

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2338

TITLE DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
v. Appellants
TAXATION WITH REPRESENTATION OF WASHINGTON

PLACE Washington, D. C.

DATE March 22, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

DONALD T. REGAN, SECRETARY OF
THE TREASURY, ET AL.,

Appellants

v.

TAXATION WITH REPRESENTATION
OF WASHINGTON

No. 81-2338

Washington, D.C.

Tuesday, March 22, 1983

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
10:06 a.m.

APPEARANCES:

REX E. LEE, ESQ., Department of Justice,
Washington, C.C.; on behalf of the Appellants.

JOHN CARY SIMS, ESQ., Washington, D.C.; on behalf
of the Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Regan against Taxation with Representation of Washington.

Mr. Solicitor General, you may proceed whenever you're ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE APPELLANTS

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

Congress has provided two general types of tax relief, either or both of which may be available to certain kinds of organizations.

First, Section 501(c) exempts the income of about two dozen different types of organizations from taxation on that income. Second, Section 170 entitles the donors to a smaller number of 501(c) organizations including both veterans groups and also groups qualifying under 501(c)(3) to deduct their contributions.

One of the qualifications for 501(c)(3) status, and, therefore, both tax exemption and also donor contribution deductibility, is that no substantial part of the entity's activity consists of attempts to influence legislation.

The proposed activities of the Appellee which has unsuccessfully sought recognition as a 501(c)(3) organization

1 will consist principally of attempts to influence legislation.
2 It attacks the constitutionality of the scheme that I just
3 described on two grounds.

4 The first is that withholding tax exempt status
5 from 501(c)(3) or any other organizations which lobby is a viola-
6 tion of a first amendment right. The second is that since
7 Congress has afforded tax exempt status to veterans organizations
8 which lobby but not to 501(c)(3) organizations which lobby, its
9 equal protection rights have been denied.

10 The En Banc Court of Appeals unanimously held, and
11 we agree, that the Appellees' first amendment argument is
12 foreclosed by this Court's unanimous holding in Cammarano
13 versus The United States that the constitution does not require
14 Congress to subsidize First Amendment activity.

15 With respect to equal protection, the Court of
16 Appeals further observed, and I am quoting, that "Taxation
17 also has a weak case solely in terms of equal protection
18 because of Congress's vast leeway under the constitution to
19 classify the recipients of its benefits and to favor some
20 groups over others."

21 Nevertheless, the Court of Appeals ruled that a
22 heightened standard of equal protection scrutiny was applicable
23 and that it was infringed in this case because First Amendment
24 rights were affected even though they had not been infringed.

25 The Court remanded to the District Court with

1 instruction to cure the unequal treatment which it found by
2 one of two alternatives.

3 QUESTION: Well, did the Court of Appeals use that
4 rather obscure phrase that you just used that First Amendment
5 rights were affected but not infringed?

6 MR. LEE: Well, it first held, Justice Rehnquist, that
7 under Cammarano they had not been violated. I think that is
8 more my characterization, but I think that is the only fair
9 way that the Court of Appeals' opinion can be read because of
10 the effect upon First Amendment rights.

11 The Court identified as the most logical remedy
12 option to impose the lobbying restriction on veterans organiza-
13 tions none of which is a party to this litigation. It also
14 identified another alternative: judicially enlarging the
15 Congressional list of exempt organizations to include the
16 501(c)(3)'s which the Court observed, correctly in our view,
17 might open a Pandora's box of woes and abuse.

18 In our view, the underpinning of the Court of Appeals'
19 holding has to be that Congress has violated the equal pro-
20 tection clause even though there is no direct infringement
21 of a First Amendment right if Government treats different groups
22 of people in different ways and the deferential treatment
23 comes to rest on a First Amendment or other fundamental right
24 interest. That is the combination of circumstances that brings
25 the equal protection guarantee into play.

1 Whatever appeal that argument might have had, if
2 we were at the dawning of its day in Court, I submit that
3 it comes too late because it has already been considered and
4 rejected by this Court which has held on at least three separate
5 occasions that Government subsidization of one group but not
6 another even where the fundamental rights of the nonsubsidized
7 group will be affected violates no constitutional guarantee.

8 In Buckley versus Valeo, for example, upheld provi-
9 sions of the Internal Revenue Code which granted public funds
10 to the candidates of major parties but not minor parties.
11 There was clearly unequal treatment, and there was an arguable
12 impact on First Amendment values.

13 Similarly, in Monner versus Roe and Harris versus
14 McRae congressional statutes providing medicaid funds for
15 indigent live births but prohibiting such funds for abortions
16 were attacked on the same grounds advanced here, namely, that
17 the impact of the different treatment came to rest on a
18 fundamental constitutional right of the disfavored group,
19 namely, the right to decide whether or not to have an
20 abortion.

21 QUESTION: But the Court in those cases left open
22 a situation which I take it you are going to come to.

23 MR. LEE: Yes, but the difference of treatment in
24 those cases was undeniable, and the effect was on a fundamental
25 constitutional right. Nevertheless, the Court held that there

1 was a legal protection violation because there is a basic
2 difference between direct state interference with a protective
3 activity and state encouragement of an alternative activity
4 consonant with legislative policy.

5 Now the difference between those cases and the
6 instant case: in our view there are two that are relevant,
7 and both of them make this case a stronger case for constitu-
8 tionality than in Harris and in Monner.

9 The first difference is that in those cases the
10 two things that were treated differently were mutually pre-
11 clusive competitors. That is to say, the statutorily birth
12 event which was birth necessarily precluded the constitutionally
13 protected abortion decision by the indigent person so that to
14 whatever extent funding encourages child birth, abortion is
15 necessarily inhibited.

16 Here by contrast, subsidizing veterans groups has
17 no automatic detrimental effect on charitable groups.

18 The second difference, and in my view the more
19 important one, is that the classification in this case is
20 part of our national acts of laws. This Court has made it very
21 clear that for equal protection purposes, income tax cases are
22 in a class by themselves. The Internal Revenue Code is perhaps
23 without peer in its intricacy, its detail, and its sheer
24 length. By their very nature, most income tax provisions
25 classify. Their function is to identify under what circumstances

1 the burden of different groups in our society, the share of
2 the National tax burden borne by different groups is to be
3 either increased or decreased. In carrying out this function,
4 Congress necessarily treats different people in different ways,
5 and many of those differences have an arguable impact on a
6 fundamental right.

7 Importing heightened scrutiny as the test governing
8 the constitutionality of that kind of a complex and inner-
9 related statutory construct would seriously damage the certainty
10 and the predictability that should be characteristic of our
11 national tax laws.

12 Aside from everything else that ought to go into a
13 fair tax system, it is important that taxpayers know with as
14 much certainty as possible what their obligations are. That
15 certainty value is enhanced by the rational basis equal
16 protection has because of the likelihood that it ensures that
17 the congressional judgment will in fact survive. It is
18 diminished, correspondingly, by a test of heightened scrutiny.

19 Look at the matter from Congress's standpoint.
20 It is probable that the time will never come when Congress
21 does not have before it some proposal for change in the income
22 tax law. Congress's ability to respond to new developments,
23 new information, new understanding is a difficult enough task
24 under any circumstances. It should not be rendered even more
25 burdensome by increasing the likelihood that

1 the judgments that Congress makes will be turned around by the
2 Courts.

3 Take this case, for example: Section 501(c) consists
4 of 22 categories. It comes of no surprise to anyone that the
5 Court of Appeals found that two of those categories resulted
6 in a difference in treatment to their occupants. Of course,
7 there are differences in treatment. If Congress had not
8 intended differences in treatment, there would not be 22
9 categories.

10 The point is that the entire Code, and not just these
11 22 categories, essentially consists of differences in treatment.
12 That, I submit, is why this Court has consistently accorded
13 great deference to Congressional line drawing in the income tax
14 area.

15 It is repeatedly stated, and most recently in
16 San Antonio versus Rodriguez, that in taxation, even more than
17 in other fields, legislatures possess the greatest freedom
18 in classification.

19 That brings me to the final point. That is whether
20 the distinction between lobbying by veterans groups on the
21 one hand and lobbying by 501(c)(3) organizations on the other
22 satisfies this deferential standard. Quite clearly, it does.

23 Prior to 1934 there were no express statutory limita-
24 tions on lobbying by exempt organizations. Congress was con-
25 cerned, however, in 1934 that the deductibility of contributions

1 to organizations otherwise classified as religious, charitable,
2 or education could effectively translate into the public
3 financing of private propogandizing on a range of subjects
4 limited only by the donor's whim and the attractiveness of that
5 abuse increased with the donor's wealth.

6 It was a concern that was first expressed by Judge
7 Han for a unanimous Court of Appeals for the Second Circuit in
8 1930 in a case called Slee versus The Commissioner, and as
9 this Court observed in Cammarano, the 1934 act made explicit
10 the conclusion derived by Judge Han in 1930 in Slee.

11 Very simply, there are differences between veterans
12 organizations on the one hand and 501(c)(3) organizations on
13 the other that are highly pertinent to this concern first
14 expressed by Judge Han in 1930 and then ratified by Congress in
15 1934.

16 In the first place, there are quantitative differences.
17 The number of veterans organizations is only a fraction of the
18 total number of the 501(c)(3) groups, and the 501(c)(3)'s
19 collect about 1500 times as much in contributions as do the
20 veterans groups. Even more important, these organizations
21 structurally by virtue of the way they are chartered by
22 Congress and in fact carry out their operations do not offer
23 the opportunities for abuse identified by Judge Han in 1930
24 and by Congress in 1934.

25 The veterans organizations were --

1 QUESTION: Solicitor General Lee?

2 MR. LEE: Yes.

3 QUESTION: What if Congress instead of giving the
4 veterans organizations a break in the tax statute had simply
5 appropriated \$5 million to each of them? Do you think that
6 would be challengeable in Court at all?

7 MR. LEE: I do not.

8 QUESTION: This really isn't much different.

9 MR. LEE: I think it is not very much different.
10 I think this Court has made that very clear, and it brings into
11 play another body of doctrine that is also determinative in
12 this case.

13 QUESTION: Has not the Congress over a period of
14 years granted a great many benefits to veterans?

15 MR. LEE: Precisely. They have been consistently
16 upheld. The most recent that I am aware of is Johnson versus
17 Robison in which this Court upheld the differential treatment
18 insofar as veterans' benefits were concerned to conscientious
19 objectors and to those -- the benefits went to those who had
20 seen actual combat duty, and the challenge was by a conscientious
21 objector.

22 The point is, as set forth in our brief, the figures
23 that have been released by the Government demonstrate that
24 two out of five of every American citizen is a beneficiary in
25 one way or another of veterans' legislation which has been passed

1 by Congress.

2 Just as is the case with the income tax laws, this
3 Court has also clarified that there is a great deal of deference
4 to which Congress is entitled in determining the benefits
5 to which those persons are entitled who have made a great
6 sacrifice for the benefit of this country, both in terms of
7 interrupting their civilian pursuits and also in terms of
8 risking their life and their health.

9 QUESTION: Mr. Solicitor General, may I go back for
10 a moment to your comment that there are only two differences
11 between the abortion cases, the funding case, and this case?

12 Do you think the abortion cases would have been
13 decided in the same way if the people on welfare who wanted
14 abortions not only didn't have them financed by the Government
15 but if they had an abortion they then lost their welfare
16 benefits?

17 Here, as I understand it, the 501(c)(3) organization
18 loses its exemption if it engages in lobbying.

19 QUESTION: This is the same question that I raised
20 that you haven't yet answered.

21 MR. LEE: Yes, and I plan to do so right now.

22 I think it is not at all clear to me that Monner
23 and Harris would have been decided in the same way if the
24 consequence had been to lose welfare benefits for a couple of
25 reasons.

1 One is I think another principle that comes to play
2 is whether Congress has acted in such a way as to solve the
3 problem that was immediately before it. At least a very strong
4 argument could be made that that was simply sweeping too
5 broadly with the revenue.

6 In this instance, by contrast, the problem that
7 Congress has identified is the problem of the 501(c)(3) with
8 unidentifiable size of membership and type of membership and
9 the potential that it offers for a small number of wealthy
10 individuals to have their expression of public views, their
11 lobbying if you will, subsidized by the Government. In this
12 instance, Congress has not swept any more broadly than is
13 necessary to solve the particular problem.

14 QUESTION: Well, I suppose you say they are wealthy
15 persons because they are rich enough to contribute to a charity,
16 but by hypothesis, I suppose, the lobbying is for a charitable
17 purpose which the Government recognizes is in the general public
18 interest, or otherwise they wouldn't give them the tax exemption
19 in the first place.

20 MR. LEE: Yes, and in Snee, of course, the problem
21 was attacked by defining what is meant by "charitable," and
22 what Judge Han did in that case was to uphold the Government's
23 position that it isn't really charitable if it is being used
24 for lobbying purposes.

25 Now, what this really does is to make administratively

1 more feasible to administer by eliminating the need on a case-
2 by-case basis to determine whether it is charitable, but in
3 any event, I think there is this distinction in your abortion
4 hypothetical and the case at -- of course, the other distinc-
5 tion -- the other two distinctions are the rules applicable to
6 veterans' cases and applicable to tax cases.

7 QUESTION: Well, General Lee, I suppose the Appellee
8 can set up a separate corporation to do its lobbying and
9 preserve the 501(c)(3) status for everything else.

10 MR. LEE: The Court of Appeals in fact pointed that
11 out, and that is our understanding.

12 QUESTION: Do you agree with that?

13 MR. LEE: They can. Yes, they can set up a separate
14 501(c)(4). Now, they will tell you I think in fairness.

15 QUESTION: Wouldn't the IRS be the first to move in
16 and say these are twin corporations, and, hence, they will lose
17 their --

18 MR. LEE: Well, it depends on what the relationship
19 is between them, and that depends, Justice Blackmun, as you
20 correctly point out. It is not that clear. In the event that
21 there is an attempted subsidy by the 501(c)(3) group of the
22 501(c)(4), then, yes, that is not permitted, and as a
23 consequence that is not a complete answer.

24 QUESTION: It is certainly not so easy to answer.

25 MR. LEE: That's right. I have found that it is less

1 easy as the Court of Appeals applied in fact.

2 QUESTION: General Lee, I am not quite certain
3 what happens to an organization, a 501(c)(3) organization, which
4 does lobby. Did you say that it actually lost its exemption?

5 MR. LEE: That is correct.

6 QUESTION: Is that correct? I thought perhaps it
7 just lost its right to have contributions deductible. It
8 actually loses?

9 MR. LEE: That's right. It is demonstrated by this
10 case. There was an application made for 501(c)(3) status for
11 a determination under Section 7428 that this was a 501(c)(3)
12 organization. It described 501(c)(3) status as the status
13 which entitles initially to income tax exemption, and then
14 Section 170 in turn keys into 501(c)(3) status in terms of
15 deductibility.

16 It was determined not to be a 501(c)(3) entity
17 because of its lobbying and, therefore, loses both the
18 deductibility and also the tax exemption terms.

19 QUESTION: General Lee, one of the amicus briefs
20 argued that there was no jurisdiction under Section 7428 to
21 make a constitutional attack on the validity of tax statutes.
22 I know that in a footnote in your reply brief you indicated
23 disagreement, but it seemed that was worth a comment at least
24 because that statute seems to be set out to provide only review
25 by the Commissioner of administrative matters, not to raise

1 constitutional issues.

2 MR. LEE: It certainly can be interpreted in that
3 way, Justice O'Connor. We submit that in that respect it is
4 susceptible of interpretation either way.

5 The crucial language is that the Court on one of these
6 7428 reviews may make a declaration with respect to such initial
7 qualification or continuing qualification.

8 Now, two points: one is that an argued qualification
9 is broad enough to include the constitutional issue, and the
10 second is that particularly where you have some ambiguities
11 which I think we certainly have here that it is proper to
12 look to Congress's purpose.

13 In this case, the congressional purpose was rather
14 clear. It was to undo the inequity that resulted as a result
15 of the decisions in Bob Jones versus Simon, the 1974 decision,
16 the companion case that came down the same day in Americans
17 United.

18 The only way one of these 501(c)(3) or other types
19 of organizations could obtain a determination as to whether
20 they did or did not qualify was to either have a refund suit
21 in the District or to go into the Tax Court.

22 Now, since the objective law is to provide one simply
23 remedy for determination of 501(c)(3) status vel non, it would
24 be a bit anomalous to say that Congress intended to split those
25 out and require constitutional determination through the old and

1 more difficult process. For that reason, we don't think that
2 7824 precludes the constitutional issue.

3 QUESTION: One other question if I may. Do you think
4 that this Court's recent holding in Perry Education has
5 anything to do with this case?

6 MR. LEE: Well, I think it helps us to an extent.
7 It certainly is not as on point as Cammarano, but, nevertheless,
8 it does slow the flexibility, other things being equal, insofar
9 as the judgment of the policy-making bodies is concerned.

10 Yes, Perry does support us.

11 QUESTION: Flexibility for the First Amendment?

12 MR. LEE: Well, the ability of that amendment to make
13 accommodation in the light of other policies, in this case
14 it enforces at least Cammarano's holding that when you have
15 an arguable effect as you do in this case on a First Amendment
16 interest that comes about because of an income tax classifica-
17 tion, that you judge the case as an income tax and you defer to
18 Congress's judgment in that case.

19 Indeed, I know of no instance in which this Court
20 has ever applied anything other than the rational-basis test
21 in equal protection income tax cases.

22 QUESTION: May I ask one other question?

23 MR. LEE: Yes.

24 QUESTION: Forgetting for the moment the equal
25 protection phase of the case because I think part of your

1 position that all charitable organizations are not fungible,
2 veterans are different from --

3 MR. LEE: Right.

4 QUESTION: Do you think your First Amendment argument
5 is equally strong regardless of the character of the organization?
6 Say it is Aid to the Blind or something, and you are a group which
7 just tries to promote legislation which will help the group.

8 MR. LEE: I do, Justice Stevens. You can argue that
9 Cammarano was distinguishable, but I think that the principle
10 that was established in that case carries through to Congress
11 can make the decision as to which kinds of First Amendment
12 activity it wants to subsidize and which kinds it does not
13 which really brings it back to an equal protection --

14 QUESTION: But you have acknowledge, I think, that
15 there is more than subsidy at issue. It isn't just deducting
16 the portion of the income that is spent on lobbying. It has
17 required them to lose their entire exemption.

18 MR. LEE: That is correct, and it is different from
19 Cammarano in that respect. My answer is twofold. The first
20 is that in that instance, Congress went no further than it
21 needed to go in order to cure the problem it identified.
22 The second is that whether it is --

23 QUESTION: Here in effect, my Aid to the Blind
24 organization is losing a very valuable exemption because it
25 engages in a protected activity. That's all it does. I assume

1 that the lobbying is a protected activity.

2 MR. LEE: Yes, but it is just as true here as it was
3 in Buckley and in Monner and in McRae, and in those last two
4 cases the Court said, "It's not as though the Government were
5 saying you can't have an abortion."

6 QUESTION: No, but in none of those cases did the
7 claimant lose anything. He just wasn't allowed to finance it.

8 MR. LEE: That's true and there is that distinction
9 as we have observed. As I say, my answer to it is --

10 QUESTION: Is there any other case in which merely
11 because a party engaged in an activity protected by the First
12 Amendment that the Government was allowed to take something
13 away from it?

14 MR. LEE: So far as I know, at least in that respect,
15 you will be making new law in this case, but I submit to you that
16 the principle from which that new law ought to be made has been
17 declared by Cammarano, and that is that it is after all a
18 matter of Congress's determining how certain activities should
19 be financed and how valuable those activities are to Congress,
20 and I would like to save the rest of my time.

21 QUESTION: I take you stand by your -- I think it is
22 in your reply brief -- you suggest that the First Amendment
23 issue isn't here at all.

24 MR. LEE: That is correct.

25 QUESTION: It isn't properly here.

1 MR. LEE: That is correct for reasons set forth in
2 that footnote.

3 CHIEF JUSTICE BURGER: Mr. Sims?

4 ORAL ARGUMENT OF JOHN CARY SIMS, ESQ.,

5 ON BEHALF OF THE APPELLEE

6 MR. SIMS: Mr. Chief Justice, and may it please
7 the Court:

8 In this case, Appellee challenges the severe penalty
9 which is imposed on public charities if they choose to engage
10 in substantial lobbying as a means of promoting their charitable
11 purposes.

12 Let me emphasize at this point that the case only
13 involves public charities, that is, organizations under Section
14 501(c)(3) which are not private foundations. Private founda-
15 tions are groups that, as defined in the Tax Reform Act of
16 1969 and the IRS Regulations implementing that statute, are
17 groups where there is not seen to be enough accountability to
18 the public to assure that the organization will act in the same
19 way that it would if it were accountable to the public. The
20 Tax Reform Act of 1969 virtually precludes lobbying by private
21 foundations.

22 We think that is important because when the Solicitor
23 General was referring to what he believes Congress was concerned
24 about in putting into effect the restriction that we are
25 challenging here, he is talking about the possibility that a

1 charity might really not be acting for charitable purposes
2 in particular circumstances. It may be that a particular
3 individual would be attempting to manipulate a charity or
4 perhaps even set up a charity in order to serve private
5 concerns.

6 Well, under the Tax Reform Act of 1969 Congress has
7 already defined the group of organizations where there could
8 be a legitimate concern that there is not enough public accounta-
9 bility, and Congress has acted independently, and that issue
10 is not before the Court in this case.

11 Another point that I think is worth making with
12 regard to the risk that a public charity might lobby in order
13 to promote some private interest, we would like to point out
14 that first of all to the extent that there is any risk in that
15 regard, lobbying isn't any different than any other activities
16 that a charity might engage in. That is, I suppose one could
17 say that there is some risk that a charity might engage in
18 litigation or pamphleting or publishing of educational books
19 in order to promote some private interest, so the argument
20 made by the Solicitor General doesn't really hone in specifical-
21 ly on the lobbying issue.

22 As we have emphasized in our brief, there are also
23 a number of independent restrictions that aren't challenged
24 in this case that would prevent a public charity from using
25 its resources for lobbying or for any other activity on behalf

1 of private interests. Under the IRS regulations in order to
2 qualify in the first place for 501(c)(3) exemptions, you have
3 to be operating for the public good rather than for a private
4 good.

5 QUESTION: Are you suggesting, Mr. Sims, that IRS
6 could make an evaluation in each case of each exempt taxpayer
7 and say, "You are 33 and a third percent over the line here,
8 so we will cut off 33 and a third percent of your exemption"?

9 MR. SIMS: Your Honor, if Congress were to pass
10 that alternative statute, that would deal with our argument
11 about the disproportionate penalty. To the extent that there
12 was a penalty on lobbying that was tied in amount to the amount
13 of excessing lobbying beyond whatever Congress said was
14 appropriate, the disproportionate aspect of the current penalty
15 would be eliminated.

16 We don't believe that would make the statute
17 constitutional because you are still left with the core question
18 that comes up in any First Amendment case which is first of
19 all what is the congressional interest that is being promoted
20 by the restriction, and secondly, has Congress in developing
21 the particulars of the restriction done it in as narrow and as
22 minimally restrictive a way as possible.

23 QUESTION: Mr. Sims, you suggested a moment ago
24 that there was a distinction to be made between lobbying for
25 a private interest or in the public interest. Is that done by

1 Congress or by the IRS?

2 MR. SIMS: That's part of Section 501(c)(3), Your
3 Honor, in that no group can qualify under 501(c)(3) if there
4 is going to be any inurement for the benefit of a private
5 individual.

6 In addition, the statute itself says that any charity
7 has to be organized and operated exclusively for exempt purposes.

8 QUESTION: So it is the common law concept of
9 inuring to the private groups as opposed to the public groups.

10 MR. SIMS: It is a common law concept that has been
11 incorporated in the statute, and that is also reflected in the
12 regulations, so to the extent that one can discuss a concern
13 about the possibility that lobbying might be directed to a
14 private end, that is already dealt with in a number of other
15 ways in the statute and in the regulations and, as you have
16 indicated, in the common law of charities and trusts.

17 QUESTION: Well, the truth of the matter is if you
18 set a trust for your own benefit, that is not charity.

19 MR. SIMS: Exactly, Your Honor.

20 QUESTION: Well, I don't understand your public and
21 private. What is a private charity?

22 MR. SIMS: A private foundation is --

23 QUESTION: I said a private charity.

24 MR. SIMS: I'm not sure that there is such a --

25 QUESTION: You said the difference between the public

1 and the private.

2 MR. SIMS: Your Honor, the terminology that we have
3 been using in our brief and that I have been trying to use today
4 is public charity which is not a statutory term of art, but it
5 is a term that is used often to refer to charities, that is,
6 501(c)(3) groups, which are not private foundations. Private
7 foundations are independently defined in Section 509 of the
8 Internal Revenue Code.

9 The point I was making in this regard is that to the
10 extent that it said that additional restriction on lobbying is
11 necessary in order to prevent charities from engaging in activities
12 improperly on behalf of private interests, that concern is
13 already dealt with in other provisions in the code, specifically,
14 the no-inurement provision in Section 501(c)(3), and also the
15 operated-and-organized-exclusively-for-exempt-purposes provision
16 of the code.

17 QUESTION: What would the Ford Foundation be?

18 MR. SIMS: Pardon, Your Honor?

19 QUESTION: What would the Ford Foundation be? A
20 public or a private?

21 MR. SIMS: I'm not sure. I suspect it's probably a
22 private foundation.

23 QUESTION: Well, what are you talking about if you
24 don't know? I'm trying to find out what is the line between a
25 public and a private charity.

1 MR. SIMS: A private foundation is defined in Section
2 509 in terms of the sources of income, so --

3 QUESTION: I'm talking about charity, not foundation.

4 MR. SIMS: Well, a private foundation under Section 509
5 is a subcategory of Section 501(c)(3) charities.

6 QUESTION: Just because you are named by an individual?

7 MR. SIMS: No, because the sources of revenue for
8 that particular subcategory of charitable organizations comes
9 primarily from a small number of sources rather than from the
10 general public, so in enacting the Tax Reform Act of 1969,
11 Congress indicated that there wasn't the same discipline of
12 public support for those groups that there is for public
13 charities, but this case only involved public charities.

14 QUESTION: Is there any issue like this in the cases
15 as far as you know?

16 MR. SIMS: Involving --

17 QUESTION: This distinction. I didn't hear it.

18 MR. SIMS: Well, the distinction is only relevant to
19 the extent that it addresses the concern expressed about the
20 diversion of charitable resources to private benefits. It is
21 relevant in that regard.

22 As this Court has noted in the Bob Jones case,
23 the denial of a tax exemption under Section 501(c)(3) can have
24 disastrous consequences for a charity. It means in effect that
25 many contributors simply will not make contributions to the

1 organization, and it may very well jeopardize the organization's
2 ability to exist.

3 QUESTION: Mr. Sims, do you agree with the Solicitor
4 General that a 501(c)(3) organization lobbying loses its
5 exemption?

6 MR. SIMS: First of all, an organization is permitted
7 to lobby up to the level of substantiality under Section
8 (501(c)(3)). If an organization has already qualified under
9 501(c)(3) and it lobbies to an excessive amount, it does lose
10 its exemption altogether.

11 QUESTION: Could it then qualify for 501(c)(4)?

12 MR. SIMS: It could up until the Tax Reform Act of
13 1976. One of the changes that was made in 1976 was to provide
14 -- it created this election mechanism under Section 501(h), and
15 the statute also said that if an organization is eligible to
16 elect under Section 501(h), and all charities under 501(c)(3)
17 are eligible to elect except churches and except private
18 foundations, so any other public charity could. If you are
19 eligible to elect under 501(h), then if you lose your 501(c)(3)
20 status because of excessive lobbying, then you can't qualify
21 for (c)(4) status. That was a change that was made in 1976.

22 The Solicitor General in referring to the Appellee
23 organization said that the organization would primarily engage
24 in lobbying. We would like to clarify that in two respects.
25 First of all, all of the activities engaged in by Taxation

1 must be directed to charitable ends. We think that the dis-
2 tinction between lobbying as a mean and lobbying as some ulti-
3 mate end is one that is reflected at a number of places in the
4 Government's brief. We never have argued that lobbying, per
5 se, is a charitable purpose. We emphasize that under the law
6 of trust and under the common law and under the IRS regulations,
7 lobbying is a proper means of promoting a charitable purpose.

8 The reason that Taxation couldn't qualify for
9 Section 501(c)(3) tax exemption in this case is because it
10 couldn't say ahead of time that it would not engage in substan-
11 tial lobbying. We have not indicated that lobbying is going to
12 be the only activity carried on by the organization, and,
13 in fact, the exemption application which is in the record
14 in the case indicates that there are a number of other liti-
15 gational and educational activities that will be carried on
16 by the organization, but lobbying engaged in by Taxation will
17 be exclusively a means of promoting a charitable end.

18 To the extent that the Solicitor General relies
19 on Slee for the proposition that lobbying is not a proper
20 purpose for promoting a charitable end and that somehow the
21 use of that means rather than some other means of promoting
22 a charitable purpose renders the purpose uncharitable, we suggest
23 that even if Slee were properly decided in 1940, and that may
24 be a close question, certainly the law since then has developed
25 very strongly in the direction that lobbying is a proper means

1 of promoting a charitable purpose. The restatement of trust
2 says it. All the standard treatises on trust state it, and
3 in fact, the IRS regulations say that charitable, which is the
4 umbrella term which is used in the regulations, in Section
5 501(c)(3) is used in its generally-accepted legal sense.

6 In fact, in permitting charities to lobby up to the
7 level of substantiality, Congress has implicitly recognized that
8 lobbying is a proper means of promoting a charitable purpose.

9 The Government relies very heavily on three cases.
10 Cammarano, obviously, is the bedrock for the Government's
11 position, and then there are the three more recent cases of
12 Buckley, Mayer, and Harris.

13 I'll speak briefly about Cammarano which has already
14 been discussed at some length in the exchanges between the
15 Solicitor General and the Court. We do want to emphasize that
16 the penalty that is imposed on a charity which engaged in
17 substantial lobbying is totally disproportionate to the
18 amount of lobbying that is engaged in, and that makes a big
19 difference in comparing this case to Cammarano.

20 In Cammarano there was a complete correspondence
21 between the amount of the lobbying activity engaged in by the
22 taxpayer and the tax consequences. The taxpayer simply
23 couldn't deduct the amount of money that was spent on lobbying.

24 In the case of a charitable group under Section
25 501(c)(3) the group loses its right to receive any tax

1 deductible contributions. As I mentioned before, if it has
2 been an electing organization or eligible to elect under
3 501(h), you can't even qualify for a 501(c)(3).

4 QUESTION: So you are really challenging on First
5 Amendment grounds the whole lobbying qualification in 501(c)(3).

6 MR. SIMS: Your Honor, we are challenging both.
7 We are challenging the restriction itself, and the more particular
8 issue before the Court is the disparity in treatment between
9 veterans groups and charities.

10 QUESTION. I understand that. Do you think there is
11 any merit in the suggestion that the First Amendment issue is
12 not properly here at all?

13 MR. SIMS: Your Honor, we believe that the issue
14 is here. We out of caution filed a cross appeal raising
15 specifically the First Amendment issue. The Court hasn't acted
16 on that.

17 We believe that because this is an appeal under
18 Section 1252 though, the whole case comes up to this Court,
19 and the Court has indicated that in the past although it hasn't
20 specifically addressed this issue. We certainly think that the
21 issue is before the Court if the Court chooses to grant review.

22 QUESTION: What about your qualification to argue it
23 as an Appellee?

24 MR. SIMS: Pardon me, Your Honor?

25 QUESTION: Suppose you had never filed a cross appeal.

1 Would you still be --

2 MR. SIMS: We believe -- I think there is something
3 to the Government's argument that the relief would be different,
4 and if it weren't a 1252 case. If it were a more conventional
5 case, I think we might have had difficulty because if we
6 prevail on the First Amendment issue, we would get relief
7 that would be broader than the relief we got in the Court of
8 Appeals.

9 QUESTION: All right. Thanks.

10 MR. SIMS: On Cammarano, we do think that the penalty
11 issue is very important, that there is not the correspondence
12 here that there was in the Cammarano case.

13 Secondly, of course, this case does have the equal
14 protection issue. The specific hold in Cammarano was that
15 a non-discriminatory, even-handed denial of deductibility
16 did not violate the First Amendment.

17 Of course, we don't have a non-discriminatory,
18 even-handed across-the-board denial of tax benefits based on
19 lobbying. We have a situation in which certain groups --
20 the veterans organizations -- are allowed to lobby without
21 limitation in support of their charitable purposes, and the
22 501(c)(3) groups must choose between the tax benefits of the
23 statute and their freedom to engage in lobbying as a means of
24 promoting their charitable purposes.

25 QUESTION: Do you suggest that Congress cannot

1 distinguish between an organization formed let us say to help
2 the handicapped and others of that kind where there is a great
3 deal of public activity in the area that these activities
4 supplemented? Are you saying that Congress can't distinguish
5 and have a more generous attitude toward the foundation or
6 the exempt taxpayer assisting the handicapped, the blind, the
7 hard of hearing, crippled? Is it absolutely uniform across the
8 board?

9 MR. SIMS: No, Your Honor. We have never claimed that.
10 In fact, we wouldn't claim that --

11 QUESTION: Congress has an enormous respect for the
12 veterans. You are saying that the veterans are being treated
13 more favorably than others; therefore, it must fall.

14 MR. SIMS: The problem is not the favorable treatment.
15 The problem is that the favorable treatment is specifically
16 directed to the area of First Amendment rights, and --

17 QUESTION: I'm addressing that. More favorable
18 treatment with respect to lobbying which everyone has the right
19 to do of course.

20 MR. SIMS: Your Honor, we don't believe that there
21 could be more favorable treatment of that sort unless it can
22 meet the First Amendment standard of review. That is unless
23 the congressional purpose in providing the preferred treatment
24 is compelling and unless the restriction is crafted in such
25 a way that there is a minimal restriction on First Amendment

1 rights.

2 Buckley may be a good example in that respect. I
3 think that nobody can question the Court's -- the logic of the
4 Buckley decision when it says that there can't be a requirement
5 that anybody who wants to run for President has \$20 million.
6 The Court pointed out that would encourage a multiplicity of
7 parties, frivolous candidacies, and in effect it would under-
8 mine the very purposes for the statutory benefit scheme which
9 was to change the way that elections were financed for the
10 good, not to create greater chaos.

11 In Buckley the distinction that was made between
12 existing party, the new party, was integral to the system of
13 public financing of elections, but if there had been a statute
14 that said that the Republicans or the Democrats could get
15 funding, but the other major party can't, that would have been
16 suspect under the equal protection clause.

17 We think that is essentially what is involved here.
18 It is discrimination among charities based on their identities.
19 It is specifically directed to the exercise of First Amendment
20 rights, and it is not directed to the legitimate objectives
21 that Congress certainly can implement if it chooses to do so
22 to, for example, provide various other sorts of benefits to
23 veterans: their educational benefits, re-employment benefits,
24 medical benefits, and lots of others. There is no problem in
25 providing those in recognition of veterans' service to the

1 country.

2 QUESTION: Mr. Sims, supposing the cure to the problem
3 you are now addressing was to just say, "Okay, we won't let
4 the veterans lobby either without losing." What good would
5 that do your client?

6 MR. SIMS: It wouldn't, Your Honor, and we don't
7 think that is the appropriate relief. Judge Mikfa --

8 QUESTION: It would remove the illegality which
9 you are now purporting to describe.

10 MR. SIMS: That's right. It would not solve the
11 equal protection argument that we are making, but it would
12 solve the equal protection disparity.

13 As we have noted in our brief, we are not aware of
14 any situation in which this Court has found an equal protection
15 violation and then remedied by saying, "We will take something
16 away from the parties that aren't before the Court rather
17 than giving something to the party who is."

18 That in some cases involved very substantial drains
19 on the Federal Treasury. For example, when you have got a
20 social security case in which widows can get a certain benefit
21 and widowers can't and there is a challenge to it, and it is
22 determined that that is an equal protection violation, if
23 you are going to provide benefits to everyone, that means
24 additional money is drawn out from the Treasury.

25 Nonetheless, this Court in those cases where an

1 equal protection violation is found has uniformly extended the
2 benefit.

3 QUESTION: So you don't defend the Court of Appeals'
4 result in this respect?

5 MR. SIMS: No, and in fact no one does so far as I
6 know. The veterans groups obviously don't prefer the remedy
7 suggested by Judge Mikfa.

8 QUESTION: Then don't you have the jurisdictional
9 problem that you are basically arguing for relief as an
10 Appellee that was different than that granted by the Court of
11 Appeals?

12 MR. SIMS: Yes, Your Honor, so that everything that
13 I said before with regard to the First Amendment issue would be
14 equally applicable to this except to the extent that I think
15 this Court has in the past sometimes regarded a remedy --

16 QUESTION: Except with respect to your cross appeal.
17 Did you raise that in your cross appeal?

18 MR. SIMS: Yes. The two questions were the First
19 Amendment issue and the remedy issue, but I think this Court
20 in the past has sometimes reached the remedy issue in an equal
21 protection case as an integral part of the whole case without
22 necessarily granting review independently.

23 The other thing we would emphasize in that regard is
24 this case does involve First Amendment rights, and in, for
25 example, the picketing cases, I don't think it has ever been

1 seriously suggested that if there is an equal protection violation
2 because some people can picket at a particular location and
3 other people can't that the proper solution is to prevent
4 everyone from picketing.

5 QUESTION: But can you think of any case in which
6 this Court has granted someone a benefit under the Internal
7 Revenue Code which Congress didn't choose to grant them because
8 of an equal protection argument?

9 MR. SIMS: I'm not aware of any tax case that does
10 that, Your Honor.

11 QUESTION: But there is one case in this Court where
12 it says that on equal protection argument, you cannot solve it
13 by taking away from the other one, Cummins against the Board of
14 Education, 1914.

15 MR. SIMS: I'm glad to hear about it.

16 (Laughter.)

17 MR. SIMS: Justice Rehnquist, I am reminded that
18 although it is not a Federal tax case, the Spizer case did
19 involve a tax benefit that had been denied.

20 QUESTION: That was a California --

21 MR. SIMS: That's right. It was a state case, so it
22 is not directly on point, but it may be analogous.

23 QUESTION: While we are talking about remedy, may I
24 ask you what you would suggest is the proper -- if we put to
25 one side for a moment the equal protection problem and just

1 concentrate on the First Amendment and your argument that there
2 is a penalty here, how do you cure that? I can understand curing
3 it on the Cammarano facts where you just allow a deduction for
4 the amount expended, but how can you get partially qualified
5 as a 501(c)(3) organization?

6 MR. SIMS: Well, we think that the right way to cure
7 it would be to pass a statute that if there are particular
8 abuses that are concerned relating to lobbying such as improper
9 lobbying for private purposes, that the statute --

10 QUESTION: Suppose that Congress decides that 60
11 percent of your revenue is spent on lobbying and they don't
12 want to subsidize the lobbying portion of your work. Under the
13 abortion cases would you agree they could do that if they could
14 figure out administratively a way just to avoid financing the
15 lobby?

16 MR. SIMS: I don't think so, Your Honor, because in
17 this case --

18 QUESTION: Well, then you really are not relying on
19 the penalty aspect of the case.

20 MR. SIMS: Well, we are relying on both. I think that
21 both of those arguments help us. If you take the penalty
22 argument out with regard to the abortion cases, the abortion
23 cases still involve a situation where the Courts found that there
24 are two competing interests each of which was valid. There was
25 the interest in preserving the life of the fetus, and there was

1 the freedom of the potential mother to have an abortion. The
2 Court found -- at one point I think the Court said in Harris
3 against McRae that in applying the equal protection analysis
4 that an abortion is not like any other medical procedure. It
5 cannot be compared because the interest of preserving life is
6 involved.

7 In this case, the kind of discrimination that is
8 involved is among speakers and among --

9 QUESTION: But my question is on the assumption that
10 we are not troubled with -- we say we agree with the Government
11 that veterans are different from Aid to the Blind because taking
12 away their exemption won't really help you, and we are just
13 concerned with your First Amendment issue on its own bottom.
14 Is there any way to remedy the problem insofar as we might
15 see a defect in the scheme because it penalizes you whenever
16 you engage in substantial lobbying by taking away your entire
17 exemption? Is there any remedy that would be addressed to
18 that alleged defect in the scheme?

19 MR. SIMS: I haven't developed a specific one. I'm
20 sure it could be done. I'm sure it could, but I don't think
21 anybody in this litigation has put forward a specific proposal.

22 QUESTION: Does that sound like your position is that
23 the Government must subsidize the lobbying?

24 MR. SIMS: No, Your Honor.

25 QUESTION: Just to be consistent with the First

1 Amendment.

2 MR. SIMS: No, our argument is that the Government --

3 QUESTION: What limited relief besides that could you
4 have? How could the Government, as Justice Stevens asked, meet
5 your objection without subsidizing lobbying?

6 MR. SIMS: Well, I think Justice Stevens is asking
7 whether a remedy could be developed that would prevent subsidy
8 of lobbying but still allow deductibility for other charitable
9 activities.

10 The point that I wanted to make is that we believe
11 that the question is not whether Congress has to subsidize
12 lobbying but whether Congress having chosen to allow these
13 tax benefits to charitable groups which are engaging in
14 socially beneficial activities and to allow those groups to
15 litigate and to publish books and to carry on --

16 QUESTION: So you must keep the exemption going for
17 people who lobby for charitable purposes.

18 MR. SIMS: The Congress, if it is going to single
19 out that category of First Amendment activity --

20 QUESTION: So, yes, they do. So your position is that
21 lobbying must be allowed by charitable organizations without
22 losing the exemption. That's your position.

23 MR. SIMS: Yes, that is our position.

24 QUESTION: And must to that extent be subsidized.

25 MR. SIMS: Unless Congress could explain in a way

1 that would meet this Court's First Amendment --

2 QUESTION: We see the problem, but we can't figure
3 out administratively any way to avoid the -- we have the two
4 extremes. We have either got to take your exemption away
5 completely, or we have got to subsidize the lobbying. We don't
6 want to do the latter, so as a practical matter we have adopted
7 the only feasible solution, and you haven't suggested that there
8 is a feasible solution inbetween.

9 MR. SIMS: Well, the Tax Reform Act of 1969 shows
10 that when Congress does what to specifically address an identified
11 problem it can do it, and that's exactly what it did with regard
12 to the perceived abuses and activities by private foundations.

13 QUESTION: But you have already conceded I thought
14 in discussion that Congress can favor some entities like the
15 veterans, the handicapped, over others. Did I misunderstand you?

16 MR. SIMS: No, Your Honor. That certainly is right,
17 but I also I believe qualified that by saying that when the
18 discrimination involves the exercise of First Amendment rights,
19 Congress has to meet the very stringent requirements that are
20 applicable when First Amendment rights are regulated, that is,
21 Congress has to explain why some groups are being given enhanced
22 First Amendment rights and others aren't, and it has to show
23 that the restriction has been developed to minimally intrude
24 on the exercise of First Amendment rights.

25 QUESTION: When the blind and the veterans engage

1 in lobbying, it is to advance a broad public interest that has
2 been recognized in other settings by Congress, is it not?

3 MR. SIMS: Yes, Your Honor. The blind, the lame, and
4 their representatives are the very people that are being
5 denied their right to lobby in pursuit of their charitable
6 interests, so we have an amicus brief which has been filed in
7 this case by almost two dozen charitable groups of just the
8 sort you have referred to: the Red Cross, the American Heart
9 Association, and the Girl Scouts.

10 QUESTION: They don't have a case before the Court
11 for us to make an evaluation of their problem, do they?

12 MR. SIMS: No, all their activities are limited by
13 the same statute that limits Taxation's activities. Like
14 Taxation, like all 501(c)(3) groups, they are limited to
15 carrying out charitable purposes under Section 501(c)(3), and
16 they are all limited with regard to the extent that they can
17 use one particular means, lobbying, in order to accomplish their
18 charitable purposes. In the amicus brief, those charities
19 have indicated that that restriction prevents them from carrying
20 out their activities in support of the sick and the injured and
21 the needy, and that they could do those jobs better if they
22 could lobby. In fact, they have indicated that in some cases
23 lobbying may be the only way to accomplish a charitable goal,
24 such as, for example, the Mental Health Association mentions
25 that in many places there are archaic statutes that are on the

1 books regarding the mentally handicapped or the mentally ill,
2 and it is only by working for a revision of those statutes at
3 the local or the state or the national level, that they can
4 accomplish their purposes.

5 We don't think that there is any basis for saying
6 that there is an inconsistency between lobbying and the proper
7 charitable purposes that 501(c)(3) organizations promote.

8 CHIEF JUSTICE BURGER: Do you have anything further,
9 Mr. Solicitor General?

10 MR. LEE: No, Mr. Chief Justice, unless the Court
11 has some questions.

12 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
13 case is submitted.

14 (Whereupon, at 11:01 a.m., the case in the
15 above-entitled matter was submitted.)
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DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., Appellants
v. ~~TAXATION WITH REPRESENTATION OF WASHINGTON~~

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