

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1506

TITLE FEDERAL ELECTION COMMISSION, ET AL., Petitioners
v.

PLACE NATIONAL RIGHT TO WORK COMMITTEE, ET AL
Washington, D. C.

DATE November 1, 1982

PAGES 1 thru 59



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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 FEDERAL ELECTION COMMISSION, ET AL, :
4 Petitioners :
5 v. : No. 81-1506
6 NATIONAL RIGHT TO WORK COMMITTEE,
7 ET AL :

8 - - - - -x
9 Washington, D.C.
10 Monday, November 1, 1982

11 The above-entitled matter came on for oral argument
12 before the Supreme Court of the United States at
13 11:44a.m.

14 APPEARANCES:
15 CHARLES N. STEELE, ESQ., General Counsel, F.E.C.,
 Washington, D.C.; on behalf of the Petitioners.
16 RICHARD H. MANSFIELD, III, ESQ., Washington, D.C.; on
17 behalf of the Respondents.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
CHARLES N. STEELE, ESQ., on behalf of the Petitioners.	3
RICHARD H. MANSFIELD, III, ESQ., on behalf of the Respondents.	27

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Federal Election Commission against the National
4 Right to Work Committee. Mr. Steele, I think you may
5 proceed whenever you're ready.

6 ORAL ARGUMENT OF CHARLES N. STEELE, ESQ.

7 ON BEHALF OF THE PETITIONERS

8 MR. STEELE: Mr. Chief Justice, and may it
9 please the Court:

10 This case involves the scope and effect of the
11 provisions of the statute which regulates the
12 participation of corporations and labor organizations in
13 the financing of federal election campaigns.

14 The case was brought by the Federal Election
15 Commission against the National Right to Work
16 Corporation saying that it had violated the prohibitions
17 on the use of general corporate treasury funds. The
18 facts are largely uncontested. They were found by the
19 district court below; none of them were reversed as
20 erroneous by the court of appeals.

21 The district court found that the -- under
22 Virginia law, corporations are offered a choice as to
23 whether they wish to become membership corporations or
24 non-membership corporations. Virginia law specifically
25 provides that the articles of incorporation must set

1 forth that fact, whether you are a member -- if you are
2 a non-membership organization it sets that forth, and if
3 you are a membership organization that you're not.

4 The National Right to Work Committee organized
5 itself under these laws, set itself forth in its charter
6 and in its bylaws and in its formal papers as being an
7 organization that had no members. It's not a membership
8 organization.

9 The corporation was also organized under
10 501(c)(4) of the Internal Revenue Code as an educational
11 organization involved in combatting what it refers to
12 compulsory unionism.

13 The district court also found that with regard
14 to this organization that its basic method of receiving
15 funds was to rent mailing lists, obtain mailing lists.
16 From these mailing lists they would send out large
17 mailings. These mailings included several items. The
18 first item would be an article about compulsory
19 unionism and the viewpoints on it.

20 Included therein was -- again, the record is
21 full of examples of these, and in summarizing them,
22 there are some differences. But the basic format was
23 that there would be an article on the effects of
24 unionism, compulsory unionism, frequently reprinted from
25 a magazine. With it would be a questionnaire asking

1 questions of the people to whom these mailings went as
2 to whether they agreed with various questions about the
3 effect of these laws, various right to work laws, of
4 various labor laws that were pending in front of the
5 Congress, and there would be a request or a donation, or
6 sometimes called a gift or a contribution to support the
7 mailing out of these materials, to support in the fight
8 against these particular bills, and would seek funds.

9 Also, frequently there would be a request to
10 engage in what is called legislative action in the
11 record. Legislative action is taken as a term defined
12 therein to send in comments to legislators, and there
13 would often be appeals for that kind of mailings to
14 legislators.

15 There was no -- as the district court found,
16 there was no reference in any of these materials to
17 membership in the organization, no setting forth of any
18 requirements for membership, no invitation to join in
19 membership; solely, the request for funds.

20 There were also several other factors that the
21 district court looked at. It looked at the fact that
22 there was nothing set forth as to how these people would
23 terminate their so-called membership. In this case, the
24 court set forth the determination was something that was
25 solely determined by the National Right to Work

1 Committee.

2 The court of appeals disturbed none of these
3 findings. In fact, the court of appeals' interpretation
4 and what the Commission believes to be a very important
5 statutory issue was based on the findings, but went to
6 the scope and effect of the basic prohibitions. And
7 that scope and effect involve the question of statutory
8 interpretation. It's clear that the court of appeals,
9 in its interpretation, felt that that interpretation was
10 illuminated certainly by constitutional considerations,
11 which it certainly is, but basically was a question of
12 the scope of the statutory history.

13 To review that statutory history, I would note
14 first that under the Federal Election Campaign Act there
15 are two forms, two basic provisions. One, Provision
16 441b, which was the former U.S. 610, governs
17 corporations and labor organizations. There are other
18 general provisions first enacted in 1971 governing
19 political committees as a whole and their operation.

20 And as we have noted in our brief, we think
21 that this structure was reviewed by this Court in the
22 California Medical Association case two terms ago, and
23 that basically, what was set forth there is that
24 Congress, in attempting to legislate for the purpose of
25 controlling the effect on the electoral process, is

1 entitled to make certain kinds of judgments.

2 The basic judgment that Congress made long,
3 long ago was that corporations -- and then in 1947 labor
4 organizations -- presented a different case; a special
5 case, a greater danger to the electoral process.
6 Consequently, the initial actions of the Congress in
7 1907 were to ban totally contributions by corporations.

8 Through a process which I know this Court is
9 familiar with and which, as a matter of history, would
10 take me a long time to recite, there was an expansion of
11 that. In 1947 Congress, feeling that the definition of
12 contributions had allowed certain expenditures to be
13 made which were, for all practical purposes, the same as
14 contributions, broadened the definition to include
15 expenditures.

16 But basically, corporations and labor
17 organizations were regulated by a statute which
18 prohibited them generally from making expenditures that
19 would reach outside of them, to affect the general
20 public, to affect the general electorals, but were --
21 under the decisions of this Court and of the Congress in
22 amending the statute -- were permitted to make
23 expenditures for communications to their members. And
24 most prominently, first by interpretation of this Court
25 and then effectively enacted in 1971 by the Congress,

1 were allowed to establish, maintain and pay for the
2 solicitations to a separate segregated fund, and those
3 solicitations were limited to its members.

4 In effect, what the statute controls is the
5 use of the corporation's funds or the labor
6 organization's funds.

7 Finally, in 1976, in relation to this case,
8 there was an amendment known as the Allen Amendment.
9 When the Congress convened to act on the statute after
10 this Court's decision in Buckley versus Valeo, it
11 inserted several provisions with regard to then 610. As
12 this Court probably knows, it moved it from the criminal
13 sections of 18 USC to the Title II and turned it to a
14 civil statute.

15 But with regard to this case, they enacted a
16 provision which said that for a membership corporation,
17 the statute if read to bar it from soliciting its
18 members would prohibit it from dealing with those people
19 who basically make up the corporation. Consequently,
20 Senator Allen proposed and Senator Cannon, who was
21 managing the bill on behalf of the proponents of the
22 bill, agreed that that amendment really corrected a
23 basic deficiency in the statute. I don't know if
24 deficiency is too strong a word, but basically, without
25 that amendment, it was a clarifying amendment to make it

1 clear that for those people who were the members of the
2 corporation, that they would be allowed to do the same
3 solicitation as they would to shareholders.

4 As we have set forth in our brief, we think
5 that the legislative history of that shows that the
6 purpose of Congress there was to deal with members for a
7 membership corporation in much the same way that it had
8 dealt with shareholders for a stock corporation or for
9 members in unions, as the specialized case of membership
10 organizations that the Congress has legislated specially
11 for them.

12 Senator Allen, who was the proponent, spoke of
13 it in those terms; spoke of it as supplying a
14 deficiency, as remedying an omission in the bill that
15 would otherwise not make it clear.

16 The question, then, on which the court of
17 appeals disagreed with the district court and the
18 Commission, was the interpretation of that term, of the
19 membership organization which is incorporated. It said
20 that the scope and effect of that must be to allow a
21 corporation to solicit anyone who has expressed through
22 various means a political affinity with the goals of the
23 organization.

24 The court of appeals' opinion rested on the
25 feeling that there would be interference with

1 associational rights if such solicitations were not
2 allowed. As we have indicated in our brief, we consider
3 that the focus of the statute is not on the solicitation
4 but is on the flow of corporation money.

5 The National Right to Work Committee here,
6 having established a separate, segregated fund, is
7 permitted under the statute to pay for all of the costs
8 involved in that fund. Those involve all of the costs
9 of establishing and maintaining, setting it up,
10 incorporating if it is incorporated. If it's not, the
11 articles for it. All of those matters.

12 QUESTION: Mr. Steele, I take it from your
13 brief that it's 441b(4)(C), is it, that contains the
14 exemption that was construed by the court of appeals?

15 MR. STEELE: Yes, it is.

16 QUESTION: What is the precise operative
17 language of 441b that would prevent these people from
18 doing what they seek to do if it weren't for the
19 441b(b)(4)(C)?

20 MR. STEELE: Again, the structure of the
21 statute is that 441b, the prohibition is contained in
22 441b(a). When you said the citation you said b --
23 there's a double b there. It's 441b(b)(4)(C). The
24 prohibition is set forth in 441b(a).

25 QUESTION: Well, which line or which clause of

1 (a) sets forth the prohibition against what these people
2 are trying to do?

3 MR. STEELE: The prohibition is that of making
4 a contribution or expenditure in connection with any
5 federal election. That has been -- within the
6 provisions of b(b), what has been exempted from that
7 broad original provision --

8 QUESTION: Okay. But I don't want to get to
9 the example. You say that in seeking to solicit money
10 from these people that are circularizing, they are,
11 what, accepting a contribution for an election?

12 MR. STEELE: The corporation is making an
13 expenditure; it is expending the corporate funds for the
14 purpose of the solicitation. In other words, that the
15 prohibition is against using that money, that corporate
16 treasury money, to make an expenditure to go forth and
17 seek contributions which would come directly to the
18 corporation. It can set up a political fund which can
19 do that, but --

20 QUESTION: So that now the complaint is the
21 expenditure of this membership corporation or a
22 membership corporation's assets to undertake the
23 solicitation.

24 MR. STEELE: The solicitation is permitted in
25 the exceptions if it is two member, so the question

1 revolves around the question of whether they are members
2 or not. But yes, that is -- the prohibition is against
3 the expenditure by a corporation of funds to solicit the
4 general public, in effect.

5 QUESTION: And the exception to that
6 prohibition applies only if the solicitation is of
7 members.

8 MR. STEELE: Yes. So that the critical
9 question in the court of appeals' decision was what is
10 the definition of members as intended by Congress. And
11 what purpose does that serve. They felt that there was
12 no valid purpose there. Again, the underlying purpose
13 served by that is the use of the corporation's funds for
14 large-scale use in federal elections. The structure has
15 been designed in that fashion.

16 I would note, as I started to, that there is a
17 separate regulatory scheme for political committees
18 overall, which this Court considered in the California
19 Medical Association case, which limits anyone else to a
20 contribution stated in dollar terms of \$5000 to a
21 political action committee.

22 QUESTION: Mr. Steele, is this the precise
23 language in 441b(a) or for any corporation, whatever, or
24 any labor organization, to make a contribution or
25 expenditure in connection with any election at which a

1 presidential and vice -- and if not, what is?

2 MR. STEELE: That is the operative language.

3 As I say, that operative language was clearly interpreted
4 throughout the history of the statute as prohibiting the
5 expenditures out to the general public. In the CIO
6 case, this Court was faced with the question of whether
7 that statute could be read or should be read to prohibit
8 expenditures that were made for the purpose of
9 communicating with, in that case, the members of a labor
10 organization, but by parallel, with the stockholders of
11 a stock corporation.

12 So that that phrase, by that interpretation
13 and by this Court's interpretation also in Pipefitters,
14 is clearly meant not to allow a corporation to make
15 those kind of expenditures out to the general public; to
16 solicit broadly for purposes either to get in funds to
17 give to candidates, or to make expenditures that would
18 tout them on radio or whatever.

19 QUESTION: Mr. Steele, I suppose there could
20 be less restrictive ways of addressing the problem.
21 Congress could, for instance, just prohibit the
22 expenditure by the corporation of no more than X number
23 of dollars for the purpose, could it not, rather than
24 prohibiting any solicitation of its supporters?

25 MR. STEELE: I think that that could be done.

1 I think the question would be somewhat -- is that less
2 restrictive or more restrictive, because if you had a
3 dollar amount that might not reflect the size of the
4 corporation. So I think that Congress, in dealing with
5 that question, dealt with it in somewhat different
6 terms, but basically dealt specifically with the
7 expenditures by the corporation for those kinds of
8 expenses.

9 QUESTION: Well, they could have left the
10 statute the way it was, before 76.

11 MR. STEELE: They could have. Before 76, -- I
12 mean, in 76 what they felt was -- at least with regard --

13 QUESTION: That corporations should be able to
14 spend some of its money for solicitation, subject to some
15 limitation.

16 MR. STEELE: But that solicitation was only
17 for its --

18 QUESTION: Yes.

19 MR. STEELE: Its shareholders. I agree
20 Congress could have left the statute as it was.

21 CHIEF JUSTICE BURGER: We'll resume there are
22 1:00 o'clock. And would you, at least for me, address
23 the Bellotti case at that time.

24 (Whereupon, at 12:00 p.m., the oral argument
25 in the above-entitled matter was recessed for lunch, to

1 reconvene at 1:00 p.m. the same day.)

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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE BURGER: Mr. Steele, you may
4 continue.

5 ORAL ARGUMENT OF CHARLES N. STEELE, ESQ.

6 ON BEHALF OF THE PETITIONERS -- Continued

7 MR. STEELE: If I might pick up where I left
8 off before the lunch break and take advantage of the
9 Chief Justice's invitation to discuss the Bellotti case,
10 I would like to note first that what is here is a case
11 in which there is not challenged the basic prohibition
12 of 441b on corporate expenditures.

13 The National Right to Work Committee, as a
14 corporation, admits and agrees that it comes under that
15 provision and indeed, takes the benefits of that
16 provision, the ability under that provision to provide
17 for the support of a committee. They do not challenge
18 the overall prohibition. What they challenge is the
19 interpretation of the subsection.

20 I might -- I'm not sure, Mr. Justice
21 Rehnquist, whether my response to you was as helpful as
22 it might have been in discussing --

23 QUESTION: I can't answer that now.

24 (Laughter.)

25 MR. STEELE: Well, in discussing the

1 prohibitions of the statute, I alluded to the overall
2 provision in 441b(a). In 441b(4), it starts off with
3 repeating the basic prohibition which is at issue here
4 in the subsection. That's at page 59a of the Petition
5 for Writ of Certiorari. But 4(a) says except as
6 provided in subparagraphs b, c and d, it shall be
7 unlawful for a corporation, or its separate, segregated
8 fund, to spend monies to solicit contributions to people
9 other than stockholders' employees.

10 QUESTION: It seemed to me that 441b(4)(i) was
11 a good deal closer to a precise proscription than the
12 more -- what I thought was the more general language in
13 441b(a).

14 MR. STEELE: I think that's correct, and that
15 is really what is at issue in this case, and that's why
16 I think by dwelling only on the broad prohibition. You
17 have here the specific prohibition on a corporation or
18 its separate, segregated fund, from soliciting
19 contributions to such a fund from persons other than.
20 (C) is the one that is specifically at issue here,
21 because it says except for b, c and d -- and c is the
22 one that goes to membership --

23 QUESTION: Do you think Congress intended to
24 do other than have a paraphrase in subsection (4) of the
25 more general language in 441b? Do you think Congress

1 meant to tighten up that language in subsection (4)?

2 MR. STEELE: I think not. I think that what
3 they did in 1976 was to expand on the class of people
4 that could be solicited, but the language in (4) was
5 itself just spelling out rather than changing anything.
6 In other words, what they spelled out was what the
7 exceptions to the broad prohibition were. And as
8 Justice White said, I think in 1976, what they did was
9 to expand the class for a new -- for membership
10 corporations to allow them to solicit members. But the
11 prohibition I think was basically the same as it had
12 been prior to that.

13 In any event, with regard to the Bellotti
14 case, I think that there are several distinctions. I
15 think, as I started to say, most notably not challenged
16 here is the overall prohibition. They agree that they
17 come under the prohibition. And in effect, this is
18 almost a case that is like a mirror image of the
19 California Medical Association case where they asserted
20 the right to solicit throughout, broadly through the
21 general public; also asserted the right that a political
22 committee would have to give to many political
23 committees. But argued to this Court that they should
24 also be allowed to take advantage of the provisions in
25 441b which allow for administrative support.

1 This is somewhat the mirror image. This is a
2 case in which they are arguing that they should be
3 allowed the restriction, which is the restriction to the
4 class, while still taking advantage of that portion of
5 the statute which allows them to spend the corporate
6 treasury funds to support that fund. So that you have a
7 situation where they really don't really contend that
8 the overall statute is unconstitutional. They contend,
9 for constitutional reasons, that the congressional
10 exception must be broadly construed to allow them to
11 solicit anyone who has a similar political philosophy,
12 in the phrasing of the court of appeals.

13 QUESTION: Well, you certainly don't need to
14 get to the constitutional considerations to pose the
15 issue of what does a membership mean.

16 MR. STEELE: No, you certainly do not.

17 QUESTION: And would you be here arguing if
18 they had -- I think you probably would, but would you be
19 here arguing if the corporation had said that anybody
20 who -- in their initial solicitations they said anybody
21 who gives us \$5.00 is a member.

22 MR. STEELE: I don't know whether they would
23 have challenged that. But --

24 QUESTION: Well, suppose they, in their
25 initial circulation, said anybody who gives us \$5.00 is

1 a member. And then they wanted to solicited everybody
2 who had given them \$5.00. Solicit them for political
3 contributions.

4 MR. STEELE: No, I think --

5 QUESTION: Now, there is a definite
6 intra-organization definition of membership.

7 MR. STEELE: No, certainly in that sense, if
8 they had an externalized offering --

9 QUESTION: You wouldn't be here, right?

10 MR. STEELE: I don't think we would be here if
11 they had what we would consider a genuine membership
12 structure. But here, --

13 QUESTION: Now, they didn't say that when they
14 initially solicited it, but everybody who gave them
15 anything, they sent a membership card to. So why not --
16 de facto, at least, didn't they have a policy of making
17 everybody who gave them any money a member?

18 MR. STEELE: I don't think that they did
19 because --

20 QUESTION: What do you mean? Do you challenge
21 the fact that they sent them a membership card?

22 MR. STEELE: They sent them a piece of paper
23 at the end of the year at the end on the renewal saying
24 we want you to renew your membership.

25 QUESTION: Well, nevertheless, they recognized

1 them as members.

2 MR. STEELE: But when they solicited them,
3 they never told them that they were soliciting them for
4 membership.

5 QUESTION: That may be so. But they suddenly
6 discovered that people who gave them -- we suddenly
7 discover we were members. So this is a policy of the
8 organization.

9 MR. STEELE: A policy of the organization I
10 think is a strong statement of it. They have then
11 decided to solicit people who --

12 QUESTION: So if they put a little footnote to
13 their initial soliciation, by the way, anybody who gives
14 us money is a member. Just about eight or nine words.
15 That would have made all the difference in the world.

16 MR. STEELE: I think that the Commission in
17 its opinions has said that you have, at the very least,
18 to have that. If you are within a state law you have to
19 be organized as a membership fund --

20 QUESTION: Well, would you have to have
21 anymore or not?

22 MR. STEELE: In the Commission's view, you
23 would have to have a voluntary acceptance of that. In
24 other words, that you would have to have --

25 QUESTION: Well, a voluntary acceptance in the

1 sense that if you have that footnote and the guy sends
2 in his money, he has accepted membership.

3 MR. STEELE: That you not only have to have
4 that -- and in a knowing sense, that people know that.
5 And the reason I quibble with that is whether a footnote
6 at the bottom said this makes you a member, as opposed
7 to an invitation, we would like you to join as a member,
8 would raise questions in my mind as to whether the
9 membership was a voluntary, knowing decision. Because
10 the entire premise of the Commission's regulations is
11 that there are requirements for membership and that
12 those be made known to those people that come forward.

13 I would add that in addition to that, the
14 Commission feels that there has to be some measure of
15 rights and obligations coming to the members. That what
16 Congress was here seeking and what the history of the
17 amendment in 1976 says, is that it was a parallel to the
18 shareholder and member definitions for unions and
19 corporations, and that you have some form of fiduciary
20 relationship; something comparable to the fiduciary
21 relationship there. That you have some kind of --

22 QUESTION: You don't suggest that it was
23 illegal under state law for the corporation to treat
24 these people as members.

25 MR. STEELE: Not if they organized themselves

1 as a membership corporation.

2 QUESTION: Well, that isn't my question. So I
3 take it you say that they -- was it consistent with
4 state law or not, to treat these contributors as members?

5 MR. STEELE: They don't have members under
6 state law. It would be consistent in the sense that --

7 QUESTION: All right. So it is illegal for
8 them to treat anybody as a member.

9 MR. STEELE: Well, they would have to give
10 them notice of annual meeting. They would have to give
11 them, under the Virginia law, they would have to give
12 them the rights of members in a membership organization
13 --

14 QUESTION: So your answer to my question is
15 under the state law they were not permitted to treat
16 these people as members.

17 MR. STEELE: Not without constituting
18 themselves a membership organization, which carries with
19 it certain obligations to its members.

20 QUESTION: And they didn't.

21 MR. STEELE: And they did not.

22 QUESTION: Mr. Steele, I wonder how confident
23 you are of that answer. Where I practiced -- and I have
24 understood it's a fairly doctrine in the States -- they
25 have the doctrine of de facto corporations. A bona fide

1 attempt to incorporate, a certain amount of formalities
2 complied with, and the state would treat you as a
3 corporation. Do you know that Virginia would not have
4 treated these people as a corporation on the basis of
5 what they actually did?

6 MR. STEELE: No, I do not. What I was saying
7 is that under Virginia law, if you have members, you
8 have obligations to them. And where --

9 QUESTION: And are you saying you're also
10 obligated to say that you are a membership organization?

11 MR. STEELE: That's the third requirement.
12 The articles of incorporation have to say, one, your
13 name; two, your purpose; three, whether you're a
14 membership corporation, and if you're not a membership
15 corporation state that; four, if you are a membership
16 corporation, state that and what classes of membership
17 you will have. And there are certain other requirements
18 that flow from Virginia law; most prominently, notice --

19 QUESTION: And what did these articles provide?

20 MR. STEELE: These articles provided that they
21 were not a membership organization.

22 QUESTION: Mr. Steele, if your restriction as
23 to membership is agreed to, then I guess we get to the
24 constitutional question, do we?

25 MR. STEELE: Certainly, the court of appeals

1 seemed to have constitutional questions underlying it
2 that --

3 QUESTION: But isn't there a constitutional
4 question here on the premise of your interpretation of
5 membership?

6 MR. STEELE: Well, I think it's really a
7 question of -- I mean, the constitutional question in
8 the sense that if Congress did make that limitation, is
9 there something that prohibits that.

10 QUESTION: Well, what's the governmental
11 interest in that limitation?

12 MR. STEELE: Well, the governmental interest I
13 think, once again, is in distinguishing between the
14 overall statute where you have a prohibition on
15 corporations with the exceptions in between, that
16 there's an underlying governmental purpose there of
17 controlling the corporation's expenditures, the amounts.

18 QUESTION: How does this membership
19 restriction further those interests?

20 MR. STEELE: It furthers it in the same way
21 that -- it's a quid pro quo. It furthers it in the same
22 way that the restriction to shareholders with regard to
23 a stock corporation furthers that law. It allows the
24 corporation, which Congress wishes to control in a
25 certain way, to communicate with those people that make

1 it up, in the terms of the legislation, that make up the
2 corporation. So it's a parallel and it serves the same
3 restriction. It deals with the financing by the
4 corporate body or by the labor organization.

5 QUESTION: No less restrictive way of doing it
6 than this?

7 MR. STEELE: Well, in regard to Justice
8 O'Connor's question, it might be less restrictive if
9 Congress said no corporation shall send more than \$5000
10 in soliciting anyone, and put them under that
11 restriction that was the one in Calpak. But again, I
12 think that Congress has made a balancing here between
13 two types of restrictions, and less restrictive seems to
14 be a conclusion in that sense. They have balanced here
15 the two interests.

16 QUESTION: Mr. Steele, if we have to reach the
17 constitutional issue, which I would suppose we would if
18 we accept your definition of membership, wouldn't
19 resolving that question almost resolve the
20 constitutionality of the pre-1976 situation with respect
21 to membership corporations?

22 MR. STEELE: I would think it might. I'm not
23 sure I follow. If you reach the constitutional
24 question, the argument would be, it seems to me, that
25 the Constitution --

1 QUESTION: If you say -- and then the question
2 is well, how does this restriction serve the purposes of
3 the statute, answering those questions could easily
4 resolve the constitutionality of the general restriction
5 with respect to membership corporations.

6 MR. STEELE: I suppose in that sense that it's
7 implicated here. On the other hand, they don't
8 challenge it because they are -- in other words, if
9 there was an overall prohibition on them but they don't
10 challenge --

11 QUESTION: If that's the case, then, if you
12 would sustain the general prohibition with respect to
13 membership, wouldn't you necessarily have to sustain
14 this one?

15 MR. STEELE: In that sense, yes, it is
16 implicated. I would reserve the rest of my time for
17 rebuttal.

18 CHIEF JUSTICE BURGER: Mr. Mansfield.

19 ORAL ARGUMENT OF RICHARD H. MANSFIELD, III, ESQ.

20 ON BEHALF OF THE RESPONDENT

21 MR. MANSFIELD: Mr. Chief Justice, and may it
22 please the Court:

23 The whole FEC argument in this case is based
24 upon one premise and one assumption, an assumption which
25 only this Court now at this stage has realized and made

1 the FEC answer, and that is: almost every argument that
2 it makes states that the individuals that the National
3 Right to Work Committee solicited in 1976 for
4 contributions to its PAC were not its members. Never
5 has the FEC looked into and defined what a member is for
6 the terms of the Act.

7 The Act itself, the statute itself and the
8 regulations promulgated under the statute --

9 QUESTION: They certainly have taken the
10 position that these people are not members.

11 MR. MANSFIELD: They do.

12 QUESTION: So they defined it to that extent.

13 MR. MANSFIELD: Only to the extent where on
14 the public record the Federal Election Commission has
15 stated it knows what a membership corporation is.

16 QUESTION: They claim to know that these
17 people are not members, but in that extent, it's defined.

18 MR. MANSFIELD: To that extent it is defined.

19 QUESTION: Why don't we talk about whether
20 that's defensible or not?

21 MR. MANSFIELD: Well, it is not defensible for
22 numerous reasons. The first of which is that the
23 statute, on its face, allows corporations without
24 capital stock -- not membership organization, but
25 capital organizations without capital stock -- to

1 solicit its members. The regulation promulgated by the
2 Federal Election Commission seems to adopt the
3 definition of a member of the organization itself,
4 except that it does not allow the membership to be
5 premised solely upon contribution to the separate,
6 segregated fund.

7 Never has the FEC been able to precisely
8 define what a member is. However, this Court has
9 sanctioned the use of an analysis between or of the
10 relationship between, or nexus between, the organization
11 and the participant in determining membership status.
12 The court of appeals concluded --

13 QUESTION: You say this Court has sanctioned
14 it. In what case?

15 MR. MANSFIELD: That's in the Hunt versus
16 Washington State Apple Advertising Commission case.

17 QUESTION: That really didn't involved federal
18 election controls.

19 MR. MANSFIELD: Not at all. That case was a
20 case in which the Court was asked to determine whether
21 or not the Washington State Commission had standing
22 before a federal court to prosecute the claims of its
23 members against another state, and this Court said that
24 in order to determine whether or not this was a
25 traditional membership organization, whether it was the

1 type of organization which the prior cases had allowed
2 standing, that the Court would look below the organizing
3 documents, below the fact that this was a state
4 organization and look into the nexus between the
5 individuals and the --

6 QUESTION: But our organizational standing
7 cases have frequently dealt with just groups of people
8 or associations that didn't attempt to have corporate
9 status. And I would think perhaps when you're talking
10 about a member of an organization like that you might
11 mean one thing; when you're talking about a member of a
12 corporation, of a non-profit corporation with members,
13 you might be talking about something quite different.

14 MR. MANSFIELD: I believe that the analysis
15 holds, though. The analysis that this Court has
16 sanctioned, looking beyond the formal organization into
17 the nexus. I mean after all, the question here is what
18 did the statute mean, what does the Federal Election
19 Campaign Act mean when it says corporations without
20 capital stock can solicit their members.

21 QUESTION: I can hardly believe that Congress
22 meant to incorporate the definition that this Court used
23 in Hunt versus Washington State Apple Commission when it
24 was enacting the Federal Campaign Contribution Act.

25 MR. MANSFIELD: Not at all, but the question

1 faced by those individuals such as the National Right to
2 Work Committee when they are faced with how do they
3 comply with the statute is when they're deciding what is
4 a member. They have to look to this Court's prior
5 guidance as to --

6 QUESTION: I would think before they looked
7 even to this Court's prior guidance they might figure
8 out what they were incorporating under, under the laws
9 of Virginia, and if they get a status that says it has
10 no members, I would think they might feel they were in
11 trouble.

12 MR. MANSFIELD: Well, there are two answers to
13 that. The first is that as the court of appeals held,
14 the state definition of member is not likely to reflect
15 the First Amendment rights that are involved in an
16 interpretation of the Federal Election Campaign Act.
17 For example, --

18 QUESTION: But wait a minute. Isn't Congress
19 rather apt, when it talks about a corporation and a
20 corporation without member -- a not for profit
21 corporation without members in view of the long history
22 of federal refusal to participate in general
23 incorporation, isn't it apt to be referring to state
24 laws?

25 MR. MANSFIELD: Not in this case, and I would

1 say not in this case because two reasons. First of all,
2 the Federal Election Commission in interpreting the Act,
3 some months after they filed the complaint against the
4 National Right to Work Committee, the question was posed
5 to the Federal Election Commission: is it, in your
6 opinion, Federal Election Commission, necessary only for
7 us to become -- to change our articles, to amend our
8 articles of incorporation and become a membership
9 organization? The question was posed. And the answer
10 was, we don't know. It is not enough for you to change
11 your membership, change your articles, and become a
12 membership organization. That is not what Congress
13 meant.

14 QUESTION: Your client made that inquiry of
15 the Commission?

16 MR. MANSFIELD: Yes. And the Commission, as
17 the court of appeals stated, barricaded itself behind
18 that articles of incorporation. The offer was made, and
19 the FEC says that's not enough. So we don't know -- at
20 least, according to the FEC --

21 QUESTION: What is it now? Is it a membership
22 corporation or not?

23 MR. MANSFIELD: It is, for the purposes of
24 state law, it is a corporation without members.

25 QUESTION: Now, will you answer my question.

1 Is it a membership corporation or not?

2 MR. MANSFIELD: Undoubtedly, it is a
3 membership corporation.

4 QUESTION: Do you have a membership list?

5 MR. MANSFIELD: There is a membership list.

6 QUESTION: Is it in the record anyplace?

7 MR. MANSFIELD: It is not in the record.

8 QUESTION: Do they hold regular meetings of
9 the membership?

10 MR. MANSFIELD: There are not regular meetings
11 of the membership.

12 QUESTION: Do you know of any other membership
13 corporation that doesn't hold annual meetings?

14 MR. MANSFIELD: That's the issue in the case
15 with respect to the organization documents, Mr. Justice
16 Marshall.

17 QUESTION: My final question is where did you
18 raise your constitutional point? When?

19 MR. MANSFIELD: The constitutional point in
20 this case is that the FEC, the statute --

21 QUESTION: Not is. When. Was it raised in
22 the district --

23 MR. MANSFIELD: This case came up through the
24 courts as follows. The National Right to Work Committee
25 filed an action against the Federal Election Commission;

1 some months later, the FEC filed an action against the
2 National Right to Work Committee. The cases were
3 consolidated and came up through the courts of appeals
4 that way.

5 At the original --

6 QUESTION: And as of that, I haven't found out
7 yet where the constitutional part --

8 MR. MANSFIELD: At the district court.

9 QUESTION: Did you raise it?

10 MR. MANSFIELD: We raised the constitutional
11 issue.

12 QUESTION: Can you point to it?

13 MR. MANSFIELD: It is in the complaint, in the
14 original --

15 QUESTION: That's good enough. I'll find it.

16 MR. MANSFIELD: To just finish my answer with
17 respect to the organization documents, the FEC, the
18 Federal Election Commission's interpretation of
19 congressional intent is that regardless of whether or
20 not you're a membership organization under state law,
21 that's enough.

22 Our position in this case is that --

23 QUESTION: That might apply to another case,
24 but here the organization was not a membership
25 organization.

1 MR. MANSFIELD: It was not a membership
2 organization.

3 QUESTION: And certainly, one of the positions
4 of the Commission is if you're not a membership
5 organization under the state law, you're not a
6 membership --

7 MR. MANSFIELD: But there's never been a
8 substantial reason in First Amendment terms why an
9 organization must have this threshold criteria. There's
10 never been a --

11 QUESTION: You're talking as if we're
12 construing the assumption on a kind of a common law
13 basis -- there's no substantial reason in First
14 Amendment terms. The question is what did Congress mean.

15 MR. MANSFIELD: Congress -- there is nothing
16 in the record at all, nothing in the legislative history
17 that Congress dealt with the question of what is a
18 member. It's clear --

19 QUESTION: Then you look at -- if there's
20 nothing in the legislative history I suppose you could
21 look at the statute.

22 MR. MANSFIELD: Indeed. And the statute says
23 membership organizations, some other organizations, and
24 corporations without capital stock can solicit their
25 members. The statute doesn't say membership

1 corporations. Or corporations with members. The
2 Congress left it, we believe, purposefully vague in
3 order to get all of the efficacy organizations such as
4 the National Right to Work Committee, regardless of
5 whether organizationally they had members or not.

6 QUESTION: Well, if there's nothing in the
7 legislative history and only that language to support
8 it, do we have any basis for speculating as to why
9 Congress left it rather openended?

10 MR. MANSFIELD: We have nothing from the
11 record as to speculation. However, --

12 QUESTION: But you say, I guess, the First
13 Amendment would limit the discretion of the Commission
14 to say what a membership organization is.

15 MR. MANSFIELD: Yes. If the Commission's
16 position is correct, and if the prohibition on
17 membership, the strict restrictions on membership of the
18 Commission are adopted, then one must say that it's
19 clear that these restrictions infringe upon the rights
20 of the association, the rights of the members of the
21 National Right to Work Committee.

22 QUESTION: If the only restriction of the
23 Commission was that you should be a membership
24 organization under state law, and if you aren't you
25 don't solicit anybody --

1 MR. MANSFIELD: If that were the case, then
2 this case never would have been before this Court.

3 QUESTION: Why?

4 MR. MANSFIELD: Because long ago at the
5 conciliation period, the National Right to Work
6 Committee offered to amend its articles of
7 incorporation, and this was refused. The Federal
8 Election Commission said that's not -- whatever the
9 nexus is between individuals and an organization to make
10 them members, that is not it.

11 QUESTION: Mr. Mansfield, you give the
12 impression that you have done almost the same thing as
13 if you had gone and converted your Virginia charter to a
14 corporation with members. But it doesn't seem to me you
15 have. I think it's one thing to make that sort of an
16 offer in conciliation proceedings. Perhaps it fleshes
17 out the position of the agency. But I don't think that
18 puts you in the same position as if you had gone ahead
19 and said I don't care what the FEC says; as a matter of
20 prudent advice to my client, I'm going to at least give
21 him this much to go on under the statutory definition.

22 MR. MANSFIELD: That's true. But there are
23 reasons -- the reason why the committee, I presume, was
24 not, at that time, I presume, organized as a membership
25 organization under Virginia articles of incorporation is

1 because it's an advocacy organization. It's not a trade
2 association, it's not a professional association --

3 QUESTION: It also puts a lot of restrictions
4 on what the managers can do.

5 MR. MANSFIELD: Absolutely.

6 QUESTION: And he'd have to hold annual
7 meetings and a lot of other meetings you would have had
8 to hold.

9 QUESTION: And elections for the board of
10 directors.

11 MR. MANSFIELD: Right. But it's an advocacy
12 organization. It's an organization by its charter
13 organized and operated for one purposes, and only one
14 purpose. Unlike the trade and professional
15 associations, it provides no services to its members, it
16 has not conventions.

17 QUESTION: May I ask you a question? What
18 would happen with the assets of the entity if it were to
19 dissolve and liquidate? Who would get the money?

20 MR. MANSFIELD: It is a Section 501(c)(4)
21 organization. The assets would be given to an
22 organization that carries on similar purposes.

23 QUESTION: There's no provision for
24 distributing among the directors or anything like that?

25 MR. MANSFIELD: No, sir.

1 QUESTION: That would be the case even if
2 there were members.

3 MR. MANSFIELD: And if there were members, I
4 suppose it would --

5 QUESTION: Well, would it go to members or
6 would it go --

7 MR. MANSFIELD: It would not go to members; it
8 would go to the same sort of organization.

9 QUESTION: Mr. Mansfield, if we were to
10 determine that indeed, the FEC is right and your
11 organization did not have members, and furthermore, that
12 you were right in arguing that the provision of Section
13 441b(b)(a) is unconstitutional, then would the
14 restrictions in Section 441(a) still prohibit your
15 company from giving more than \$5000 to this committee
16 that it formed?

17 MR. MANSFIELD: Of course, we don't hold that
18 it is not our position --

19 QUESTION: Is that what would happen?

20 MR. MANSFIELD: It is not our position that
21 the statute itself is unconstitutional.

22 QUESTION: It isn't? That's interesting.

23 MR. MANSFIELD: Not the general prohibition.
24 We're saying that what we are attacking is
25 441b(b)(4)(C), and we're not attacking the statute nor

1 the regulation, unless the interpretation of the Federal
2 Election Commission --

3 QUESTION: Yes, that was my assumption. If
4 that were upheld, then your argument is that some
5 portion of the statute is unconstitutional. As I
6 understand it.

7 MR. MANSFIELD: To the extent that it
8 infringes upon the rights of the members of the National
9 Right to Work Committee to associate through political
10 contributions in the political sphere, that is true.

11 QUESTION: Precisely what section is it that
12 you're contending would be unconstitutional?

13 MR. MANSFIELD: Section 441b(b)(4)(C) is the
14 section that's --

15 QUESTION: The one starts out, "This paragraph
16 shall..." But that's an exemption.

17 MR. MANSFIELD: Yes, that's an exemption. But
18 to the extent that it differentiates, if it cuts off the
19 associational rights of the members of the National
20 Right to Work Committee, then the statute doesn't
21 reflect the -- certainly doesn't reflect the
22 congressional intent.

23 QUESTION: I suppose then the question is
24 would Congress -- if you're correct that the (C) perhaps
25 is "under-inclusive" or whatever the lingo is, I suppose

1 then the question would be whether Congress would have
2 preferred the statute without any exception or with one
3 as broad as you propose. And I suppose with no
4 exception it really doesn't help you much to say it's
5 under-inclusive.

6 MR. MANSFIELD: No -- if there were no
7 exceptions, we would be in the same position as everyone
8 else. Our rights would not be infringed upon
9 differently.

10 QUESTION: A factual question that maybe isn't
11 too important. Do I understand you've spent over a
12 million dollars in your solicitation efforts since 76?

13 MR. MANSFIELD: That's a very good question
14 because the Federal Election Commission in its brief
15 failed to distinguish between two types of
16 solicitations. The National Right to Work Committee
17 finds its members through mass solicitation. It rents
18 lists or does whatever it needs to get at individuals,
19 to find the names of individuals it believes -- that
20 believe in its philosophy and who are willing to take an
21 active part in promulgating its philosophy.

22 To the extent that in 1976 -- actually, the
23 figures in the record are from 1977 I believe -- at
24 least eight million solicitation letters were sent.
25 However, these were solicitations not for political

1 candidates, but rather, for membership. The National
2 Right to Work Committee was looking for members.

3 QUESTION: Well, you never said that in your
4 solicitation -- we would like you to become a member.

5 MR. MANSFIELD: The solicitations are as
6 follows. Generally speaking, in their --

7 QUESTION: They never mentioned membership.

8 MR. MANSFIELD: They all speak of joining
9 with. They ask whether or not the individual believes
10 in the philosophy of the organization, and it's not an
11 ask; it's you check the blank. And second, it says,
12 please join with us. So these are individuals who --
13 the members are individuals that have agreed with and
14 joined with --

15 QUESTION: Well, the people who contribute are
16 people -- yes.

17 MR. MANSFIELD: Well, the people who
18 contributed are additionally, active members. There are
19 two types of members in the organization. And only the
20 active members are the ones who were solicited under
21 Section 441b.

22 QUESTION: But there's nothing that defines
23 members in your bylaws or in your articles or anything.

24 MR. MANSFIELD: Nothing in the bylaws.

25 QUESTION: So these are just telling us that

1 that's the way you treat --

2 MR. MANSFIELD: The individuals refer to
3 themselves as members. In fact, 11 depositions were
4 taken at the district court stage in this case. All of
5 the 11 were members who had contributed to the
6 solicitation for the ERCC. Of those 11, all but 3 knew
7 that -- all of them knew what the philosophy of the
8 National Right to Work Committee was, and believed in
9 it. All but 3, 3 out of 11, believed they were members,
10 knew they were members. They were unequivocal that they
11 were members.

12 QUESTION: How did they knew that?

13 MR. MANSFIELD: They knew that because the
14 rights and obligations, as Mr. Steele calls them, of the
15 committee -- once you become a member, the committee
16 sends you regularly and routinely information.

17 QUESTION: I know that. But how did they even
18 know that they became a member?

19 MR. MANSFIELD: They knew because the
20 solicitation -- the membership solicitation. They sent
21 the thing back.

22 QUESTION: They suddenly, after they gave
23 money they suddenly got some distributions that said
24 they were a member.

25 MR. MANSFIELD: Yes.

1 QUESTION: Or treated them as a member.

2 MR. MANSFIELD: Yes, they got a membership
3 card. All active members who are really at issue here
4 have membership cards. They received a membership
5 card. They sent something back, they sent their
6 questionnaire back, they said I want to joint, I want to
7 help you; they got a membership card.

8 QUESTION: Do you suppose the state, the
9 attorney general, could have closed you down if he said
10 I understand you're sending out membership cards, and
11 yet you've filed with the Secretary of State that you're
12 not a membership organization.

13 MR. MANSFIELD: For the purposes of state law,
14 members, under the statute, have certain rights. If
15 you're going to give people that right, then you have to
16 call them members. For example, voting. If you want
17 people to vote, --

18 QUESTION: Well, take it the other way. If
19 you're going to call them members you have to treat them
20 like members, under state law.

21 MR. MANSFIELD: Under state law, if you call
22 them in your charter. The reason that the committee
23 does not have members, or at least didn't at that time,
24 is because it's an advocacy organization. And the key
25 to an advocacy organization is the efficient use of

1 contributed funds.

2 The National Right to Work Committee has one
3 goal, and its goal is to educate the public and advocate
4 voluntary unionism.

5 QUESTION: Let me go back to my million dollar
6 question. Does the record show how much of that came
7 from corporate supporters?

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1 MR. MANSFIELD: The National Right to Work
2 Committee has, the Committee itself has, both corporate
3 and noncorporate members. As to how much of the dues
4 are contributed by either, it's not on the record. I
5 don't know.

6 QUESTION: Is there a membership list
7 maintained somewhere in the central office?

8 MR. MANSFIELD: There is a membership list
9 maintained because the Committee actively and constantly
10 communicates with its members by mail. There's quite a
11 -- as a matter of fact, there's 1.25 million members.

12 QUESTION: How long do you stay a member if
13 you've given \$10 one year and

14 MR. MANSFIELD: You get your member --

15 QUESTION: -- some association wants to
16 solicit them for political contributions two years
17 later, and yet there's never been any intervening
18 contributions.

19 MR. MANSFIELD: On the factual --

20 QUESTION: Is there some rule about it?

21 MR. MANSFIELD: Yes, there is, as a matter of
22 fact on the records. An active member, when one joins
23 the organization, he is -- he becomes an active member.

24 QUESTION: When he gives some money?

25 MR. MANSFIELD: When he gives some money.

1 QUESTION: Yes.

2 MR. MANSFIELD: He becomes an active member.

3 He gets his active membership card back. He knows he's

4 an active member. One year later he's sent a dues bill

5 because the organization calls these voluntary dues, and

6 he's sent a bill.

7 QUESTION: What does he send them for? Do

8 they send a bill in the amount of his previous

9 contribution?

10 MR. MANSFIELD: Yes. Now these --

11 QUESTION: So there's no standard membership

12 fee?

13 MR. MANSFIELD: There is no standard

14 membership fee.

15 QUESTION: If you give a million dollars one

16 year, you get billed for a million dollars the next year?

17 MR. MANSFIELD: Well, whatever you can afford,

18 because --

19 (Laughter.)

20 QUESTION: Is there any way for us to rule

21 with you without at the same time admitting that we are

22 knowingly ignoring the laws of the State of the

23 Commonwealth of Virginia?

24 MR. MANSFIELD: Yes, there is. The -- the

25 laws of --

1 QUESTION: Please tell me.

2 MR. MANSFIELD: The laws of the State of the
3 Commonwealth of Virginia deal only with the rights of
4 the members, if they are members, or the individuals of
5 the organization.

6 QUESTION: But you just said you have a
7 membership list.

8 MR. MANSFIELD: We have a membership list but
9 they don't accord these individuals the rights that they
10 would be accorded under the law of Virginia if they were
11 to lose accorded --

12 QUESTION: Or to use your phrase, they're
13 second-class members. Is that what you're saying?

14 MR. MANSFIELD: We have members who are --

15 QUESTION: Second class.

16 MR. MANSFIELD: They are not second class. We
17 --

18 QUESTION: Well, they are not first class.

19 (Laughter.)

20 MR. MANSFIELD: We would like to -- we would
21 like to believe that they're all first-class members.
22 The only rights of membership that they don't have are
23 the rights to vote and --

24 QUESTION: Which are guaranteed by the laws of
25 Virginia; right?

1 MR. MANSFIELD: Only if you declare yourself
2 as a membership organization.

3 QUESTION: Well, do they have any rights at
4 all? What right does a member have?

5 QUESTION: To give money.

6 (Laughter.)

7 QUESTION: The right to give money. I see.

8 MR. MANSFIELD: No. As an advocacy
9 organization, the National Right --

10 QUESTION: No, I am serious in my question.

11 MR. MANSFIELD: Yes.

12 QUESTION: Does a member of your organization,
13 either supporting or active, have any rights at all by
14 virtue of his membership?

15 MR. MANSFIELD: He has the right to receive
16 the materials and he's asked to -- to take the action in
17 support of the philosophy.

18 QUESTION: That's true of both the supporting
19 and the active members; right?

20 MR. MANSFIELD: Yes.

21 QUESTION: Why is it that you say that only --
22 the only issue before us is the active members? It
23 seems to me you have an equally strong case for both --

24 MR. MANSFIELD: Well --

25 QUESTION: -- under the regulation and under

1 the statute.

2 MR. MANSFIELD: In 1976 the case arose by the
3 fact that the National Right to Work Committee made
4 solicitations. In the face of an unknown law, it chose
5 only to solicit active members who had -- who had
6 contributed that year.

7 QUESTION: But if you are right in your
8 position, you would also have the right to solicit the
9 others, too; wouldn't you? And if not, why not?

10 MR. MANSFIELD: Well, depending upon the --

11 QUESTION: Because they're all members, under
12 your definition of membership.

13 MR. MANSFIELD: It is our position that all
14 members of the organization, of the Committee, are
15 members.

16 QUESTION: And have an equal right under it --

17 MR. MANSFIELD: And have an equal --

18 QUESTION: -- to be solicited?

19 MR. MANSFIELD: Right. Right. Because
20 they've joined the organization, they've joined the
21 organization affirmatively to --

22 QUESTION: Right.

23 MR. MANSFIELD: -- they believe in the
24 philosophy and they've taken an affirmative step to
25 further that philosophy.

1 QUESTION: So that the issue before us applies
2 equally to the supporting members and the active members
3 --

4 MR. MANSFIELD: The issue --

5 QUESTION: -- I mean the legal ramifications
6 of what we are asked to decide in this case.

7 MR. MANSFIELD: We would like this Court to
8 decide on the broad basis. However, it's possible for
9 the -- for us to win the case if this Court held that
10 one of the parts of the nexus between an individual and
11 the organization in order to be a member must be some
12 financial contribution. We don't believe --

13 QUESTION: We have to rewrite the regulation
14 or the statute to do that.

15 MR. MANSFIELD: Excuse me?

16 QUESTION: We have to rewrite the regulation
17 or the statute to draw that distinction, it seems to me.

18 MR. MANSFIELD: No, we don't have to write --
19 rewrite any -- either one, because the statute simply
20 says, membership -- membership --

21 QUESTION: Right. And the regulation says,
22 people who currently satisfy the requirements of
23 membership of the organization.

24 MR. MANSFIELD: In the organization --

25 QUESTION: And they're all required to satisfy

1 that.

2 MR. MANSFIELD: Yes.

3 QUESTION: So they're all members.

4 MR. MANSFIELD: Well, all of the members of
5 the National Right to Work Committee are members for
6 that --

7 QUESTION: That's right.

8 MR. MANSFIELD: -- for that.

9 QUESTION: Now, this membership list, is it in
10 the record?

11 MR. MANSFIELD: The membership list is not in
12 the record. The membership list has always been kept
13 confidential by the organization as -- on -- as the
14 membership list in the NAACP v. Alabama was kept
15 confidential because it is an advocacy organization.

16 QUESTION: Does Virginia allow or permit the
17 membership list to remain confidential?

18 MR. MANSFIELD: It -- it does unless the
19 membership, unless it is a membership organization, at
20 which time individuals would have -- members might have
21 the right to view the membership list.

22 QUESTION: For your information, the
23 membership list of NAACP is controlled by the State of
24 New York, not Alabama.

25 QUESTION: That's right.

1 MR. MANSFIELD: In NAACP v. Alabama, however --
2 QUESTION: It was the same way there. It was
3 the New York members who --
4 MR. MANSFIELD: Yes, sir, but the State --
5 QUESTION: And it still is.
6 MR. MANSFIELD: The State tried to get those
7 members made as a condition precedent for the --
8 QUESTION: If there wasn't, he could have
9 gotten the list in New York. Anybody could have.
10 MR. MANSFIELD: Yes. But this will foretell
11 that the State couldn't compel that membership list --
12 QUESTION: You know more about it than I do.
13 Go right ahead.
14 QUESTION: Mr. Mansfield, if you prevail, will
15 the limitations on corporate political action committees
16 differ from those on those committees that are set up by
17 individuals?
18 MR. MANSFIELD: No. Actually, there are the
19 three different types. The FEC refers to the CMA case,
20 the California Medical Association case, which is an
21 independent multi-candidate political committee. It --
22 that case, in that case they registered as such, and
23 then came to this Court asking for more rights. But
24 what they did is they registered as such.
25 That, in a case like that, they can solitic

1 the whole general public, but no individuals, no
2 unassociated corporation, for example, can give more
3 than \$5,000 towards those solicitations.

4 QUESTION: Does that same limitation apply to
5 the corporate --

6 MR. MANSFIELD: It doesn't --

7 QUESTION: -- collection?

8 MR. MANSFIELD: It does not. Under 441(b)
9 corporations, including corporations without capital
10 stock, can in essence underwrite the solicitation
11 expenses, but as a trade-off, instead of being able to
12 solicit the general public, they can only solicit
13 certain defined --

14 QUESTION: Well, does that perhaps suggest an
15 equal protection problem lurking behind this?

16 MR. MANSFIELD: We would hope that this Court
17 would not have to go that far to find that. But I
18 believe that the Court has held in the California
19 Medical Association that Congress had the right to -- to
20 look at the -- the -- the threat; the threat being that
21 the corporate warchest, for example, the ability of a
22 corporation to use its general treasury funds. If a
23 corporation could use the general treasury funds to
24 solicit the world, then the Congress felt there is a
25 balancing that this would be unfair. So it instead says

1 it can use corporate funds but only to solicit its
2 members or people with a nexus between the organization,
3 the corporation.

4 QUESTION: Do you think Med Cal then suggests
5 that these classifications between individual and
6 corporate committees would be -- would not run afoul of
7 the equal protection?

8 MR. MANSFIELD: I am sorry, I couldn't hear
9 the first part.

10 QUESTION: I say, are you suggesting that Med
11 Cal has said anything to indicate that these
12 classifications would pass muster under the -- under an
13 equal attack?

14 MR. MANSFIELD: Not directly.

15 QUESTION: No one suggests that your initial
16 mailing to the public is by any means violates any law.

17 MR. MANSFIELD: No, not at all.

18 QUESTION: And so you're free to solicit for
19 membership, as you would like to have it interpreted --

20 MR. MANSFIELD: Yes.

21 QUESTION: -- the public generally. The
22 restriction would say that you're not supposed to use
23 the money raised for that kind of a solicitation to
24 finance political solicitations with such funds --

25 MR. MANSFIELD: With the exception that you

1 can use -- you can use that money to -- to finance
2 political solicitation only if that solicitation goes to
3 your members.

4 QUESTION: Yes.

5 MR. MANSFIELD: And, of course, it's our
6 position that these individuals is a more than
7 sufficient nexus between these individuals to be our
8 members.

9 QUESTION: But you don't -- you don't -- if
10 you didn't claim to be a membership organization, you
11 wouldn't be in here challenging the general restriction
12 on forming these groups.

13 MR. MANSFIELD: No, because we would then be
14 in the same position, I suppose, as the California
15 Medical Association was.

16 QUESTION: Yes.

17 QUESTION: Now, absent knowledge of
18 membership, are there some practical problems lurking
19 here? This case has come up through a United States
20 District Judge and then through seven, eight, or nine
21 Court of Appeal Judges and then here. What about some
22 other requirements of knowing whether judges are
23 disqualified? Suppose the wives of all those judges who
24 dealt with it were members had contributed to this
25 organization, would they be disqualified?

1 (Pause.)

2 QUESTION: In other words, in your briefs and
3 the briefs coming here, unlike those in some of the
4 corporate cases, we don't have a list of members. We
5 couldn't have with as many members as you -- as you
6 state that you have. Does that present a practical
7 problem, the nondisclosure of members?

8 (Pause.)

9 QUESTION: Well, how are judges going to know
10 whether they're disqualified under other statutes?

11 MR. MANSFIELD: Well, because this is an
12 advocacy organization, Mr. Chief Justice, and not an
13 economic organization. The -- the key to the National
14 Right to Work Committee is people who join it wish to
15 contribute in order to promote a philosophy. It would
16 be the same, for example, I suppose as a church or any
17 other type of --

18 QUESTION: Let's make it a little bit closer.
19 Suppose it developed that all these judges were members
20 of this organization in the sense that they had sent \$5
21 or \$10 every year. Would they be disqualified?

22 MR. MANSFIELD: Only if they believed -- since
23 it's not an economic relationship, it's a philosophic
24 relationship, I would believe that they would not be
25 disqualified unless they believed that it would somehow

1 prevent them from reaching an equitable decision under
2 the law.

3 QUESTION: Well, but isn't it even a little
4 harder than that? Am I not correct in understanding
5 that the rights that you seek to vindicate in this
6 litigation are the rights of your members, the rights to
7 receive and to participate in the political process in
8 the manner that you support?

9 MR. MANSFIELD: Yes.

10 QUESTION: Then would it not be true that any
11 individual, such as the Chief Justice suggested, who
12 without perhaps realizing it is a member under your
13 definition, he is in effect a party to this litigation?

14 QUESTION: Or at least he would appear to some
15 people to have some interest. The perception is the
16 important thing under the statute.

17 QUESTION: It is sort of a class action, in a
18 way.

19 MR. MANSFIELD: I hadn't thought of it in
20 those terms precisely, but I suppose that there is
21 justification in that.

22 QUESTION: Very well. Do you have anything
23 further, Mr. Steele?

24 MR. STEELE: No, Your Honor, unless there are
25 further questions.

1 CHIEF JUSTICE BURGER: Very well. Thank you,
2 gentlemen.

3 The case is submitted.

4 (Whereupon, at 1:46 p.m., the case in the
5 above-entitled matter was submitted.)

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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: Federal Election Commission, Et Al, Petitioners v. National Right to Work Committee, Et Al - No. 81-1506

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