, to increase the contact
12 with religious organizations where we don't think we have a
13 sufficient interest, certainly not the establishment clause
14 requiring that we do that.

15 So that is why the line is drawn differently for
16 religious organizations.

17 QUESTION: You might be in trouble, might you not,
18 under cases like Sherbert against Verner and Indiana --
19 Thomas versus Indiana Employment Security Commission, if you
20 were to get too close to a religious organization?

21 MR. SALUSTRO: Yes, Your Honor. I agree with
22 that. We would have some difficulty, and we -- there are
23 two questions. One is, would we have difficulty, would that
24 be unconstitutional under the religion clauses as in some
25 cases it might have been under those cases. The second

1 question is, even if we don't reach the limit or the point
2 of unconstitutionality, can the state nonetheless draw back
3 somewhat from that? And it is clearly stated in the Walz
4 case, I think, that the point at which the state can
5 accommodate religious organizations is not the same point at
6 which the religion clause, the free exercise clause requires
7 that the state do that.

8 QUESTION: Would you say it would be permissible
9 for the state to have precisely the same requirements with
10 respect to all charitable and religious organizations
11 insofar as registering and disclosure is concerned?

12 MR. SALUSTRO: Yes, Your Honor.

13 QUESTION: You could just have across the board --
14 is there some case like that? You are saying that you may
15 regulate religious solicitations in the identical way you
16 may regulate non-religious charitable solicitation.

17 MR. SALUSTRO: Yes, I am saying we may do that.
18 And we do make distinctions between First Amendment -- the
19 \$10,000 limit applies to First Amendment free speech type
20 organizations and religious ones, and we could do that
21 across the board.

22 QUESTION: And it would be valid if you just
23 eliminated Subsection -- the religious -- the particular
24 religious provision here?

25 MR. SALUSTRO: The legislature could have -- the

1 legislature could have made the decision to do that, yes.

2 QUESTION: Is there some case you rely on that you
3 can treat -- that you can regulate religious solicitations?

4 MR. SALUSTRO: We can regulate religious
5 solicitations? Well, Cantwell versus Connecticut certainly
6 concerned a religious organization. Village of Schaumburg
7 didn't concern a religious organization, but I am not clear
8 that this Court has held that there is a hierarchy of First
9 Amendment values, that religious organizations have more
10 First Amendment protection than other free speech type
11 organizations. So I think we can treat them identically as
12 charitable organizations, as a group of charitable
13 organizations, as the Court did in Walz. It included the
14 whole group of charitable organizations for the purpose of
15 tax exemption.

16 QUESTION: Well, what if a religious organization
17 as part of their doctrine -- suppose part of their doctrine
18 is the duty to raise money?

19 MR. SALUSTRO: We are not prohibiting them from
20 the duty to raise money. The right that they would have to
21 assert would be the right -- the right to raise money from
22 the general public, from strangers, and the right to refuse
23 to tell the general public what they have done with the
24 money. They have to assert those two rights. Now, it is
25 theoretically possible that there could be such a religious

1 organization that asserts those rights, but I think the
2 proper remedy there would be to create an exemption for that
3 particular organization on religious rights grounds, and not
4 to throw out the entire statute here because there is some
5 possible application in the future that is going to conflict
6 with religious doctrine.

7 QUESTION: What bearing do you think the Krishna
8 Consciousness case that the Court decided last spring has on
9 this?

10 MR. SALUSTRO: Well, it is a case concerning
11 solicitation, and it is a case concerning -- well, a case
12 concerning raising funds and state regulation. In that
13 case, the Krishnas could be treated as other First Amendment
14 groups were. The notion that religious organizations have
15 more First Amendment protection as far as raising money is
16 concerned than other First Amendment organizations do, that
17 seems to have been rejected in that case.

18 The other issue that is before the Court is the
19 issue of whether plaintiffs have standing to invoke the
20 jurisdiction of the Court to declare this exemption
21 provision unconstitutional on establishment clause grounds.
22 This argument is set out in our brief. The cases say that
23 the proper inquiry is whether plaintiffs have a personal
24 stake in the outcome of the action and suffer an injury
25 which will be redressed by a favorable decision.

1 The procedural posture of this case in the court
2 below is crucial. This is plaintiff's motion for summary
3 judgment that is on appeal here. On plaintiff's motion for
4 summary judgment, the disputed facts are resolved against
5 the plaintiffs. One of the disputed facts in the district
6 court and the circuit court, and plaintiffs acknowledge it
7 here, is whether they are a religious organization.

8 Because summary judgment is involved, as a matter
9 of law on this motion, plaintiffs are not a religious
10 organization. This appeal concerns only the exemption
11 provision for religious organizations. Only religious
12 organizations are affected by it. Plaintiffs are not a
13 religious organization. They don't suffer injury from it.

14 QUESTION: Counsel, did the state treat the
15 plaintiffs as a religious organization originally by
16 initiating some kind of action? Was it not --

17 MR. SALUSTRO: This action was initiated by
18 plaintiffs in federal court. The action that we started in
19 state court we alleged that they were a charitable
20 organization and that they did not register, and therefore --

21 QUESTION: But did the state take the position
22 that it was a charitable religious organization governed by
23 the 50 percent?

24 MR. SALUSTRO: No, our pleading in state court
25 says that it is a charitable organization, and naturally it

1 is up to them if they decide that they are exempted because
2 of the religious exemption, it is up to them to raise that
3 point.

4 If this Court should strike down the exemption
5 provision for religious organizations, it will not as a
6 matter of law do plaintiffs any good in this case. We think
7 this is a clear case that there is no injury, there is no
8 redressability, and there is no standing.

9 I reserve whatever time I have.

10 CHIEF JUSTICE BURGER: Very well.

11 Mr. Fisher.

12 ORAL ARGUMENT OF BARRY A. FISHER, ESQ.,

13 ON BEHALF OF THE APPELLEES

14 MR. FISHER: Mr. Chief Justice, may it please the
15 Court, after 17 years with a charitable soliciation statute
16 like other states, categorically, neutrally, evenhandedly
17 exempting all churches, Minnesota amended its statute,
18 taking that exemption away from some but not other churches,
19 subjecting them to the statute's comprehensive regulatory
20 and licensing requirements, including extensive
21 recordkeeping, CPA certification, substantial record
22 filings, expenditure limitations, access, disclosure, and
23 publication of church documents, and an open-ended
24 nationwide investigation, all provisions, I think, which
25 comrehensively facilitate a sustained, detailed enforcement

1 audit as to what are bona fide religious expenditures,
2 solicitations and religions.

3 And the statute, Your Honors, arms the licenser
4 with broad investigative powers and provides for license
5 suspension, revocation, receivership, criminal prosecution
6 for enforcing this law and this regulatory scheme which
7 surely imposes burdens, substantial burdens on churches,
8 burdens which simply aren't remote or de minimis.

9 QUESTION: Mr. Fisher?

10 MR. FISHER: Yes, Your Honor.

11 QUESTION: You don't contend that a state couldn't
12 require some disclosure from all religious organizations
13 which seek to solicit funds, do you?

14 MR. FISHER: That is certainly not this case. I
15 think that it may, if it were evenhandedly applied to all
16 churches, may, depending on how it is done, pose some
17 entanglement problems possibly. But it is certainly not
18 this case, Your Honor.

19 QUESTION: Suppose the Exemption B, which is the
20 one that is at issue here, 309.515(b), suppose that were
21 just not in the law, and that all religious organizations
22 were covered under the charitable provision.

23 MR. FISHER: Again, then there would be
24 evenhandedness. There would not be a problem of neutrality
25 and evenhandedness, and there would be, I think, the

1 problems of entanglement that are addressed in --

2 QUESTION: You would say arguably then religious
3 organizations could not be treated the same as charitable
4 ones? Is that it?

5 MR. FISHER: I think also there would be the
6 problem that has been addressed by some of the questions
7 this morning respecting unequal treatment of churches
8 vis-a-vis other charitable organizations. Yes.

9 QUESTION: Don't you agree, though -- as I
10 understand it, churches can either -- they can raise -- any
11 church can raise up to \$10,000 without registering.

12 MR. FISHER: Yes.

13 QUESTION: But then they can also raise up to
14 one-half, up to 49.9 percent of their funding.

15 MR. FISHER: Correct.

16 QUESTION: Which other charitable organizations
17 can't do.

18 MR. FISHER: That's correct.

19 QUESTION: So they are given a better break.

20 MR. FISHER: Some churches are, and I think --

21 QUESTION: Well, some churches are, but they all
22 get the charitable -- all other churches are at least given
23 \$10,000 exemption.

24 MR. FISHER: That's correct. That's correct. I
25 think that this legislation which dose impose burdens on

1 those churches that it does apply to deserves the Court's
2 scrutiny, both as to the substantiality of the reason for
3 drawing any line at all treating churches unequally, saying
4 that some have to bear the onus of regulation and others
5 don't and the substantiality of the reason for drawing the
6 line where it is, and this close scrutiny, I suggest, is
7 called for by the establishment clause's core, most
8 essential principle of scrupulous intersectorian
9 evenhandedness between churches.

10 And what is the reason here for this disparate
11 treatment, this jerrymandering of churches? Your Honors,
12 absolutely no facts, no logic or reason I think explain this
13 disparate treatment. There is no mention whatsoever of any
14 reason for this in the legislative history, and strikingly,
15 absolutely, there is not a single mention whatsoever of any
16 purpose or reason for this law mentioned by appellants to
17 the court of appeals. Nothing. There is nothing in their
18 briefs, nothing in their argument.

19 It wasn't until the eleventh hour of this
20 litigation before this Court that in their briefs they start
21 positing possible explanations for this law, and it really
22 changes. If you look at the jurisdictional statement and
23 their opening brief and the reply brief, and particularly
24 Footnote 6 of their reply brief, you see changes. They are
25 grappling. There really isn't a purpose. There wasn't one.

1 QUESTION: Is there anything unusual about lawyers
2 going on in litigation and losing a case the first two
3 rounds and then deciding that they had better change their
4 approach to the problem?

5 MR. FISHER: Well, some would call that
6 admirable. I don't know. But I mean it underscores the
7 problem here of --

8 QUESTION: Admirable or not, it might be sensible,
9 might it not?

10 MR. FISHER: It might be, but I think it doesn't
11 work here. I think that the shifting around and the search
12 for a reason for this unequal treatment just doesn't work.
13 The premise of the reason which they give now, which is
14 member control, isn't supported by any logic, reason, or
15 facts here.

16 QUESTION: Mr. Fisher, how do you distinguish the
17 Gillette case?

18 MR. FISHER: Your Honor, I don't think that this
19 is the same as Gillette, nor -- even if it were --

20 QUESTION: Well, why?

21 MR. FISHER: Even if it were, Gillette's depth of
22 analysis, I think, would decide this statute's
23 unconstitutionality. The analysis in that case was
24 substantial, and not the appellant's proposed test here of
25 some one-dimensional application of a mechanical test, just

1 looking to see if you can find any secular purpose
2 whatsoever and then that is the end of the inquiry. That
3 isn't what the Court did, and if it was, or if the Court
4 were to adopt such a test, it would eliminate two-thirds of
5 the tripartite test in Lemon, a test which was -- brought
6 together all the extant strands of establishment clause
7 cases at that time and discussed them, didn't even mention
8 Gillette, nor has Gillette ever been mentioned by any
9 establishment clause case of this Court in the ten years
10 since decided.

11 It is just -- there is a complete analysis there
12 as to the justification for the underinclusiveness in
13 Gillette, including that the Congress went as far as it
14 could, accommodating free exercise, that the -- to go any
15 further would pose entanglement problems, and it would be
16 impossible to administer, and that the Court was deferring
17 to the government's overriding Article 1, Section 8
18 interests that were the basis of that legislation.

19 This legislation here is legislation regulating
20 churches on its face, directly. In Gillette, the Court also
21 pointed out that that was a law not on its face with
22 disparate de facto impacts. This is legislation saying that
23 some churches should be regulated, some shouldn't. The
24 legislature absolutely understood that there were churches
25 on both sides of the line or they wouldn't have amended the

1 law after 17 years.

2 QUESTION: I suppose you would make the same
3 argument if instead of 49.9 it was 90 percent.

4 MR. FISHER: There would still be --

5 QUESTION: If it exempts any church from
6 registration if it raises 90 percent of its funds from its
7 members.

8 MR. FISHER: I would be making the argument that
9 the differential treatment must be closely examined to see
10 what the reason is, whether it is 90 percent, 10 percent, or
11 50 percent.

12 QUESTION: Well, suppose the reason is that the
13 state thinks it is a good enough guarantee against fraud
14 because there is -- if it raises that much money from its
15 members who really know what is going on, that is a decent
16 enough safeguard.

17 MR. FISHER: Well, the problem there, Your Honor --

18 QUESTION: Well, that is a judgment, that is an
19 argument.

20 MR. FISHER: Yes, it's an argument, here not
21 supported, I think, by any logic, reason, or facts. I mean,
22 plainly, members of churches on one side of the line, those
23 supported by 50 percent member contributions, have no more
24 power and are no more likely to protect the public by
25 scrutinizing public solicitations and expenditures of moneys

1 collected from the public than are those churches on the
2 other side of the line.

3 QUESTION: What if the legislature had made
4 findings to that effect? I know you probably wouldn't agree
5 with them, but at least it would have been a legislative
6 judgment.

7 MR. FISHER: It would depend on what they were,
8 but here there is nothing. It just doesn't follow. Many
9 churches, as the Court well knows, are hierarchically
10 structured, non-democratic kinds of organizations, and just
11 mere membership accords nothing, and of course membership
12 isn't even defined in the statute. We don't know if this is
13 occasional congregants, true believers, card-carriers, or
14 what. I mean, there is no reference in here.

15 QUESTION: Well, would you agree that the
16 legislature would be entitled to think that most churches,
17 most churches raise their funds from within their own
18 membership? Would that be a reasonable starting point?

19 MR. FISHER: I don't know. Frankly, I don't think
20 so.

21 QUESTION: Don't you know whether that is a fact?

22 MR. FISHER: It isn't my belief.

23 QUESTION: No, do you know whether -- do you
24 suggest you don't know whether that is the fact?

25 MR. FISHER: I don't believe that it is.

1 QUESTION: Well, suppose the legislature started
2 with that premise, then, without respect to subjective
3 relief. Suppose the legislature said that.

4 MR. FISHER: Well, again, it would be a matter of
5 careful scrutiny. If there was just a categorical
6 statement, as there is an argument today, that this is a
7 fact, I think that the Court should examine that, and --

8 QUESTION: Well, now, I have changed it from fact
9 to premise. If that was the premise of the legislature,
10 that most churches raise their money from their members, and
11 as Justice White suggested, then the members are going to
12 conduct their own surveillance of the use of that money,
13 but that they are looking at people who claim religion
14 clause exemptions where perhaps they have 1 or 2 percent
15 raised from the membership and the balance raised from doing
16 what was done in the Hari Krishna case last year in this
17 Court, soliciting on the street and in public places.

18 Do you think the legislature would not be entitled
19 to address that problem?

20 MR. FISHER: Well, it is certainly entitled to
21 address the problem, but again, when it draws lines, putting
22 churches into different categories, we have to look to the
23 premise and the facts that support this differential
24 treatment, and if there was proof that there was
25 self-regulation, that satisfies part of the problem, but

1 there is another problem with this. There is no explanation
2 whatsoever for this odd jerrymander line that is tied to an
3 abstract proportion, that isn't related to the degree of the
4 effect on the Minnesota public at all.

5 You could raise tens of millions of dollars from
6 the Minnesota public, and there could be an enormous impact
7 on the public, but that church could be exempt, but one
8 collecting merely \$10,000 unmatched by member contributions
9 would be regulated, and there is just no correlation --

10 QUESTION: What about the procedural posture of
11 the case --

12 MR. FISHER: Yes, Your Honor.

13 QUESTION: -- where the state comes in and files a
14 complaint and says, we don't think this is a church at all,
15 it is a bucket shop operation, and you are just making a lot
16 of phone calls from a basement trying to raise money, and
17 you say, no, we are a religion, and we want summary judgment
18 on that basis. Do you think you are entitled to summary
19 judgment?

20 MR. FISHER: If we are talking about with respect
21 to this statute, which I assume we are, there is such an
22 allegation, it would depend on the normal rules of summary
23 judgment and their application to what is before that
24 Court. However, assuming that there was a dispute on that
25 fact, then on the establishment clause issue, I should

1 underscore that what Your Honor is suggesting is precisely
2 what the case is here.

3 The Eighth Circuit vacated summary judgment below,
4 and they remanded the case for a factual determination of
5 that merits issue as to whether the appellee is entitled to
6 an injunction. The case stands before this Court without
7 final order. It is an interlocutory matter at this time.
8 That determination will be made, and we don't disagree with
9 the making of that determination, and it might have been a
10 more expeditious thing if that is what appellants wanted had
11 they gone back to the district court then.

12 There is no question that the appellees have had
13 standing at every -- every proceeding of this case. So far
14 it has been properly alledged. There was even a preliminary
15 determination as a matter of fact on that very issue when
16 the court granted the preliminary injunction below.

17 QUESTION: What factors will be open on review in
18 the district court?

19 MR. FISHER: The factors open will be with respect
20 to the standing, and that is just one of some seven
21 different constitutional attacks to the statute that were
22 raised below, the district court finding it only necessary
23 to reach establishment clause, but the fact determination
24 will be a -- for the district court to make a final
25 determination of that which he may preliminarily, that is,

1 whether appellee is a church organization.

2 QUESTION: And if it is, then the statute is
3 invalid under the Eighth Circuit's --

4 MR. FISHER: Well -- if once that determination is
5 made a final order may issue in the case dealing both with
6 the law, which has been the matter of a determination by the
7 district court in the Eighth Circuit, and this question of
8 whether an injunction should issue with respect to this
9 particular organization.

10 QUESTION: Well, won't it just mean that that
11 particular exemption is unconstitutional?

12 MR. FISHER: That's correct.

13 QUESTION: So you will still be subject to
14 registration and disclosure.

15 MR. FISHER: Well, with this additional fact
16 determination, which the matter was remanded for the Court
17 depending on its ruling, assuming that it finds this
18 appellee a church organization --

19 QUESTION: Well, suppose it does.

20 MR. FISHER: -- will -- could enter an injunction
21 saying in addition this law cannot be applied.

22 QUESTION: Well, just that particular -- just
23 (d). Just Exemption (d). That is the one that
24 distinguishes between one church and another.

25 MR. FISHER: Right, but assuming that that is held

1 unconstitutional --

2 QUESTION: Yes.

3 MR. FISHER: -- then there will not be provisions
4 with respect to churches.

5 QUESTION: Why not? I thought the state says that
6 -- and I thought you conceded that a church, like anybody
7 else, can raise up to \$10,000. Exemption (a) exempts any
8 charity up to \$10,000.

9 MR. FISHER: Well, the holding of the --

10 QUESTION: But any charity that raises more than
11 that from the public has to register.

12 MR. FISHER: Well, the holding of the district --

13 QUESTION: Why doesn't that apply to a church?

14 MR. FISHER: Well, the holding of the district
15 court and the court of appeals was to find this statute
16 constitutionally inapplicable to churches, to any church,
17 because of the disparate treatment. It didn't extend the
18 statute taking away the exemption so that it applied.

19 QUESTION: The only thing at issue was Exemption
20 (d).

21 MR. FISHER: Well, but that exemption -- Exemption
22 (b).

23 QUESTION: (d).

24 MR. FISHER: The exemption that was --

25 QUESTION: Yes, (b). Excuse me. I am sorry, (b).

1 MR. FISHER: Yes, (b). The exemption --
2 QUESTION: That is the only one that is at issue,
3 isn't it?
4 QUESTION: But the relief granted was to extend
5 the exemption rather than to --
6 MR. FISHER: Yes, rather than make the
7 determination that the legislature would have if faced with
8 the option have taken away the exemption as to any church,
9 they -- it held that the statute could not be applied
10 constitutionally to any church.
11 QUESTION: Why isn't the validity of that relief
12 at issue here too?
13 MR. FISHER: Well, it isn't. It certainly hasn't
14 been raised in any pleading, and I don't believe it is.
15 QUESTION: Well, the judgment below is challenged.
16 MR. FISHER: It is challenged, but no one for
17 appellants has mentioned that in brief or in --
18 QUESTION: Well, isn't that needlessly destructive
19 of this statute --
20 MR. FISHER: No, I think to the contrary.
21 QUESTION: -- to say that no part of the statute
22 may apply to any church?
23 MR. FISHER: To take the exemption, I mean, to go
24 the other way and to take the exemption away from all
25 churches, making them all subject to this law, I think,

1 would even heighten, greatly heighten the entanglement
2 problems, and I think it --

3 QUESTION: Well, at least it would be treating
4 churches evenhandedly with all other charitable
5 organizations.

6 MR. FISHER: Well, I think that with all due
7 respect it may be better for a legislature to make the
8 determination that all churches are going to be regulated
9 than for a court to do that, and I think the legislative
10 history, scant as it is, and it is before the Court, makes
11 clear that the legislature did not want to, in the words of
12 one legislator, did not want to "mess around" with some
13 churches, and they were careful to make sure that this was
14 written in a way that would exclude the Catholic
15 Archdiocese, but on the other hand make sure that the
16 exemption was taken away from others. There are references
17 in the legislative history to that.

18 I don't think they intended to bring in the
19 Catholics and the Lutherans and the Protestants and the
20 other groups, but perhaps the Court could enter such an
21 order, but it would not be popular.

22 QUESTION: In the case of a federal court
23 reviewing a state statute, do you think it is entirely at
24 liberty if it concludes one portion of a statute is
25 unconstitutional to either strike down that provision or to

1 extend the provision in a way that it believes would make
2 the whole statute constitutional?

3 MR. FISHER: I think that the Court perhaps would
4 have that option. I think, though, in selecting an option
5 of relief, both the district court and the court of appeals
6 were correct in treating it the way they did, which put it
7 to a status quo, leaving the entire Charitable Solicitation
8 Act intact as it was extant until 1978, when this amendment
9 came in.

10 It also, I think, was perhaps judicious of the
11 district court to rule just on this one issue, because this
12 law was also challenged on free speech, standardless
13 licensing, vagueness, and many other issues challenging the
14 law across the board in its application to any charity or
15 religion or non-profit organization, and the court ruled
16 just very narrowly on the establishment clause issue,
17 leaving the rest of the statute intact and enforceable as to
18 others.

19 So, I mean, there are options.

20 QUESTION: Until they attack it.

21 MR. FISHER: Excuse me?

22 QUESTION: Until they attack it.

23 MR. FISHER: Yes, Your Honor. Yes. I just don't
24 think that there is any necessary correlation, as I was
25 saying before, between the amount of money that a given

1 organization collects from the public and the percentage of
2 that organization's total that comes from the public. A
3 million dollars can be 10 percent, 80 percent, 5 percent.
4 There is just no correlation. Your Honor, I think that --

5 QUESTION: No correlation with what?

6 MR. FISHER: There is no correlation between the
7 abstract proportion, this member-public contributions, and
8 correlation with the amount of money that is collected from
9 the public. In other words, looking at the ratio, if you
10 saw that it was 40, 60 percent or whatever, wouldn't tell
11 you anything about what the impact on the public is.

12 QUESTION: Well, I thought you had conceded in
13 response to Justice White's questions ten minutes ago, more
14 or less, that there is a certain assurance to the public
15 that if a large part, without putting a fixed figure on it,
16 if a large part of the support comes from the membership,
17 that then there is reasonable assurance that the
18 surveillance of the church's, the organization's activities
19 is ongoing. Do you suggest that is not a reasonable subject
20 of inquiry now?

21 MR. FISHER: No, I did not -- that may be a
22 reasonable subject of inquiry, to see if that is really
23 true, or you know, if it logically follows, or it follows as
24 a matter of fact. It is certainly not here. It is not
25 presented here. It is something that was thought of --

1 There just isn't anything in this case that --

2 QUESTION: It can be advanced in support of the
3 legitimacy of the legislation, may it not?

4 MR. FISHER: Yes, and I think that if it stands on
5 logic or reason, on its own, without requiring any facts,
6 then maybe the Court, you know, is free to embrace that, but
7 here it is completely speculative. I suggest that it isn't
8 true, that there is no reason to believe that a 49 percent
9 membership group as opposed to a 51 will have any more power
10 or access, any more inclination, any more desire, or will be
11 just more likely to have access to anything -- we are
12 talking about mere members -- than those on the other side
13 of the line.

14 I think it is interesting, too, that there was an
15 amendment, you could see, following the legislative history,
16 to, one, the treatment of groups other than religious, and
17 one regarding religious. The one regarding other than
18 religions said that to be exempt you have to have 100
19 percent come from members, but not just any members. They
20 must be real control members. They must be voting members.
21 And there was a provision for voting members in an early
22 draft of the religion one, and you know, that was taken out,
23 and it was taken out during a colloquy that said, you know,
24 if we leave that in as to voting members, that is going to
25 mean that the Catholic Archdiocese and other hierarchical,

1 non-democratically organized groups are going to lose
2 theirs, and we don't want to mess around with them, so we
3 had better take that voting requirement out.

4 So we know that it is just rank members, and we
5 don't even know, again, what that means in the context of
6 this statute. And I think that there is a -- this
7 legislative history gives particular reason for the Court's
8 close scrutiny, because I think there is an inherent
9 potential risk that by fashioning legislation that focuses
10 on churches, taking into account differences in membership,
11 organizational structure, funding sources, and what have
12 you, all matters, by the way, I think, which are
13 constitutionally sensitive inquiries, because they are often
14 dependent on church doctrine or how churches perceive their
15 mission, and what have you --

16 QUESTION: Mr. Fisher --

17 MR. FISHER: Yes, sir.

18 QUESTION: -- this statute wasn't aimed at
19 churches, period, was it?

20 MR. FISHER: This amendment --

21 QUESTION: It was aimed at charitable -- raising
22 funds for charity.

23 MR. FISHER: That's right. When it was enacted --

24 QUESTION: Well, I just -- I thought you had
25 forgotten that.

1 MR. FISHER: No. I mean, when it was initially
2 enacted 17 years before the amendment, it focused on
3 charities, just like other states have charitable
4 solicitation statutes. It is this amendment, which is
5 unprecedented in the country, save for the North Carolina
6 amendment, which was found unconstitutional by the North
7 Carolina Supreme Court in the Heritage Village case
8 recently. It is unprecedented, and I don't think there has
9 been a case before this Court where a legislature actually
10 sits down and decides that some churches are going to be
11 regulated and others aren't, and setting out some very
12 substantial regulatory burdens that some, but not others,
13 are going to have -- be saddled with.

14 QUESTION: You would agree, though, would you not,
15 that a state can properly pass a reasonable disclosure law
16 applicable to all churches who solicit funds from the
17 public? Would you agree with that?

18 MR. FISHER: Well, I agree that this is possible.
19 I suspect that it could very well raise potential free
20 exercise problems, some entanglement problems or what have
21 you, depending on what that disclosure is and to whom and
22 what have you. Certain things obviously are more sensitive
23 than others. Internal church documents regarding doctrine,
24 membership lists, and this sort of thing, depending on what
25 followup is attached to the disclosure -- there could be

1 substantial problems.

2 QUESTION: What about if the statute were confined
3 strictly to a church-sponsored retirement community?

4 MR. FISHER: Well, I think that when you are
5 talking about the jugular of the lifeblood flow of funds for
6 the church's support, you are talking about one thing, as
7 this statute talks about. When you are talking about the
8 charitable kinds of activities that churches often are
9 involved in, I think that that perhaps is another question,
10 and the -- this law, though, goes to the question of
11 regulating the church support fund question itself. Does
12 that answer the question?

13 QUESTION: Yes.

14 MR. FISHER: Again, I think that the legislative
15 history dramatically illustrates the potential risk when
16 there is line drawing that the legislature may be subject to
17 kind of -- more likely to be influenced by the result or the
18 effect of where they draw the line, and I think that there
19 are some seven references in the legislative history to
20 let's make sure about the Catholic Archdiocese. On the
21 other hand, let's make sure that we get the people at the
22 airports, and -- and there is one comment that I think is
23 right on, the heart of the matter, by a Senator Celoff, who
24 says, let's make sure -- I mean, that this applies to those
25 institutions that are not substantial institutions in our

1 state, and there is also a reference to something like, why
2 are we so hot to get the Moonies? I mean, there -- and
3 there isn't anything else. I mean, there is nothing that
4 tells you the reason for the legislation or anything, but
5 when it gets down to where to draw the line, there is some
6 concern, and I think that that just is more reason why the
7 Court should give this close scrutiny.

8 QUESTION: In your view, is there any line that
9 could be drawn by the legislature that would sustain the
10 constitutionality of the Act?

11 MR. FISHER: I think that if --

12 QUESTION: In place of the 50 percent.

13 MR. FISHER: Well, the problem with the 50 percent
14 is that there is just nothing that supports it in fact or
15 logic. If there were, if there were findings and studies
16 where it really was shown that there was control by the
17 public, then it would be a harder case if and only if there
18 was some sort of real tying of the line to the impact on the
19 public. In other words, here you have an abstract
20 proportion that doesn't -- really isn't correlated, doesn't
21 really relate to how much money is really being taken from
22 the public, because your interest is the public. If it did
23 have some sort of a figure, and there were findings that
24 some kinds of groups would take care -- that would be able
25 to self-police, to self-manage their solicitation practices

1 and their uses of --

2 QUESTION: Let me get back to the question. Is
3 there a line that would be constitutional, in your view?

4 MR. FISHER: Well, there might be. There might
5 be. I am not --

6 QUESTION: Ten percent, 25 percent, 33 and a third
7 percent?

8 MR. FISHER: Well, again, I am saying it is
9 possible, but it would depend on a real showing of, you
10 know, a meaningful line drawing that -- where there is a
11 legitimate reason for distinguishing. I think in many of
12 the Court's cases where such line drawing may have been
13 allowed -- I mean, Gillette allowed some under
14 inclusiveness. I mean, there was analysis. There were
15 reasons for upholding this, and I just don't think that
16 there are here, and that is really the crux of the matter.
17 I mean, there is just nothing that really supports a lack of
18 evenhandedness. In the Krishna case, in Hefron, I mean,
19 that was evenhandedness. That was treating -- the problem
20 there was that the Krishnas perhaps were seeking some
21 special treatment.

22 QUESTION: Wasn't the argument made when that
23 Minnesota case was here?

24 MR. FISHER: Well, no. But that would have been
25 perhaps the effect, and it was conceded, I think, in that

1 case by counsel, that they really didn't -- in that
2 particular case they shouldn't have a claim of special
3 treatment, but that would have been the effect, I think, of
4 a ruling, and the Court said this was a rule being
5 evenhandedly applied to everyone, the Booth requirement.

6 QUESTION: Well, I get back to Justice O'Connor's
7 question. Suppose there weren't any 50 percent limitation
8 here at all, just a complete requirement of reporting by
9 every church. Would you object?

10 MR. FISHER: Well, first of all, there is more
11 than just reporting here, but assuming that there was
12 evenhanded treatment, neutral treatment, then I think that
13 there would not be a neutrality problem, as we have argued,
14 but there would be an entanglement problem. There would be,
15 I think --

16 QUESTION: In what respect? All they have to do
17 is file reports, period.

18 MR. FISHER: Well, that is not this --

19 QUESTION: Forget about all the other fringe
20 material which is in the statute.

21 MR. FISHER: Right. Okay. Well, that fringe
22 material makes it plenty more than just disclosure. If it
23 did, I think it would be obviously a much more difficult
24 case.

25 QUESTION: Well, I would like you to address

1 Justice O'Connor's question, which I think you still haven't
2 answered.

3 MR. FISHER: Yes, Your Honor.

4 QUESTION: And that is, as I recall it, whether
5 you would find unconstitutional a neutral reporting statute
6 without any percentage limitation in it.

7 MR. FISHER: Without seeing it, but giving an
8 answer, a yes or no, I would say I would not find that
9 constitutional. I would still have a problem with that,
10 even that type of law.

11 QUESTION: Well, the court below indicated that it
12 would uphold exempting any organization, including a church,
13 if it raised all of its money from its members.

14 MR. FISHER: That also would be a more difficult
15 case.

16 QUESTION: But that would distinguish between
17 churches, those that raise all their money from members and
18 churches that don't raise all their money from members.

19 MR. FISHER: That's correct. That's correct.

20 QUESTION: So you would disagree with the court
21 below in that respect?

22 MR. FISHER: I have problems with that, yes.

23 QUESTION: Well, but if the court below, though,
24 it seems to me, would have sustained the law if it
25 distinguished between churches on that basis, and yet they

1 disagreed if the legislature made it 50 percent.

2 MR. FISHER: I think the court was grappling for
3 what is an answer in this area, and it is a difficult
4 question.

5 Thank you.

6 CHIEF JUSTICE BURGER: Mr. Solicitor, you have one
7 minute left.

8 ORAL ARGUMENT OF LARRY SALUSTRO, ESQ.,

9 ON BEHALF OF THE APPELLANT - REBUTTAL

10 MR. SALUSTRO: The argument has been made here
11 that our provision, the criteria has to be supported by a
12 factual inquiry. What was done below was, on summary
13 judgment, this provision was declared facially
14 unconstitutional as to all religious organizations. It is
15 not up to us on their motion for summary judgment to supply
16 facts that support our criterion and the 50 percent part of
17 it.

18 Furthermore, in their brief, they have
19 acknowledged that this statute has a rational basis, on Page
20 23 of their brief. That is the standard that comes out of
21 Gillette. If there is a secular criteria, if there is no
22 religious jerrymandering in the exemption, all we need is a
23 rational basis. There is a secular criterion here. There
24 is no jerrymander here. And there isn't a jerrymander
25 because of these references to legislative history and what

1 the Catholics thought and what the Moonies were doing.

2 In fact, if you go through that material you will
3 find there was a Catholic organization, the Pallatine
4 Mission, that was the reason for this legislation, because
5 they were a direct mail organization. There is no attempt
6 here to separate organizations by who is controversial and
7 who is not, who is traditional and who is not.

8 Controversial organizations like the Church of Scientology,
9 the Jonestown Peoples' Temple, those organizations are
10 exempt. Traditional organizations like the Pallatines or
11 Billy Graham Crusade, those organizations are not exempt.

12 This does not cut across controversy. This is not
13 a religious jerrymander. We only need a rational basis.

14 Thank you very much.

15 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
16 case is submitted.

17 (Whereupon, at 11:04 o'clock a.m., the case in the
18 above-entitled matter was submitted.)

19

20

21

22

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

JOHN R. LARSON, ETC., ET AL vs. PAMELA VALENTE, ET AL. #80-1666

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY

Deane Hammond

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'981 DEC 16 AM 10 18