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THE SUPREME COURT OF THE UNITED STATES

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DKT/CASE NO. 84-312

TITLE DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, Petitioner v. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL.

PLACE Washington, D. C.

DATE February 19, 1985

PAGES 1 thru 49

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1 THE SUPREME COURT OF THE UNITED STATES

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3 DONALD J. DEVINE, DIRECTOR, :

4 OFFICE OF PERSONNEL :

5 MANAGEMENT, :

6 Petitioner, :

7 v. : No. 84-312

8 NAACP LEGAL DEFENSE AND :

9 EDUCATIONAL FUND, :

10 INC., ET AL. :

11 - - - - - - - - - - - - - - - - - - -x

12 Washington, D.C.

13 Tuesday, February 19, 1985

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 1:51 o'clock p.m.

17 APPEARANCES:

18 REX E. LEE, ESQ., Solicitor General of the United

19 States, Department of Justice, Washington, D.C.; on

20 behalf of the petitioner.

21 CHARLES STEPHEN RALSTON, ESQ., New York, New York; on

22 behalf of the respondent.

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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 REX E. LEE, ESQ.,

4 on behalf of the petitioner 3

5 CHARLES STEPHEN RALSTON, ESQ.,

6 on behalf of the respondent 18

7 REX E. LEE, ESQ.,

8 on behalf of the petitioner 42

9

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

2 CHIEF JUSTICE BURGER: We will hear arguments

3 next in Devine against NAACP Legal Defense Educational

4 Fund.

5 Mr. Solicitor General, I think you may proceed

6 whenever you are ready.

7 ORAL ARGUMENT OF REX E. LEE, ESQ.,

8 ON BEHALF OF THE PETITIONER

9 MR. LEE: Thank you, Mr. Chief Justice, and

10 may it please the Court, the Combined Federal Campaign

11 is an annual effort by the federal government to solicit

12 contributions to charity from its employees.

13 Like most employers who engage in like

14 efforts, the federal government has never opened its

15 campaign to all categories of charities. Among the

16 groups who have never participated are churches,

17 universities, opera guilds, animal welfare groups, and

18 other groups, including the respondents in this case.

19 The question pressented here is whether the

20 President has the constitutional authority to limit

21 participation in the Combined Federal Campaign to

22 agencies that provide or support direct health and

23 welfare services to individuals or their families.

24 Not included within the eligible groups are

25 organizations such as the respondents, legal advocacy

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1 groups whose objective is to influence public policy
2 through litigation.
3 For the first 19 years of its existence, the
4 Combined Federal Campaign did not include legal advocacy
5 groups and was generally understood not to include
6 them. The federal government's practice in this respect
7 was also consistent with the practice of other
8 employers, such as private employers, and also
9 consistent with the practices of federated charitable
10 fundraisers such as the United Way and its predecessors,
11 the United Fund and the old community chests.
12 In 1980, however, after the petitioner's
13 predecessor had determined them to be ineligible,
14 several legal advocacy groups filed suit in District
15 Court which held that the direct services requirement
16 which they had allegedly failed to meet was
17 unconstitutionally vague.
18 The President's steps taken in response to
19 that decision, culminating in Executive Order 12404,
20 which --
21 QUESTION: Was that decision ever appealed?
22 MR. LEE: It was not.
23 QUESTION: Is there any indication in the
24 record why it wasn't appealed?
25 MR. LEE: No, there is not. The Executive

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1 Order 12404 which was issued in February, 1983, made
2 explicit that which had been the consistent
3 understanding and practice for 20 years, and I quote
4 from the language of the executive order: "Agencies
5 that seek to influence the determination of public
6 policy through litigation shall not be eligible to
7 participate in the Combined Federal Campaign."
8 The issue in this case is remarkably narrow.
9 Everyone agrees that the respondent's right to engage in
10 fundraising activities is constitutionally protected,
11 and no one contends that every charity should be
12 constitutionally entitled to participate in the Combined
13 Federal Campaign.
14 So that the problem is one of line drawing.
15 Who is to be admitted and who is not, and by what
16 criteria does the Constitution permit that distinction
17 to be made? The controlling issue as seen by the Court
18 of Appeals, by the respondents, and by the petitioner,
19 is whether drawing the line where the President has
20 drawn it, the same line that existed through five
21 previous Administrations, is reasonable.
22 The respondents and the Court of Appeals are
23 absolutely correct in our view in focusing on
24 reasonableness as the relevant and controlling
25 constitutional question, and we will join them orally,

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1 as we have in the briefs, on that issue as the issue in
2 the case.
3 But I want to do so against the background
4 that this necessarily assumes and correctly assumes that
5 we are dealing here with a non-public forum, and that
6 assumption is a correct one. The only public property,
7 indeed, the only place that is at issue in this case is
8 the federal work place, which the federal government
9 most assuredly has not opened generally for expressive
10 activity.
11 QUESTION: Mr. Lee, does your case stand or
12 fall on that proposition?
13 MR. LEE: No, it does not, Justice Blackmun.
14 It is simply a recognition at the outset that that is
15 the correct analytical framework, but even if it did
16 not, we would contend that what the President did was
17 still constitutional.
18 But in any event, there is general agreement
19 that the focal point for analysis in this case should be
20 whether the President's decision was feasible, that is,
21 whether there are differences between these respondents
22 and the Combined Federal Campaign eligible charities
23 which are sufficiently relevant to legitimate
24 governmental objectives that the eligibility criteria
25 are reasonable.

We submit that there is not only a reasonable distiction, but that each of the three objectives stated in the executive order constitutes a separate and independently sufficient reasonable ground for sustaining the criteria, and I will discuss each of them separately.

First, while the government's exclusion of advocacy groups is consistent with the practice of employers generally, the government's involvement in charitable fundraising has a dimension that is not shared by other employers who participate in charitable solicitation efforts, and it is this.

Governments have taken upon themselves the obligation of caring for the needs of the poor, of assuring that certain minimum levels of food, clothing, shelter, and educational opportunities are available.

Segments of that obligation have been undertaken by the federal government, and under those circumstances it is perfectly proper for this same federal government to make some reasonable judgments concerning those organizations whose efforts are most likely to achieve that objective and thereby to minimize the extent to which this task must be performed by government itself.

It will not do in this respect to point to

1 some individual instances where in the opinion of some
2 legal advocacy groups have in fact succeeded through
3 litigation in obtaining money for the poor, because in
4 the first place those efforts sometimes succeed, and
5 they sometimes yield nothing, but even more important,
6 there is in fact a difference in the way that these
7 groups go about performing their tasks.

8 The eligible groups render their services
9 directly, and by contrast, legal advocacy groups attempt
10 to influence the action of other persons and entities,
11 including governments, and they frequently find
12 themselves opposing each other in the courts.

13 Under those circumstances, it is surely
14 reasonable, it is surely constitutionally permissible
15 for the President of the United States to make some
16 judgments concerning whether a dollar given to a direct
17 providing traditional charity is more likely in general
18 than a dollar given to a public advocacy group to lessen
19 the government's overall burden of providing for health
20 and welfare.

21 QUESTION: Mr. Lee, some of your listed
22 groups, however, go off on opposite directions, don't
23 they?

24 MR. LEE: That is correct.

25 QUESTION: How does that square with what you

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1 have just said?

2 MR. LEE: Well, I think it squares

3 completely. That provides certainly a reasonable basis

4 for the government to conclude that its financial

5 efforts are better expended for groups that provide

6 their services directly, and groups for which there is

7 at least a reasonable basis for the President to

8 conclude that they do a more direct and a more effective

9 job of lessening the government's overall health and

10 welfare burden.

11 QUESTION: Specifically, I refer to the Moral

12 Majority Foundation on the one hand and Planned

13 Parenthood Foundation on the other hand.

14 MR. LEE: I misunderstood your question,

15 Justice Blackmun. With regard to those two

16 organizations, the argument, of course, is an

17 underinclusiveness one that in applying these standards

18 we simply made a mistake in applying it to those two.

19 There is not enough in this record to make a

20 determination as to the propriety or the impropriety of

21 the determination as to those groups, and of course the

22 question presented in this case does not include whether

23 those or any other groups should or should not have been

24 included, but those are issues for other litigation, for

25 other lawsuits and other occasions in the event that --

1 QUESTION: But your answer is, they just made
2 a mistake?
3 MR. LEE: Well, that they might have. There
4 just isn't enough in this record to determine whether
5 they did or they did not. I just don't know enough.
6 There isn't enough in this record to determine what the
7 Moral Majority and Planned Parenthood does.
8 QUESTION: Mr. Solicitor General, may I ask
9 you a question about the record? I notice in the Court
10 of Appeals Judge Star made quite a point of the fact
11 that this was a summary judgment dase, and that
12 inferences could be drawn that were different from those
13 drawn by the majority.
14 And in your brief you don't seem to make much
15 of the point about i being a summary judgment case.
16 What disposition do you ask for, a total reversal or a
17 trial?
18 MR. LEE: Well, we think what is needed here
19 is a total reversal. We think the Court has enough --
20 QUESTION: You think the record is adequate?
21 MR. LEE: We think it is. Yes, Your Honor.
22 And that is the reason.
23 I turn next to the second objective stated in
24 the executive order, which is to minimize disruption in
25 the federal workplace, reduce the costs of fundraising,

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1 and maximize the success of the campaign.

2 In other words, the President, we submit,

3 could reasonably conclude that the campaign would be

4 less costly and would raise more money structured as he

5 structured it, and this borne out by the record. The

6 nature, the tone, and the magnitude of the controversy

7 that was engendered by the inclusion of these advocacy

8 groups during the interim years when the lower court

9 orders have so required, the difficult barriers that

10 these create for those who attempted to carry out the

11 government's fundraising objectives are summarized in our

12 brief at Pages 37 through 40.

13 I would particularly invite the Court's

14 attention to Pages 346 through 392 of the Joint

15 Appendix, which does give a fair sample of the kinds of

16 problems that these volunteers who were charged with the

17 responsibility of running the campaign encountered

18 because of the inclusion of these particular groups.

19 Now, it is, of course, impossible to tell what

20 the performance of the campaign would have been if those

21 groups had been included, what the cost would have been

22 in terms of dollars and time, and how much money would

23 have been raised if things had been other than they

24 were.

25 But two things are very clear. First, the

1 inclusion of these groups did pose widespread and
2 serious problems in the judgment of those who were
3 charged with the stewardship of running the campaign,
4 and second, and probably even more important, precisely
5 because no one can make a comparison of what was with
6 what might have been, this is the kind of decision that
7 has to be made by someone. Someone has to make those
8 judgments, and it must be upheld so long as it is
9 reasonable.
10 Here it is the President who had made the
11 judgment, and it is consistent with the judgment of his
12 five predecessors, and is clearly reasonable.
13 The respondents rely on the Hecklers veto
14 cases, and they contend that their First Amendment
15 rights cannot be suppressed by those employees who
16 disagree with them. Their reliance is misplaced for two
17 reasons.
18 One is that none of their cases involved a
19 non-public forum. And in cases where a non-public forum
20 was involved, the potential disruptiveness of the
21 activity in terms of disruptiveness to an ongoing
22 governmental activity has been a major factor in
23 upholding constitutionality. And I will mention just
24 two cases.
25 One is the Perry case, in which the Court

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found it relevant that exclusion of a rival union from the school mail system would help to preserve labor peace within the schools.

And Lehman versus City of Shaker Heights recognized that exclusion of political advertising from mass transit vehicles was justified in part because it would avoid involving the city in controversy and jeopardizing its revenues.

This just isn't a Hecklers veto kind of case. This brings me to my second point. It is a non-public forum case in which the President has made some judgments about the best way to enlarge employee involvement in a fundraising effort while keeping down the disruptive effects of that effort.

The third reasonable basis for the President's distinction is avoiding both the reality and also the appearance of using federal resources to advance a particular political cause.

This one is squarely supported by the Court's holding in Lehman versus Shaker Heights, where concerns about avoiding the appearance of favoritism were held sufficient to sustain a policy permitting advertising generally on the city's buses, but excluding political candidate advertising.

I would like to invite the Court's attention

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1 now to one feature that is common to all three of the
2 President's objectives and that I believe is dispositive
3 of the issue in this case. Underlying each of those
4 objectives is a Presidential resolution of an issue
5 which is partially factbound and whose factual
6 components cannot be verified one way or the other.
7 It is not known, for example, and cannot be
8 known whether in fact health and welfare organizations
9 that provide their services directly have a greater
10 ameliorative effect on the total governmental welfare
11 burden than to entities such as these respondents, whose
12 mission is to effect public policy through the bringing
13 of lawsuits.
14 Neither can it be empirically verified whether
15 the inclusion of these groups in this campaign will or
16 will not affect such things as the ability to campaign
17 to raise money or its costs in dollars, employee time
18 and disruptiveness, or an appearance of favoritism.
19 But one thing is clear. This Court has faced
20 that same problem in other cases and uniformly has
21 accorded governmental officials the benefit of a
22 presumption in favor of their factual judgments.
23 In Perry, for example, the school board's
24 judgment was necessarily based on a determination that
25 restricting access to the mailboxes would, and I am

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1 quoting from the opinion, "serve to prevent the district
2 schools from becoming a battlefield for interunion
3 squabbles."
4 And in Lehman, in Greer, and in Jones, those
5 who were charged with specific governmental
6 responsibilities made some judgments, some factbound
7 judgments concerning the likely effect of their
8 decisions on such matters as perceptions of political
9 favoritism and the maintenance of discipline within a
10 military base or a penal institution.
11 In each institution, that judgment was
12 upheld. Under this Court's precedents, therefore, the
13 Constitution does not prohibit a Presidential decision
14 on the ground that the factual correctness or
15 incorrectness of his determination cannot be verified.
16 I have just one final point. We submit that
17 this just isn't a case in which there has been a first
18 amendment violation or any serious implication of First
19 Amendment values. The significance of the Combined
20 Federal Campaign is not the expressive opportunity that
21 it offers to charities to convince people to give money
22 to them.
23 It offers very little opportunity for that
24 kind of appeal, and there are in any event ample other
25 available means which are far more effective for that

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1 purpose, such as direct mail, door to door solicitation,
2 commercial advertising.
3 The reason that these respondents or anyone
4 else would like to be included in the Combined Federal
5 Campaign is not because of opportunities that afford
6 expression, but rather because it is a very effective
7 money-raiser. It is, in the respondent's own words,
8 "qualitatively superior to any other alternative means
9 of fundraising among federal workers."
10 This just is not like the situation,
11 therefore, in Village of Schaumburg, where government
12 has imposed a negative on any fundraising efforts. The
13 only governmental action in this case has simply been to
14 decline to confer upon a particular individual or group
15 the financial advantage of a more effective fundraising
16 opportunity.
17 The Court of Appeals attached controlling
18 significance to the fact that the government has already
19 determined these petitioners to be charitable because of
20 their qualification for income tax exempt status under
21 Section 501(c)(3) of the Internal Revenue Code.
22 That argument, which is central to the Court
23 of Appeals decision, is highly instructive. The
24 determination of what is a tax-exempt organization is
25 made for purposes quite different from those that

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1 underlie the determination of eligibility criteria for
2 the CFC.

3 This is highlighted by the fact that if the
4 two were the same, there could be over 300,000
5 participants in the campaign, a circumstance for which
6 no one contends and everyone agrees would be undesirable
7 and unworkable.

8 QUESTION: That would force or at least bring
9 some pressure to include searches as such, would it
10 not?

11 MR. LEE: Mr. Chief Justice, my answer to that
12 is yes. Now, we are dealing here today with
13 distinctions that affect only a handful of groups, 30 or
14 40 maybe at the outset, but I don't know of any
15 principal basis short of the proposition that any
16 501(c)(3) charity that has qualified for 501(c)(3)
17 status is eligible.

18 In other words, if the distinction between the
19 legal advocacy groups and other groups is not within the
20 President's constitutional power, then I do not see any
21 basis, any constitutional basis for distinguishing
22 churches, universities, or any others.

23 We submit that what the President did in this
24 instance clearly is reasonable. Of course the lines
25 could have been drawn in other ways, but the

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1 Constitution does not so limit the President, and the
2 judgment of the Court of Appeals should be reversed.
3 I would like to reserve the rest of my time
4 for rebuttal.
5 CHIEF JUSTICE BURGER: Very well.
6 Mr. Ralston.
7 ORAL ARGUMENT OF CHARLES STEPHEN RALSTON, ESQ.,
8 ON BEHALF OF THE RESPONDENT
9 MR. RALSTON: Mr. Chief Justice, and may it
10 please the Court, it is also respondent's position that
11 the issue pressented by this case is a narrow and
12 specific one. We would state that issue somewhat
13 differently, however.
14 And our statement of the issue is, can the
15 government prohibit charitable organizations from
16 participating in the solicitation of federal employees
17 for donations of their money because, Number One, those
18 organizations use litigation to obtain health and
19 welfare benefits for their clientele, and Two, because
20 some federal employees find such organizations
21 controversial or objectionable on some basis or other.
22 And I think to frame that issue I would like
23 to emphasize a few key facts that are well established
24 by this record.
25 First of all, the only thing at issue in this

1 case is access of the respondent to designated funds.
2 There are two types of moneys obtained in the Combined
3 Federal Campaign. Undesignated is money that is put
4 into a general pot to be distributed. Designated funds
5 are money that particular federal employees decide
6 freely, voluntarily, on their own to give to a
7 particular organization. That is all any of the
8 respondents get is money that federal employees want to
9 give us.

10 Second, tens of thousands of federal employees
11 have given the respondents in excess of $1 million in
12 the time period that we have been in the Combined
13 Federal Campaign, again, freely and voluntarily.

14 The third fact is that the respondents do in
15 fact provide health and welfare services, and the
16 government really has never contested that. The record
17 is replete, as was held the first time this entire issue
18 was litigated, with examples of the health and welfare
19 services we supply, and I will come back to describe
20 some of those in a moment.

21 The only basis, the only basis for excluding
22 us, and really the proper term is expelling us after we
23 had been in the campaign, is that we accomplish these
24 goals through litigation, litigation activities which
25 this Court has held are at the core of the First

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1 Amendment.

2 We are not Political Actions Organizations.

3 We do not do lobbying activities. Some of us don't do

4 any at all. The rest do whatever lobbying or

5 legislative activities as what any charitable

6 organization can do. The record is clear on that.

7 And the Solicitor General has referred the

8 Court to the letters that are in the record which

9 provided the impetus for our explusion, and I agree,

10 these letters should be read because they are replete

11 with misinformation and a misunderstanding of what we

12 do.

13 There are charges that we are political

14 organizations, that we aren't charities at all. These

15 facts are simply wrong, and this was the main basis for

16 the opposition.

17 The fifth point is that the respondents have

18 at all times sought to participate in the Combined

19 Federal Campaign, a forum that it establishes in ways

20 totally compatible with that forum and fully in accord

21 with the regulations that set it up. We are not seeking

22 to wander the halls of government buttonholing federal

23 employees.

24 We simply want to do the same things that

25 other organizations are allowed to do, which is to have

1 under the regulations here in question our names and
2 30-word statements in the brochures, and we have
3 reproduced in the appendix to our brief a couple of
4 these brochures.
5 That is what is at issue, whether we can get
6 that information before federal employees, and whatever
7 other free speech activities are allowed by the
8 particular local Combined Federal Campaign, to get that
9 information before federal employees when they are
10 deciding whether they will give them money at all,
11 whether they will designate it, and if designating it,
12 to whom they will designate, to whom they will give
13 their money.
14 And this campaign, these methods that the
15 government has set up and which we do not contest, are
16 the only way to reach federal employees effectively as
17 an audience. There are no equivalent alternatives. The
18 courts below in a series of cases held that, and to urge
19 that direct mail, for example, is just as good is simply
20 inaccurate from a fundraising point of view.
21 The State of New York, for example, in its
22 amicus brief has pointed out one of the great advantages
23 of this method of raising funds is that it maximizes the
24 funds available for the charitable activities of the
25 organizations themselves.

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1 QUESTION: Mr. Ralston --

2 MR. RALSTON: Yes, Your Honor.

3 QUESTION: -- I am curious. Do many people
4 throughout the government employee ranks designate
5 rather than not designate?

6 MR. RALSTON: Yes, Your Honor, in recent
7 campaigns there has been approximately 60 to 65
8 percent. Before the changes in 1982, there was no
9 encouragement to designate. So approximately 65 percent
10 of the funds were undesignated.

11 However, in 1982, the government, when it
12 changed the regulations, encouraged designations, and in
13 the past years the predominant amount of money has been
14 through designation. Again, we only get designated
15 funds, that is, money that people want to give to us as
16 individual organizations.

17 The final point is, as the District Court
18 found, based on what the government put in the record,
19 the motivation for expelling us from the campaign was
20 controversy. There were some federal employees who
21 didn't think we should be in. They were opposed to our
22 continued inclusion, and the government acquiesced to
23 that and ejected us from the campaign.

24 I think it is also important to focus on
25 exactliy what the rule is that keeps us out, because the

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1 government has talked a lot about having to draw lines.
2 Our position is, the line that is drawn is simply an
3 unconstitutional one.
4 We are excluded, and all elements of the rule
5 result in our exclusion, Number One, because we
6 litigate, Number Two, because our litigation consumes in
7 excess of 15 percent of our budgets and/or $1 million,
8 Three, we litigate on behalf of others, and Four, we are
9 selective in our litigation. That is, the cases we
10 select are related to particular causes.
11 If any one of these isn't present, we would be
12 in. For example, legal aid societies which expend 100
13 percent or close to it of their budgets for the purposes
14 of litigation are accepted into the Combined Federal
15 Campaing. They have been for a long time.
16 QUESTION: How about the District of Columbia
17 Bar Association, for example?
18 MR. RALSTON: Your Honor, if they are
19 charitable activities, such as to qualify them
20 generally, if they qualified as a 501(c)(3) organization
21 and met the other various provisions that are in the
22 regulations, they might be able to qualify. I am not
23 that familiar with what they do.
24 QUESTION: How about the ACLU?
25 MR. RALSTON: The ACLU Foundation, which is

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1 their tax-exempt arm of the ACLU, would be able to come
2 in in the same way that the NAACP Special Contribution
3 Fund is in the campaign.

4 QUESTION: When the designations are made, is
5 that controlling?

6 MR. RALSTON: Yes, Your Honor.

7 QUESTION: What about the undesignated funds?
8 Who decides how they are divided?

9 MR. RALSTON: Under the present system, or the
10 system that existed that is in issue here, the
11 undesignated money goes to a private organization which
12 has been designated the principal combined fundraising
13 organization. In virtually every instance it is the
14 local chapter of the United Way.

15 United Way then decides among the
16 participating organizations how to divide up the
17 undesignated moneys, but we do not get any of that.

18 QUESTION: Does that take into account the
19 amount that was received, allocated by the designation?

20 MR. RALSTON: Not under the formulas as I
21 understand them. It is simply -- There used to be under
22 the system before 1982 a rather complex mathematical
23 formula, but the way the system works now is, the PCFO,
24 which again in practical effect is the local United Way
25 branch, decides based on its assessment of local needs.

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1 Again, we don't get any of that.

2 QUESTION: Why not?

3 MR. RALSTON: Because the District Court held

4 that the rule that we are challenging was only

5 unconstitutional as it related to getting designated

6 funds, and essentially said, if we felt we were being

7 wrongfully denied undesignated funds, we could challenge

8 that under the equal protection claim.

9 We had challenged the prior undesignated funds

10 system in NAACP Legal Defense Fund Number Two. This is

11 actually the third in a series of cases. We lost that.

12 We did not appeal, primarily because we felt that since

13 the focus of the campaign had shifted almost primarily

14 to designated funds, that was a primary issue. We have

15 essentially acquiesced in our --

16 QUESTION: The cases were judged that you may

17 constitutionally be kept from sharing the undesignated

18 funds?

19 MR. RALSTON: Yes. That is the basis on which

20 the District Court decided the case. We did not appeal,

21 and that is binding on us. We do not challenge that in

22 any way.

23 QUESTION: I am curious why you didn't.

24 MR. RALSTON: Well, basically, Your Honor, the

25 formula --

1 QUESTION: Maybe you thought you would lose.

2 (General laughter.)

3 MR. RALSTON: We thought we might lose, and

4 quite frankly, it began to become de minimis, because

5 when we first challenged it, 65 percent of the funds

6 were undesignated. It has now shifted heavily to a

7 designated program, which we think is the right kind of

8 program.

9 Let me continue with some examples of some

10 other organizations that are in, and we are out. I

11 mentioned the NAACP Special Contribution Fund, which is

12 a separate organization from the lead respondent here.

13 They do exactly the same kind of litigation that we do.

14 It is just apparently they do it less than 15 percent of

15 their budget.

16 Another example of the way we are excluded

17 even though organizations which do the same thing or get

18 the same results are included, we are the only category

19 of organizations excluded because we focus on a

20 particular cause. American Cancer Society is in.

21 Various health agencies that focus on a particular issue

22 are in.

23 The regulations, and I would refer the Court

24 to again our appendix, Page 37A, which contains the

25 definitions of the agencies which are included under the

1 executive order, permit in organizations that provide
2 for the care and treatment of prisoners, a specific
3 category, a specific cause.
4 The record again establishes, without
5 contradiction from the government whatsoever, that
6 because of litigation brought by the NAACP Legal Defense
7 Fund, $20 million has been spent in the State of Georgia
8 to build medical care and mental health care facilities
9 for prisoners in the State of Georgia, and another $46
10 million spent to totally rehabilitate the main prison
11 there.
12 We would submit that these are exactly the
13 kinds of benefits, services to prisoners that the
14 regulations contemplate that other organizations
15 provide. The only reason we are out is because we do it
16 through litigation.
17 The government's reasons --
18 QUESTION: May I ask this?
19 MR. RALSTON: Yes, Your Honor.
20 QUESTION: Who does the weighing, and on what
21 standards would they do the weighing to decide whether
22 the presence of certain organizations would lead some
23 employees to boycott the entire enterprise?
24 MR. RALSTON: Your Honor, that is basically
25 the government's controversy argument, and our first

1 position would be --

2 QUESTION: That is a little more than -- it is

3 broader than controversy, isn't it?

4 MR. RALSTON: Yes. Well, as a result of their

5 opposition to us being in, they don't want to contribute

6 at all.

7 QUESTION: I was thinking of Planned

8 Parenthood, for example. You would automatically have a

9 certain reflex reaction with some people, would you

10 not?

11 MR. RALSTON: Yes, and as the Planned

12 Parenthood amicus brief establishes, it provides health

13 services of exactly the kind that other organizations

14 are in, and in fact the record in that case establishes

15 that the petitioner attempted to keep him out because he

16 didn't like them along with other organizations didn't

17 like them.

18 But they were attempted to be kept out because

19 they were too controversial, even though their services

20 were clearly within the scope of these regulations, and

21 that is what the District Court so found, and again, I

22 refer the Court to the Planned Parenthood amicus brief,

23 which describes that entire incident.

24 Our basic position is that the fact that some

25 people think that we shouldn't be in is essentially

1 legally irrelevant and in fact a constitutionally
2 unacceptable reason for ejecting us.
3 Plus the fact that unless one accepts the
4 government's view that the reasons given have to be
5 simply accepted with no review of them whatsoever, which
6 is what I now understand their position to be, the
7 notion that because we are in created such great
8 controversy that the Combined Federal Campaign was on
9 the verge of destruction simply has no support in this
10 record at all.
11 And I would like to recount briefly the
12 precise history of our involvement in the Combined
13 Federal Campaign. The government in its brief simply
14 leaves out a very important piece of it.
15 In 1980, three organizations that were
16 basically legal organizations applied, the Special
17 Contribution Fund of the NAACP, which is a separate
18 organization, Puerto Rico Legal Defense Fund, and the
19 NAACP Legal Defense Fund. The Special Contribution Fund
20 was let in. We were excluded under the direct services
21 rule, basically on the ground that we weren't legal aid
22 societies. If we were, we were in. Because we weren't,
23 they said we were out.
24 We brought an action. Judge Gizzell not
25 simply that that provision was vague, but that the

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1 direct services rule was inconsistent with the Executive
2 Order enacted in 1961 by President Kennedy which the
3 government relies on in giving a continuous history of
4 20 years of everybody understanding what it meant.
5 All I can say is, I didn't understand the
6 Executive Order to exclude us, nor did the regulations
7 exclude us. I didn't even understand the direct
8 services rule to exclude us.
9 Judge Gizzell found that the direct services
10 rule, which has basically been resurrected by the
11 government now, was inconsistent with the executive
12 order because the executive order was not limited to
13 health and welfare agencies. It stated health, welfare,
14 and other appropriate agencies.
15 In 1981, we were all let in, or five of us,
16 excuse me, were let in because the government said they
17 didn't have time to try to redo the regulations. Late
18 in 1981, they proposed -- OPM proposed to the President
19 a new Executive Order which would be very similar to the
20 Executive Order and regulations that are here at issue
21 which would exclude us.
22 The President did not adopt that Executive
23 Order. Rather, he enacted a superseding Executive Order
24 which retained exactly the language that Judge Gizzell
25 had held did not exclude us, health, welfare, and other

1 appropriate agencies.

2 The government then issued regulations that

3 specifically included us, not under court order, but

4 under the provisions of the President's new Executive

5 Order, and announced that it had decided to remove any

6 doubt of our being able to participate by stating that

7 we were entitled to be in as health, welfare, and/or

8 other appropriate agencies.

9 So, we were in, and the other two respondents

10 came in, along with some other legal defense funds.

11 Now, between 1979, the year -- I'm sorry,

12 1980, the year before any of us were in the Combined

13 Federal Campaign, and 1983, when all of us were in,

14 receipts from the Combined Federal Campaign rose from

15 \$87 million to \$109 million. That is an increase of 25

16 percent.

17 The government says, well, the level of

18 participation went down, but again, in the year before

19 any of us were in, that is, 1980, 59 percent of federal

20 employees gave. The first year any of us were in, 1981,

21 when five of us were admitted, receipts went up, and 60

22 percent of federal employees gave. There was no

23 controversy in 1981. The government has produced no

24 letters from anybody complaining about the fact that we

25 were in.

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1 1982, there was a controversy engendered
2 almost exclusively because one particular organization
3 came in, and our position is that the government could
4 have taken reasonable steps to deal with that
5 controversy including informing the people who were
6 writing the letters that they had all their facts wrong,
7 which was in fact they case.
8 They didn't. They simply said, all right, we
9 are now going to change our mind and throw all these
10 legal defense funds back out. So it is simply not
11 accurate to state that there is this historical
12 understanding that everybody always had that traditional
13 charities, whatever that term is supposed to mean, were
14 the only ones ever intended to be in the Combined
15 Federal Campaign.
16 QUESTION: Well, isn't it true that from '61
17 until the first court action in this case that
18 traditional charities were the only ones in the Federal
19 Combined Campaign?
20 MR. RALSTON: Well, Your Honor, I don't
21 understand quite what traditional means. If it means
22 organizations that serve as conduits of money from one
23 group to another, if one looks at the list, primarily
24 such organizations are in.
25 But legal aid societies, for example, were in

1 as subagencies of local United Ways, and this was why
2 when we applied in 1980, and were told, well, you would
3 be in if you were a legal aid society, and you are cut
4 because you are not, and that is because we don't
5 provide direct services, we didn't understand that at
6 all, quite frankly. I still don't understand the
7 attempted distinction, among others, between us and
8 legal aid societies, since whatever we do, we do through
9 litigation.

10 So, this concept of traditional charities and
11 the notion that somebody had that in mind all along,
12 even if it can be defined, which I contend it cannot be
13 define, is circular anyway, because it still doesn't get
14 around to the question of whether assuming such a
15 restriction existed, whether it was a reasonable
16 restriction.

17 The government also relies on the argument
18 relating to appearance of impartiality. Of course, we
19 think the government should be impartial also, but it is
20 not being impartial. It is essentially saying, look, we
21 think there are some agencies that are really
22 worthwhile, some agencies that aren't so worthwhile, and
23 we don't want federal employees even to be able to think
24 about giving to the agencies that we don't think should
25 get the money, so we are not going to let even their

1 names or 30 words be before the federal employees.

2 QUESTION: Mr. Ralston, can I interrupt you?

3 MR. RALSTON: Yes, Your Honor.

4 QUESTION: You referred us to the Planned

5 Parenthood amicus brief which I looked at during your

6 argument, and their first argument is that the Executive

7 Order is an attempt to suppress ideas with which the

8 petitioner disagrees. You don't make that argument, do

9 you?

10 MR. RALSTON: Your Honor, we -- well, we have

11 not relied in our brief on a viewpoint argument,

12 although the government has always taken the position

13 that it wants us out because it doesn't want federal

14 employees to read our 30 words and perhaps give us their

15 money, so in a way that is an attempt to express the

16 expression of our views, our ideas as to how their money

17 should be spent.

18 QUESTION: If you don't make that argument,

19 and I understand you make it marginally, I guess, what

20 is the standard? There is a line drawing problem. Your

21 opponent argues that, well, we basically have got to

22 draw the line somewhere. Maybe you say no, anybody who

23 applies ought to -- for example, what about churches?

24 Would they exclude all churches?

25 MR. RALSTON: There are -- well, to begin

1 with, I will answer your question, but my first point
2 would be, and I would like to reemphasize it, assuming a
3 line needs to be drawn, the line they have drawn here is
4 an unconstitutional one. That is our fundamental
5 position.

6 The second position is that before the
7 government draws a line which is going to result in
8 excluding, denying people First Amendment rights, and
9 the government does, I think, concede that the First
10 Amendment has something to do with this case, there has
11 to be a reason for that exclusion.

12 And if one looks at how the Combined Federal
13 Campaign works, the need for drawing a lot of very
14 strict lines and excluding groups is not at all clear.
15 In the first place, everything is on the local level,
16 550 approximately local Combined Federal Campaigns.
17 Agencies that are part of the United Way get in through
18 the United Way. That is something around, over 30,000
19 agencies.

20 The line the government has drawn here out of
21 this alleged universe of 300,000 organizations excludes
22 40, maybe 100 organizations. It simply is not a line
23 designed to limit the number of organizations. Now,
24 there are some lines that I think are perfectly
25 reasonable, 501(c)(3) organizations, organizations that

1 seek contributions from the public, because after all,
2 the Combined Federal Campaign is an attempt to get
3 contributions from the public. That would exclude
4 private foundations. It would exclude many private
5 schools, for example, which don't seek money from the
6 public generally.
7 Churches, political -- actual political action
8 groups, which of course are not 501(c)(3) organizations
9 anyway, I think could be reasonably excluded on the same
10 grounds that this Court has upheld in the Hatch Act, for
11 example. Getting government employees directly involved
12 in political activities could be a problem.
13 There are many church-related charities in the
14 Combined Federal Campaign. If one looks at the list
15 that we have provided, you will see many organizations,
16 Catholic charities, Unitarian charities are in the
17 campaign. Actual churches per se are not. I don't have
18 any idea whether any have applied or any ever will
19 apply.
20 They could be excluded, I would think, if the
21 government had to do it, could be excluded on the
22 grounds that this might be too direct support to the
23 establishment of religion, but again, the government
24 has --
25 QUESTION: Do you think the government

1 allowing churches to solicit as a part of a general
2 charitable campaign could be construed as the government
3 supporting religion?
4 MR. RALSTON: Your Honor, I don't say that. I
5 am trying to respond to if a line had to be drawn, could
6 some lines be drawn. I am simply suggesting that there
7 may be some reasonable lines. I don't feel, and this
8 relates to the government's subsidy argument, that sort
9 of comes up and then disappears from time to time, that
10 the Combined Federal Campaign is really a subsidy or
11 direct support.
12 Again, it is an attempt to get people,
13 individuals to decide to whom to give their money. I
14 don't really -- Our basic position is that no necessity
15 for drawing a line here has been shown, and there has
16 really been no necessity shown to draw any particular
17 line because there is no real indication of any
18 inundation, that there are so many charities that are in
19 fact going to apply that it is going to overwhelm the
20 campaign at all.
21 The health and welfare line generally, if it
22 could be defined in a way that related to some
23 government purpose, might be a possible line if it was
24 necessary to draw one.
25 QUESTION: Well, I suppose the exclusion was

1 for some reason. In the litigation was there some
2 reason given for excluding it?
3 MR. RALSTON: Yes, the reason given in the
4 District Court, and this was the main defense of the
5 government in the District Court, was the controversy,
6 that they got all these letters from people complaining
7 about the fact that legal defense funds or these
8 political organizations --
9 QUESTION: Well, do you accept that as the
10 reason ,that that was really the active reason?
11 MR. RALSTON: That is what the District Court
12 so found, and we believe that is the only reason that
13 makes any sense to us. None of the other reasons do.
14 QUESTION: And you say that -- and your
15 position is, that is just inadequate?
16 MR. RALSTON: That it is not only inadequate,
17 it is an unconstitutional reason. Our position would be
18 that our First Amendment rights cannot be denied because
19 someone out there doesn't want us to exercise them.
20 And again, the whole point of this, the
21 attempted exclusion, is so that our names and our 30
22 words will be removed from the brochures. That is what
23 the exclusion amounts to.
24 QUESTION: How about the Socialist Party?
25 MR. RALSTON: Pardon me, Your Honor?

1 QUESTION: How about the Socialist Party of
2 America?
3 MR. RALSTON: Your Honor, they are not a
4 charitable organization, and that simply is not at
5 issue. We would have no -- I think the government could
6 draw a line --
7 QUESTION: It certainly would involve the
8 First Amendment points that you were making.
9 MR. RALSTON: That is true, Your Honor, but --
10 QUESTION: If this is a forum and the First
11 Amendment applies, I have difficulty seeing how the
12 Socialist Party could be excluded.
13 MR. RALSTON: Your Honor we do not contend
14 that the government, having opened up with, we contend,
15 which we urge first is a limited public forum, a forum
16 for the specific purpose of charitable solicitation,
17 then as required to under the decisions of this Court,
18 open it up to any type of solicitation.
19 The Socialist Party is not a charity. Its
20 involvement in a forum which is dedicated to charitable
21 solicitation would be totally incompatible with the
22 purposes of that forum. In our brief, we have pointed
23 out that our basic position is that this is a limited
24 public forum, and we have also said, assuming that it
25 isn't, is not a public forum, we have essentially taken

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1 on the government, as it states its case, that the bases
2 for our exclusion are not reasonable anyway.
3 But our contention is that this is a forum
4 clearly dedicated to charitable solicitation. It is as
5 if, if you will, the government has set up two bulletin
6 boards in the hallway of a federal agency. One over on
7 one side is for official government business. The one
8 on the other side is labeled Charitable Solicitation,
9 and the organizations are allowed to post a card with
10 their 30 words on that bulletin board.
11 That is all we want, is access to that
12 bulletin board on the same basis as other organizations,
13 free of distinctions which we contend are basically
14 unconstitutional. That is our basic underlying final
15 contention, that the government has used an
16 unconstitutional reason, that is, the controversy we
17 have allegedly or someone has engendered, to stop a free
18 speech activity --
19 QUESTION: Well, you would -- I take it if
20 your argument is sound it wouldn't make any difference
21 how much controversy had been -- would be engendered,
22 and even if half or three-quarters of the people who had
23 been participating would no longer participate, you
24 would still be entitled to be in.
25 MR. RALSTON: Yes, Your Honor.

1 QUESTION: For your argument it is just
2 irrelevant how much controversy there is.
3 MR. RALSTON: That is right. The point is
4 that the government has -- the reason for the
5 government's action is the controversy, and our first
6 argument is, that is an unconstitutional reason. It
7 cannot justify our being denied our First Amendment
8 rights because somebody objects to our doing so.
9 QUESTION: But all of this depends upon
10 whether this is or is not a public forum, does it not?
11 MR. RALSTON: Your Honor, our basic position
12 is that even assuming it is a nonpublic forum in the
13 Perry analysis, the reasons given are unreasonable and
14 indeed are unconstitutional reasons.
15 Our first position is that it is a limited
16 public forum, using the Perry analysis. But even
17 assuming a nonpublic forum, we still contend that what
18 the government has done is unconstitutional, because
19 Perry makes it clear that even a nonpublic forum is
20 subject to the First Amendment and, for example, states
21 that the government cannot exclude organizations because
22 they don't want their ideas expressed.
23 I mean, that is the reason why we are being
24 excluded. The government does not want our 30 words to
25 get before the federal employees.

QUESTION: Your position you don't think is inconsistent with Shaker Heights?

MR. RALSTON: No, Your Honor. Our position is that Shaker Heights was a forum dedicated to commercial advertising. This is a forum dedicated to charitable solicitation. That is all we want to do. We are the same kind of organizations that are let in.

Thank you.

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

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. LEE: Just two matters, Mr. Chief Justice. First, I would like to point out that Mr. Ralston had addressed only one of the three reasonable bases for what the President did, and that is the address of the avoidance of controversy.

With regard to the lessening of the federal government's --

QUESTION: You said that was the only --

MR. LEE: The only one he thought was any good.

QUESTION: -- testimony before the District Court. Is that true or not?

MR. LEE: Well, whether that is true or not, certainly the President is entitled to make some

1 reasonable judgments.

2 QUESTION: How do we know what the reasons

3 were for his actions, excluding? How do we know that?

4 You may --

5 MR. LEE: Well, the reasons are really set

6 forth --

7 QUESTION: It may be that there are a lot of

8 reasons he might have had, but what were they?

9 MR. LEE: The reasons are set forth in the

10 content of the executive order themselves. They are

11 spelled out with at least the amount of detail that were

12 spelled out, for example, in the Perry case as to what

13 the reason was for avoiding the conflict between the two

14 unions, or in the Lehman case as to what the reason was

15 for the city's judgment there in avoiding disruptive

16 activity --

17 QUESTION: So we are to find the reasons in

18 the Executive Order? Is that where we look for them?

19 MR. LEE: Well, the basis, at least, for those

20 judgments, but the point is that there has to be a

21 certain amount of leeway for -- there is no way that

22 anyone can determine for sure whether the President was

23 right or wrong in determining that the contribution to

24 the government's net welfare benefit will be positive or

25 negative.

1 That is a factbound issue concerning which no
2 one can tell --
3 QUESTION: Now, is that the reason stated in
4 the executive order?
5 MR. LEE: Yes, it is. Yes, it is. And with
6 regard to the matter of keeping down the costs of the
7 campaign and making judgments concerning which way the
8 campaign will be able to raise more money, that also is
9 a reasonable basis.
10 Now, with regard to the one of the three bases
11 that Mr. Ralston has addressed, namely, the avoiding of
12 controversy, with regard to that one, he necessarily
13 concedes and properly concedes that it matters not how
14 controversial, how extreme the controversy may be, and
15 in that respect he has necessarily asked the Court to
16 overrule its holding not only in Lehman versus Shaker
17 Heights but also in Perry versus Perry Local Educators'
18 Association, because in that case this Court expressly
19 ruled as one of the bases for its decision that the
20 policy of excluding communcation through the mailboxes
21 in that case serves, and I am quoting from Page 52 of
22 the Court's opinion, "serves to prevent the district
23 schools from becoming a battlefield for interunion
24 squabbles," the very kind of thing, the very kind of
25 reasonable basis that is also involved in this

1 particular case.

2 QUESTION: I suppose the application of those

3 criteria might lead to striking some of the other people

4 who are now on the approved list.

5 MR. LEE: Of course, Mr. Chief Justice, and

6 that is the final point that I want to make. All that

7 Mr. Ralston has succeeded in doing is making a case that

8 it would be reasonable, it would not have been

9 unreasonable to have included the legal advocacy groups

10 within the Campaign.

11 What he has shown is that if there is to be a

12 campaign, the reasonableness test that has to govern has

13 to be a test that permits a fair degree of operating

14 room for the President's decision, because I submit that

15 everyone, churches, certainly universities, every

16 501(c)(3) charitable organization can make a point that

17 the government might achieve its objectives through some

18 other way, or might make a point that they are very

19 similar to some other organization that has been

20 included.

21 And if that is the only unprincipled,

22 unanchored rule of law that governs in this instance,

23 then there simply is no stopping it short of everyone,

24 every 501(c)(3) organization.

25 The Court of Appeals really acknowledged that

1 there were these differences, but the Court of Appeals
2 simply held that the differences weren't good enough and
3 that maybe there was some other way to achieve it.
4 Now, if that is the test, then it is a test
5 that is completely open-ended. We submit that the test
6 must be, is the President's decision reasonable, and is
7 it free of arbitrariness and caprice?
8 I fail to see, for example, how it would be
9 possible if Mr. Ralston's First Amendment argument is
10 correct, how it would be possible to exclude churches,
11 because they also have First Amendment arguments that
12 would be equally applicable.
13 The respondents, in short, are very willing to
14 suggest deferential lines by which churches could be
15 expelled, by which universities could be expelled, but
16 that there is no particular need to draw any line as to
17 them. Any principled basis on which the federal
18 campaign can be maintained within any kind of manageable
19 bounds has to be -- has to rest upon a constitutional
20 rule that is not only a reasonableness test, but a
21 reasonablness test that permits the President
22 considerable deference.
23 QUESTION: Mr. Lee?
24 MR. LEE: Yes.
25 QUESTION: What about his suggestion that you

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1 could limit it to organizations that solicit funds,
2 their principal source of funds are derived from general
3 public solicitations, which I suppose would take
4 churches out of it? Wouldn't that be a reasonable --
5 MR. LEE: Of course it would be a reasonable
6 ground. Of course it would be a reasonable ground.
7 QUESTION: So you could draw a line that would
8 exclude churches, I take it.
9 MR. LEE: Sure, if you adopt the kind of
10 standard that we are proposing, that is, a standard that
11 is truly a reasonableness standard, and gives a certain
12 amount of equity in drawing those kinds of lines, but if
13 you turn it around the other way, and then you ask
14 yourself the question, but do you have to do it that
15 way --
16 QUESTION: Well, I guess you would agree you
17 at least have to say that your reason has to be a
18 constitutionally permissible reason.
19 MR. LEE: That is correct.
20 QUESTION: And neutral, so that if, for
21 example, controversy is not a constitutionally
22 permissible reason, then you have solved the problem.
23 MR. LEE: That is correct, but it is not
24 just --
25 QUESTION: As suggested by Perry.

1 MR. LEE: That is correct, but we still have
2 the other two, and I turn back to Perry and to Lehman,
3 and the reason that Perry and Lehman are good law,
4 Justice Stevens, is not that it gives a Hecklers veto,
5 right to veto. It is simply that it is looking to other
6 objectives, other than just the fact that we are going
7 to agree with the disagreement of these particular
8 individuals.
9 We are going to look to other legitimate
10 governmental concerns that arise independently of the
11 disagreement, such as the disruption in the work place
12 that would have occurred in Perry, and that I have
13 simply see as indistinguishable, the indistinguishable
14 kind of disruption that --
15 QUESTION: Well, you don't claim that
16 controversy causes that sort of harm. You just say it
17 might chill the total contributions. That is the only
18 significance of controversy.
19 MR. LEE: Well, it might chill the total
20 contributions, and it might increase, or a person could
21 certainly conclude that it might increase the amount of
22 time and effort of federal employees in conducting the
23 campaign, and as I say, that is one of the three
24 reasons.
25 Unless the Court has further quesions, thank

1 you.

2 CHIEF JUSTICE BURGER: Thank you, gentlemen.

3 The case is submitted.

4 (Whereupon, at 2:50 o'clock p.m., the case in

5 the above-entitled matter was submitted.)

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CERTIFICATION

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preme Court of The United States in the Matter of:
4-312 - DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

titioner v. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL.

d that these attached pages constitutes the original
anscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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