

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-701

TITLE FEDERAL ELECTION COMMISSION, Appellant V.
MASSACHUSETTS CITIZENS FOR LIFE, INC.

PLACE Washington, D. C.

DATE October 7, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL ELECTION COMMISSION, :

Appellant, :

v. : No. 85-701

MASSACHUSETTS CITIZENS FOR LIFE, :

INC. :

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Washington, D.C.

Tuesday, October 7, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 2:00 o'clock a.m.

APPEARANCES:

CHARLES N. STEELE, ESQ., Washington, D.C.;

on behalf of Appellant.

FRANCIS H. FOX, ESQ., Boston, Mass.;

on behalf of Appellee.

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1 corporation under Massachusetts law whose central
2 purpose is to foster respect for human life and to
3 defend the right to human life, all human beings, born
4 and unborn.

5 It has carried out its purposes by raising
6 funds and contributions which it uses to further its
7 purposes through dissemination of information,
8 education, and legislation. It does this in large part
9 through a newsletter which it distributes.

10 QUESTION: It is now a membership corporation,
11 am I correct about that? At the time the events at
12 issue here occurred it was not, but it now is?

13 MR. STEELE: Yes. The record seems to reflect
14 that from the discussions. After 1978 it became a
15 membership corporation, apparently.

16 The Massachusetts Citizens for Life in 1978,
17 September of 1978, before the Massachusetts primary,
18 distributed an election flyer, labeled a special
19 election edition flyer, which proclaimed that it had in
20 it everything you need to vote pro-life, set forth the
21 MCFL's positions on several issues, indicated the
22 positions in relationship to some 400 candidates, all
23 federal candidates and state candidates, urged the
24 recipients to vote pro-life, depicted some of them with
25 pictures, those who supported the pro-life position.

1 The question before this Court is whether
2 Congress can require that the funds used for such
3 advocacy can be separate -- can be required to be
4 separate and segregated from the funds which consist
5 only of voluntary contributions.

6 The court below concluded that the statute in
7 question restricted the simplest method by which
8 Massachusetts Citizens for Life could achieve its
9 advocacy. It said that there was a burden on the rights
10 of speech and association because of the requirement of
11 establishing the separate segregated fund.

12 Before going on to the reasoning of the court,
13 I would like to note explicitly three things that it did
14 not decide:

15 It did not decide that the statute prohibited
16 the speech in question, but only that it burdened it;

17 It did not decide that the statute prohibited
18 the distribution of voting records, nor even that the
19 statute required that voting records be distributed
20 through the mechanism of a separate, segregated fund;

21 And it did not prohibit this organization or
22 any other similar organization from distributing in a
23 newsletter to its members voting records which advocated
24 the election and the defeat of candidates.

25 What it did hold was that Congress cannot for

1 express advocacy in elections require that any material
2 that is disseminated to the general public, not
3 distributed in the way that a message ordinarily is by
4 an organization, can be required to be from a separately
5 segregated fund, from a fund which apprises everyone
6 that the contributions to it will be used in connection
7 with specific federal elections --

8 QUESTION: I take it it's the organization
9 that apprises the people, not the fund?

10 MR. STEELE: Yes, the organization in making
11 the solicitations -- those can be done by the
12 organization, would be done by the organization, and
13 they would be the ones that apprised them of that.

14 There are three policies underlying the Act
15 which we think that the court's decision goes against.
16 First of all, if the court's decision stands the
17 disclosure aspects of the Act are substantially
18 undercut. Again, there are really three purposes put
19 forward by the statute. One of them is the disclosure.

20 It has been argued here that the section in
21 question, Section 441(b), whose antecedent goes back to
22 the Federal Corrupt Practices Act, is not a disclosure
23 statute. It does, however, specifically set forth that
24 the corporations' and labor organizations' separate
25 segregated funds are political committees and subjects

1 them therefore to the same requirements that all
2 political committees are required under the Federal
3 Election Campaign Act regarding disclosure.

4 And if the court's decision were to stand,
5 that disclosure of where money is spent and where it
6 comes from would be considerably lessened.

7 The second policy --

8 QUESTION: Could Congress require that the
9 publisher of a newspaper along with every edition of the
10 newspaper list all the stockholders of the newspaper?

11 MR. STEELE: I think Congress felt that it
12 would not do that and, in light of the First Amendment,
13 did not do that, and there was an explicit statutory
14 exception.

15 QUESTION: But suppose it changed its mind?
16 Would a requirement like that be constitutional?

17 MR. STEELE: I think that would be a very
18 difficult requirement to uphold.

19 QUESTION: Why is that different from this?

20 MR. STEELE: Because here the purposes of the
21 organization are -- again, I think one of the questions
22 here would be, if the purpose of this organization had
23 been to distribute newsletters by subscription and so
24 forth and that was its regular business, that there
25 would be that question there.

1 This, however, seems to us crosses over the
2 line from the operation of a newspaper in that sense to
3 pure election advocacy, and that in that sense the
4 Congress is balancing there between two different
5 issues, one of those issues being whether election
6 advocacy in the sense of urging the election or defeat
7 of particular individuals can be financed directly from
8 a corporation's funds.

9 They did not prohibit that speech. They
10 merely said that that should be done through a separate,
11 segregated fund and prescribed the methods for having
12 that fund operated and required the public disclosure.
13 But again, that is not a prohibition of that.

14 Now, whether the same disclosure for a
15 newspaper -- again, I think that there would be a
16 substantial question there, but I think that it could be
17 argued that disclosure of the sources of a newspaper's
18 funding was constitutionally permissible so long as it
19 involved no particular restriction on what the newspaper
20 would do.

21 Laws of general application, going back to the
22 Grosjean case and other cases of that applied to
23 newspapers, would be, could be upheld. But I don't
24 think that question is here before the Court, certainly
25 not on the basis of the Court of Appeals' decision,

1 because the Court of Appeals' decision explicitly found
2 that this was not the operation of Massachusetts
3 Citizens for Life's newsletter.

4 QUESTION: To print the list of their
5 advertisements, political advertisements, and what they
6 cost?

7 MR. STEELE: The federal election campaign
8 statute does require, on ads placed, where the source of
9 that is. That is not a direct requirement on the
10 newspaper, but I think that there is the possibility,
11 again, that such a statute could be upheld as a
12 disclosure statute as long as it did not limit the
13 newspaper's right to publish those.

14 QUESTION: But if an ordinary organization,
15 say the Jim Brown Patriotic Society, publishes a list of
16 voting records of all of the Congressmen, that's
17 barred?

18 MR. STEELE: We do not think that is barred
19 and we do not contend that that is barred. We have
20 cited in our brief --

21 QUESTION: And the difference is?

22 MR. STEELE: There's two differences. One is
23 that -- I took the hypothetical as not being a
24 corporation. Assuming that the hypothetical related to
25 a corporation, the Commission has explicitly set forth

1 that if voting records were published in a non-partisan
2 fashion it would not consider those to be in connection
3 with a federal election.

4 The question here, as the court below found,
5 is not the publication of such voting records, but
6 voting records explicitly combined with express
7 advocacy.

8 QUESTION: But the voting records themselves
9 is okay?

10 MR. STEELE: Yes, assuming by that, as the
11 Commission has set forth in its regulations, that they
12 were non-partisan.

13 In effect, I think what is centrally at issue
14 here with regard to this case is what we see as
15 essentially a purpose of Congress in establishing a
16 prophylactic rule with regard to particular types of
17 organizations -- corporations and labor organizations.

18 QUESTION: Well, is it all that clear that
19 Congress intended to sweep in all non-profit
20 corporations, even if they derive no funds at all from
21 business corporations or unions?

22 MR. STEELE: I think it is that clear, Justice
23 O'Connor. We have set forth at some length,
24 particularly in our reply brief, the origins of this
25 statute going backwards in time. And of course, as

1 we've said, we think the fact that it is an 80 year old
2 statute which has been passed back and forth through
3 Congress many times gives some weight to it.

4 But if you go back to the '47 debates which we
5 have set forth, we think that the debates there and the
6 eventual results, and indeed the legislative hearings
7 that led up to that statute, make it quite clear that
8 the sponsors of that Act, particularly Senator Taft,
9 were focusing on this question of all corporations.

10 We have set forth in footnotes to our briefs
11 several organizations with which the 1946 hearings had
12 been concerned, which were quite clearly non-profit
13 ideological organizations in that sense. Senator Taft
14 in discussing the legislation on the floor of the Senate
15 was asked numerous questions. A large number of those
16 were set out in this Court's decision in United States
17 versus CIO.

18 A number of those clearly relate to
19 organizations. He spoke, as we've noted, of churches
20 that were incorporated, that would have no right to
21 spend the money of their members in that fashion. And
22 they were drawing, in that sense, and Senator Taft was
23 drawing in the discussions a very precise line relating
24 to the existence or not or whether it was a corporation
25 or a labor organization within the meaning of the

1 statute.

2 QUESTION: Mr. Steele, it's clear -- or maybe
3 it isn't clear. Could the Commission -- could the
4 Congress constitutionally require an individual who
5 wants to make such a distribution to register and
6 publicly disclose his or her identity and the amount of
7 money that this cost, and so forth?

8 MR. STEELE: I think it is clear, in the sense
9 that that question was -- it was resolved again by the
10 Congress after this Court's decision in Buckley versus
11 Valeo. There is different disclosure required, but that
12 the statute requires the disclosure of independent
13 expenditures by individuals under a separate section of
14 the statute, 434(c). That is not the one here at issue,
15 but that individuals are required to disclose under the
16 statute independent expenditures that they make exprelly
17 advocating the election or defeat of candidates.

18 QUESTION: Does this apply to membership
19 corporations, too? Non-profit membership corporations?

20 MR. STEELE: The statute in question, 2 U.S.C.
21 441(b), does apply to non-prcfit membership corporations
22 in our view, and we think --

23 QUESTION: Is this one a non-prcfit membership
24 corporation?

25 MR. STEELE: It is organized under that

1 section of the Massachusetts law.

2 QUESTION: So then it is.

3 MR. STEELE: Yes.

4 QUESTION: There's no -- you're not saying
5 that they don't follow the law?

6 MR. STEELE: No. My phrasing was meant to say
7 that I think that the question of their tax status --
8 I'm less clear of their tax status under the federal
9 laws. But we have no quarrel with the fact that they
10 are a non-profit corporation.

11 QUESTION: Mr. Steele, I think you said
12 earlier that the -- is it 441(b) has its source in the
13 old Corrupt Practices Acts?

14 MR. STEELE: Yes.

15 QUESTION: Some 80 years ago or something?

16 MR. STEELE: 1907 was the first passage of it,
17 yes.

18 QUESTION: That's 80 years ago, believe me.

19 MR. STEELE: Yes, it is.

20 QUESTION: The corruption which provoked that
21 statute at the time, is it the sort of thing that's
22 ordinarily even associated with non-profit
23 corporations?

24 MR. STEELE: I think that at the time it was
25 passed that was certainly so. Of course, the corporate

1 structure then was considerably different. As I said in
2 response to Justice O'Connor, I think it clear when
3 Congress reconsidered the statute as it did in 1947 when
4 it added labor organizations that it envisaged that.

5 And I think that it was clear again in 1971,
6 when the statute was re-amended in light of this Court's
7 decisions in the CIO case and the UAW case, that Mr.
8 Hansen, who introduced the bill there, was saying that
9 the purpose of that bill was to codify the pre-existing
10 understanding of the law; and that it had been clear
11 throughout that period, I think, that Congress was
12 seeking a rule that dealt -- used the term
13 "corporations."

14 The term in the statute is "any corporation
15 whatever."

16 QUESTION: Well, even assuming that's what the
17 statute says and that it may embrace non-profit
18 corporations, I suppose the First Amendment question is
19 whether it can be constitutional as applied to a
20 non-profit corporation like this, isn't that right?

21 MR. STEELE: I think that is the question, and
22 that was the question --

23 QUESTION: Well, that's why I wondered.
24 Certainly the kind of corrupt practices which gave us
25 the Corrupt Practices Act, is it or isn't it the case,

1 are not usually associated with non-profit
2 corporations?

3 I mean, non-profit corporations don't have
4 these accumulations of wealth that were the seed for for
5 the problem.

6 MR. STEELE: Well, some of them do not. This
7 is quite a small one, but I think that in the context
8 again of the federal revenue code, one finds non-profit
9 corporations, particularly the ones that are not merely
10 503(c)(3)'s, but (c)(4)'s, that do have substantial
11 accumulations of money.

12 Of course, they are not, in the sense of
13 having -- they have not derived that capital from the
14 way that the traditional business corporation --

15 QUESTION: Well, do you recognize that the
16 First Amendment problem is rather more difficult as
17 addressed to a non-profit corporation than it is to a
18 profit corporation?

19 MR. STEELE: Well, I think that the concern
20 that this Court should have about that I certainly
21 understand and concede. What I think that the Congress
22 has here done has set forth a rule which is meant not to
23 inquire into every single transaction or the nature of
24 every particular type of corporation that's involved.

25 Indeed, I think one of the difficulties, one

1 of the outplays from if the Court of Appeals' decision
2 were to stand, is that it seems to say in effect that
3 the Commission not only has the power, but the
4 responsibility, for deciding and inquiring into whether
5 a particular corporation is ideological, whether it is
6 therefore one that has particular beliefs.

7 And I see that as being a substantially
8 difficult test as opposed to a quite neutral, quite
9 defined by other laws test, such as Congress put forth
10 with the use of the terms "corporation" and "labor
11 organizations."

12 QUESTION: Mr. Steele, do I detect from one of
13 your earlier comments that you think Congress may have
14 shifted gears to a certain extent in 1947 from 1907 when
15 it brought in unions, I guess many of which are
16 certainly not supposed to be in business to make money?

17 MR. STEELE: No, I think it did shift gears
18 then in deciding, certainly in deciding that labor
19 organizations, because of their role in the economic
20 process and because of the way they had been treated
21 under the federal statutes regarding labor relations,
22 posed a similar difficulty; that you had there,
23 particularly you had members who would be joining them
24 for reasons other than supporting particular political
25 candidates; and that one of the thrusts of the statute

1 that came forward in '47 and then even more strongly in
2 '71 was that in seeking money for these funds, that
3 people had to be apprised of the political nature of the
4 fund and had to be allowed to realize that, in the
5 paradigm situation of the labor organization which
6 requires membership, that they were not required to give
7 to these funds.

8 QUESTION: But sweeping in the union, they
9 also brought in a little neighborhood membership club

10 --

11 MR. STEELE: I think that --

12 QUESTION: -- in Podunk, Mississippi.

13 MR. STEELE: I think that the --

14 QUESTION: Now, that will not wreck the United
15 States.

16 MR. STEELE: I think that the decision with
17 regard to membership corporations was really not made in
18 1971. It was made by Congress in 1976, quite explicitly
19 with regard to membership corporations.

20 Again, there are many of them that are small,
21 but they are ones which have come under the corporate
22 statutes of the states and the United States.

23 QUESTION: But most of them are small.

24 MR. STEELE: There are --

25 QUESTION: Any book you look at, you'll find

1 that.

2 MR. STEELE: I think that many of them are
3 small. I think there is no doubt about that. But I
4 think that, again, that in making the balance I would
5 urge you to focus on the fact that this does not
6 prohibit those corporations from engaging in this kind
7 of conduct.

8 It says merely that the contributions that it
9 uses for that cannot be assumed to have been given to
10 the organization for its general purposes, cannot be
11 assumed to have been given for the purposes of
12 supporting political candidates and doing direct
13 political advocacy.

14 But it does allow them to gather those funds.

15 QUESTION: But don't you agree that there are
16 a lot of people that think that to urge people to vote
17 is non-partisan?

18 MR. STEELE: I think that is true. I think
19 that the statute regarding corporations made a decision
20 with regard to that which explicitly protected the right
21 to do partisan vote registration within the membership
22 organization.

23 And the Commission's regulations again, in the
24 same places that I was speaking of in regard to the
25 voting records, have set forth methods for voter

1 registration and get out the vote drives so that they
2 will be conducted in a non-partisan fashion.

3 I do think that the Congress has had over the
4 years a very legitimate concern that registration and
5 get out the vote can be partisan and can be manipulated
6 in a partisan fashion.

7 QUESTION: Mr. Steele, what is the threat of
8 corruption that's involved here, even from regular
9 business corporations? You're not talking about
10 business corporations getting together money and giving
11 it to a candidate, or even expending the money in the
12 way that the candidate directs.

13 These are independent expenditures. If
14 there's any connection with the candidate, if they say,
15 you know, in exchange for our doing this would you vote
16 this way, I assume that that would make it a connected
17 expenditure.

18 MR. STEELE: That would make it a coordinated
19 expenditure.

20 QUESTION: So there is none of that involved.
21 What risk of corruption is there in any corporation,
22 profit or non-profit, choosing to support one side or
23 another in a political campaign?

24 MR. STEELE: I think that the danger the
25 Congress feared was that you could get large

1 expenditures where the sources would be known, where the
2 help would be known, and even though there was no overt
3 cooperation before that a rule that would allow those
4 kinds of expenditures would result in the same kind of
5 indebtedness; that even without prior coordination, that
6 it thought that a prophylactic rule saying that
7 expenditures would result in the same thing -- again,
8 the Taft-Hartley Act was where that question was first
9 debated very strongly with regard to the expenditures,
10 when they put in expenditures, because of the
11 Congressional feeling that expenditures serve much of
12 the same kind of role as contributions.

13 And as we have noted in our brief, those were
14 not said to be or alleged to be or said necessary to be
15 in any of this Court's decisions ones that were
16 coordinated; that the feeling was that expenditures
17 themselves would result in the same kind of debt. The
18 same kind of problem was potentially there..

19 QUESTION: There's something wrong with that?
20 There is something wrong with a political candidate not
21 making any commitment to people that work hard for that
22 candidate?

23 MR. STEELE: I think that the judgment of
24 Congress over a long period of time, particularly with
25 regard to corporations, has been, yes, there is that

1 very strong danger there.

2 QUESTION: Oh, I understand there's the
3 danger, but I wouldn't describe that as corruption. I
4 would describe that as the normal workings of the
5 political process, that candidates who get elected tend
6 to favor the interests of those who worked hard for
7 their election.

8 If that's corruption, we're in a lot of
9 trouble.

10 MR. STEELE: Well, I think that the
11 Congressional judgment is that it's not merely the
12 working hard, that it is the relationship of the money
13 that increases that indebtedness, and that there is in
14 their mind a very similar relationship there between the
15 actual contribution under control and the expenditure of
16 money for the same purposes.

17 And indeed, that was the purpose of the '47
18 legislation, was to reach that. And they were very
19 clear, and I think that in regard to that that in this
20 case, in canvassing the CIO and the UAW cases, recognized
21 there that those were not alleged to be coordinated
22 expenditures, but that those were expenditures that came
23 within the meaning of the Act, and upheld in the UAW
24 case the indictment there.

25 QUESTION: Mr. Steele, earlier in your

1 argument you suggested there were three policies that
2 you relied on particularly. One was disclosure, another
3 was the avoidance of corruption, as I understand. But I
4 don't think you've told us what the third was.

5 MR. STEELE: Well, really I think that all
6 three, the three that I was going to mention, come under
7 I think the general heading of corruption, because I
8 think what Congress was saying was that the
9 voluntariness, the individual choice which is protected
10 in the statute, was clearly an important policy; in
11 other words, that the statute, 441(b), makes it clear
12 that in soliciting contributions to these funds that
13 they have to apprise them of the fact that they are
14 going to be used for political purposes, "political
15 purposes" there meaning explicit election-related
16 purposes.

17 And the third, the third purpose which I have
18 touched on, but not in that direct sense, was the very
19 choice that Congress was making, I think, that in effect
20 that it was a prophylactic rule, that it would use a
21 term such as "corporations" and not seek -- a very
22 neutral term, as I say -- and not seek to have an
23 individualized ascertainment of whether or not there was
24 corruption in a particular transaction, would not seek
25 to decide whether a particular corporation was

1 threatening to the process, but would do it in a form of
2 a classification that was as neutral as possible. And
3 it seems to me that was a very important Congressional
4 purpose.

5 I would like to reserve the rest of my time
6 for rebuttal.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
8 Steele.

9 We'll hear from you next, Mr. Fox.

10 CRAL ARGUMENT OF

11 FRANCIS H. FOX, ESQ.

12 ON BEHALF OF APPELLEE

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

15 Mass Citizens for Life is a non-profit
16 ideological grassroots corporation, raising money by
17 means of individual donations, garage sales, cake sales,
18 and the like, devoting itself to the purposes of
19 advancing life of the born and unborn as it sees those
20 purposes through legislative, lobbying, political,
21 ideological means, across a spectrum of activities
22 relating to fetal research, euthanasia, abortion.

23 Mass Citizens for Life has never accepted any
24 business money. Mass Citizens for Life has never made a
25 contribution to a candidate --

1 QUESTION: Mr. Fox, has it accepted any labor
2 union money?

3 MR. FOX: No labor union money, no business
4 money.

5 QUESTION: That isn't critical to your
6 argument, is it?

7 MR. FOX: Depending upon what substantial evil
8 this statute is designed to curb, if one of them is the
9 accumulation of money from the commercial world that
10 might flow into the political process, I'm only
11 mentioning that they have never accepted business money,
12 this particular corporation.

13 QUESTION: Supposing a similar organization in
14 a different state did accept money from business
15 corporations. Would it have a lesser claim than you do
16 to First Amendment protection?

17 MR. FOX: Yes, Your Honor, I think it would
18 have a lesser claim, but nonetheless one that would
19 carry the day with respect to this particular message,
20 which says: Vote, and here are the 492 candidates that
21 are up for office, and here are their positions.

22 QUESTION: Do you think the First Amendment
23 would permit the Government to pass a law requiring
24 disclosure of whether or not there were business
25 corporations contributing to the organization?

1 MR. FOX: I think that that would be a
2 legitimate exercise on the part of the Government. If
3 disclosure in and of itself is a good, and I think that
4 up to a point it is, so that people should know whether
5 the business community or the medical community or some
6 other group is behind a particular candidate or against
7 one, I think then that a statute could be passed saying
8 that any charitable corporation or ideological
9 corporation wishing to engage in independent
10 expenditures should reveal all business money or all
11 labor money it has been fortunate enough to get in the
12 last year.

13 That is not this statute.

14 QUESTION: But do you object to disclosure for
15 your expenditures?

16 MR. FOX: Well, we think that it is unduly
17 burdensome with respect to an ideological corporation
18 whose purposes may be controversial.

19 QUESTION: So you don't need to file and say,
20 I have spent this much trying to get these people
21 elected?

22 MR. FOX: Oh, if Your Honor please, any
23 independent expenditure does have to be disclosed.

24 QUESTION: And you don't object to that?

25 MR. FOX: Oh, no. Oh, no.

1 QUESTION: I didn't think so.

2 MR. FOX: If it's more than \$250, anyone who
3 makes an independent expenditure must disclose it.

4 QUESTION: Including your corporation?

5 MR. FOX: Yes, if this Court were to rule that
6 we may make them at all.

7 QUESTION: I understand.

8 QUESTION: You object to disclosing, however,
9 the sources of the \$250? You object to having to
10 disclose where you got the money that you expended in
11 that fashion?

12 MR. FOX: Well, if -- we're talking about a
13 hypothetical statute. If there were a statute that
14 wanted to ferret out business money and if --

15 QUESTION: Well, isn't that this statute?
16 Doesn't this statute required the separate fund that is
17 set up for this purpose -- don't the sources of that
18 income have to be disclosed?

19 MR. FOX: If a political committee were to
20 file its disclosure, it must disclose any contributions
21 that it has received over \$200.

22 QUESTION: Well, I thought that was -- I
23 thought that that was one of your major objections here,
24 that the effect of this scheme is to require your
25 organization with respect to any money that it wants to

1 use for political activity to disclose the names of its
2 contributors, some of whom might want to remain
3 anonymous.

4 MR. FOX: That's correct, Your Honor. The
5 basic way that my brother argues that that could be done
6 by a corporation is to set up a separate, segregated
7 fund. The way the FEC interprets this statute, Mass
8 Citizens for Life cannot out of its corporate till make
9 any expenditure, direct, indirect, what have you.

10 QUESTION: That's right. But you could set up
11 a PAC.

12 MR. FOX: And he says if we set up a PAC, then
13 that PAC would have to disclose, again only up to \$200.
14 But there is a burdensome requirement with respect to
15 the PAC. Amazingly detailed books must be kept and,
16 most importantly, the membership of that PAC is the only
17 -- the membership of the parent organization are the
18 only people to whom a PAC may go to solicit
19 contributions.

20 So that if you have an organization such as
21 Mass Citizens for Life, which has 80 to 100 chapters
22 throughout the state, and a chapter meeting occurs on a
23 Wednesday in November and 30 people show up, you may not
24 solicit a contribution for your PAC from those people
25 unless you are clear that back at the headquarters that

1 person's name appears as a member on some file card.

2 If you say, well, I'll take your membership
3 fee now and then you may give to the PAC, that's
4 dangerous. You may be implicitly soliciting to the PAC
5 when you ask him to join.

6 The 30 people who show up the next month may
7 be different from the 30 people who show up this month.
8 Are they members, are they not members? May you within
9 the law solicit a contribution to your PAC? I think it
10 would be dangerous.

11 Now, these are burdensome requirements, and
12 the disclosure that is required is of course
13 burdensome. Every nickel that is spent for paperclips
14 or anything else must be disclosed. Names and
15 addresses, though only up to \$200, must be disclosed.

16 QUESTION: Over \$200.

17 MR. FOX: Over \$200, yes, I'm sorry.

18 QUESTION: Mr. Fox, the way you describe those
19 requirements, it seems to me you really have to strain
20 to say they are burdensome. I can see how they would be
21 a nuisance and you have to devote some of your money,
22 some of your time to complying with those.

23 But they're certainly not insuperable, are
24 they?

25 MR. FOX: No, but I think that without a

1 compelling purpose and one served by the narrowest means
2 available, there shouldn't be any burdens placed on the
3 ability of organizations of individuals to make such a
4 message as was made in this case.

5 QUESTION: That's because in your submission
6 the First Amendment protects you.

7 MR. FOX: Yes, Your Honor.

8 QUESTION: But in connection with expenditures
9 in connection with elections, we have sustained a lot of
10 things that we wouldn't sustain if it were just on
11 someone's right to communicate on a street corner about
12 something.

13 MR. FOX: The cases that this Court has
14 addressed itself to in this field, the NCFAC, National
15 Right to Work, and all the others, dealt with
16 contributions to candidates. It has been perceived by
17 this Court that contributions, where there is a
18 contribution to a candidate and perhaps a debt is
19 created that is going to be paid back out of the public
20 trust when that candidate gets elected, that has the
21 propensity for corruption.

22 Equally, this Court has held that totally,
23 thoroughly independent expenditures trigger no such
24 concern, because of the lack of control which that
25 candidate has. He cannot control the spending, and this

1 Court in Buckley has actually recognized that such
2 spending might be counterproductive to that candidate.

3 So we have a situation of independent
4 expenditures, according to the rulings of this Court,
5 that do not implicate corruption. And in that respect,
6 the imposition of any burden -- and there are
7 substantial burdens, not insurmountable, I'll agree, but
8 substantial burdens -- are unjustified.

9 The organization --

10 QUESTION: Mr. Fox -- I don't want to
11 interrupt in the middle of an answer, but I did have a
12 concern I wanted you to address if you would.

13 Mr. Steele made the point that, with respect
14 to organizations of an ideological character such as the
15 one you represent, receive a great many contributions
16 which perhaps one cannot safely assume would be made for
17 an electoral purpose.

18 They might be very sympathetic with the
19 organization, but not necessarily with the use of the
20 funds to elect candidates. They like the lobbying, they
21 like the research, and all the rest. And that one of
22 the purposes the Government seeks to avoid is the danger
23 that people will be supporting, who might be Democrats
24 who agree with most of the objectives of your
25 organization, but would not want to support Republicans,

1 say.

2 Could you address that concern.

3 MR. FOX: Yes, Your Honor. If protection of
4 minority interests is raised as a justification for this
5 statute, I would say, number one, there is nothing in
6 the record here that would indicate any hint of
7 opposition to spreading voting records concerning where
8 the candidates are on this issue about which the
9 organization exists.

10 Number two, the minority interests are not
11 well protected by a statute which says you may not spend
12 any of the joint money, none of the money from your
13 till, for any purpose, lest some minority interest in
14 that statute take offense.

15 QUESTION: (Inaudible) served by forcing your
16 organization to set up a separate fund, and then you
17 solicit and people know exactly what they're paying
18 for.

19 MR. FOX: Not very well, Your Honor.

20 QUESTION: Well, better than this.

21 MR. FOX: I'm not sure that is so at all, Your
22 Honor.

23 QUESTION: Why?

24 MR. FOX: The separate segregated fund, as the
25 FEC argues, could spend for the administration of the

1 PAC, for the solicitation for the PAC, for the setting
2 up of the PAC.

3 QUESTION: That may be so.

4 MR. FOX: They would dip into the --

5 QUESTION: But what about the money you
6 raise?

7 MR. FOX: The money that you raise would be
8 controlled by the officers of the organization.

9 QUESTION: Through the PAC. Then what do you
10 tell the -- what does the separate fund say? We're
11 going to use your money for what?

12 MR. FOX: It doesn't say. Please contribute
13 to our PAC if you are in line with our goals.

14 QUESTION: At least you know it's going to be
15 used for political purposes.

16 MR. FOX: Yes, you will know that.

17 QUESTION: But you may not know at all that
18 the corporation's general revenues or general funds are
19 going to be used for political purposes.

20 MR. FOX: Well, if Your Honor please --

21 QUESTION: Isn't that right?

22 MR. FOX: You won't know either way what
23 candidates are going to be favored.

24 QUESTION: I know, but at least you'll know in
25 a separate PAC you're going to be operating in the

1 political field.

2 MR. FOX: Yes, that's correct. You will have
3 some more pointed view. But the general till may be
4 used to support the PAC, the offices of the corporation
5 may pick what candidates will be favored and what will
6 not.

7 And there comes a point where, if you are in
8 an organization, a corporation or a labor organization
9 or what have you, you have to trust the leaders of that
10 organization to make decisions compatible with your
11 desires or you leave.

12 It is not necessary to set up an absolute
13 prohibition for the use of treasury funds to spend on
14 printing a message.

15 With respect to the --

16 QUESTION: Mr. Fox, just so we're clear about
17 the message here, what you said before led me to believe
18 you were going to assert that the message here is just
19 get out and vote. I didn't read it that way. It was
20 really get out and vote pro-life, and here are the
21 records of people on the basis of who's pro-life and who
22 is not.

23 MR. FOX: That is correct, Your Honor.

24 QUESTION: So it was not just get out and
25 vote, but vote our way and here's something to help you

1 do that.

2 MR. FOX: The message here, the basic and
3 overwhelming significance of the message, was the
4 gathering together of the positions of 492 candidates,
5 and then that was to be distributed. That message could
6 be used by a pro-choice person equally with a pro-life,
7 to know where the candidates line up. You have the
8 information right here that will assist you.

9 The message also said this is not to be an
10 endorsement of any candidate. There were --

11 QUESTION: Well, it's nice to say that, but
12 when you also say vote pro-life doesn't that rather
13 contradict that?

14 MR. FOX: I don't say that it would take a
15 psychiatrist to figure out which side of the issue the
16 authors of this message were on, Your Honor.

17 QUESTION: Thank you.

18 (Laughter.)

19 MR. FOX: There is no doubt what their
20 subjective hopes would be. But many of the races had
21 people who were equally bad or equally good on both
22 sides, and it just served up the information. Some of
23 the pictures here, there would be a Republican and a
24 Democrat for Senator. And it does not expressly say you
25 must vote for Smith, please. It says vote pro-life.

1 QUESTION: But the only pictures are those of
2 the candidates that are pro-life, isn't that right? The
3 others don't get their pictures in?

4 MR. FOX: I'm not sure about Tip O'Neil, Your
5 Honor. His picture is --

6 (Laughter.)

7 MR. FOX: His picture is prominently
8 displayed, and no one really knows.

9 QUESTION: Well, the Court of Appeals said
10 that only pro-life candidates had their pictures.

11 QUESTION: And the rule for which you contend,
12 or the holding of the lower court, would apply even if
13 the publication expressly said we endorse X, Y, and Z,
14 wouldn't it, please vote for Mister So-and-so?

15 MR. FOX: Yes, Your Honor.

16 QUESTION: And that's what you're arguing you
17 have a right.

18 And is it not also true -- and I'm not saying
19 this makes your position stronger or weaker. But it's
20 not just your organization that's at stake here, but
21 there are a whole range of organizations, I supposed
22 churches and the National Rifle Association, a lot of
23 trade associations, there are all sorts of groups who
24 would be covered by the rule for which you contend?

25 MR. FOX: The briefs have set forth various

1 positions here, varying constitutional interpretations
2 which would exclude or include various organizations
3 depending upon what this Court were to believe was the
4 evil that was to be combatted.

5 If the evil is corruption, then independent
6 expenditures do not trigger corruption and one would
7 think that any organization, a business organization, an
8 ideological organization, or any other organization,
9 could make independent expenditures.

10 QUESTION: Well, what if the evil is the one I
11 tried to describe rather clumsily a little bit ago, that
12 you want to be sure the contributors don't just feel
13 they want to contribute to a general cause, but want to
14 know whether they're contributing to an election
15 campaign?

16 What if that's all you're interested in?
17 Doesn't that cut across all these organizations,
18 including yours?

19 MR. FOX: Well, that interest this Court has
20 stated in *Cort v. Ash* is but a secondary concern, if at
21 all, of this statute. It is not well served, and there
22 could be some kind of a requirement that there be an 80
23 percent vote of all members. There could be less
24 restrictive methods than to say the corporate till is
25 off limits for the payment of printing costs for this

1 message.

2 There could be less restrictive means of
3 securing that particular goal. That is not really the
4 goal of this statute. The goal here has been
5 articulated by this Court to be the avoidance of the
6 fact or the appearance of corruption in many cases.
7 That is what has been held to be the evil that Congress
8 was trying to come to grips with.

9 QUESTION: We have also mentioned the concern
10 that Justice Stevens has.

11 MR. FOX: That's correct, Your Honor. It was
12 mentioned as a secondary concern and it is there. But
13 it is not well served by this statute.

14 On this record, there is absolutely not a
15 shred of evidence that anyone of the members of this
16 organization would have any problem with the position
17 taken by this organization in distributing voting
18 records.

19 And the Court in the First National Bank
20 versus Bellotti case mentioned it on the record in that
21 case that there has been no indication of a minority
22 problem. In every case that comes along, no one seems
23 to see that there is any indication that minority
24 interests are not being well represented.

25 But if that were the goal, a better statute

1 could be drafted.

2 The newsletters themselves have been published
3 from 1973 to 1978, and they're all in a separate
4 appendix here, every one of them. That's the relevant
5 time frame. We have also filed with the Court one each
6 of the originals of those newsletters, and here is the
7 special election edition that gives rise to this
8 lawsuit. It covers 492 candidates with their
9 positions. It looks like a newspaper.

10 QUESTION: How is the position expressed, for
11 or against, or what?

12 MR. FOX: It has a Y and an N or NR. It's a
13 box score. The Y is a position on one of the three
14 questions that aligns itself with the pro-life view as
15 they saw it here, and the N is no and NR is no
16 response. Gathered from Congressional voting records
17 for incumbents and questionnaires for non-incumbents.

18 QUESTION: Vote him up or vote him down on the
19 one issue?

20 MR. FOX: If there is a 'single message
21 perhaps, it would be make pro-life be the one issue that
22 you should address yourself to, not elect Smith or don't
23 elect Jones. Here's the information on which you may
24 live up to your principles.

25 The newsletter was started as the most

1 important activity of this organization, and has been
2 published since its first one in 1973, maybe four to
3 eight times a years as funds would allow. Whenever
4 there was as election year, the organization would come
5 out with a special election edition, gathering the votes
6 as it did here, or the statements of position.

7 As to the constitutional arguments, Section
8 441 implicates freedom of expression, freedom of
9 association, and freedom of the press: freedom of
10 expression because speech concerning the qualification
11 of candidates or elected officials goes to the heart of
12 the First Amendment's concerns and supports an
13 enlightened electorate; freedom of association because
14 the ability of like-minded individuals to gather
15 together and communicate to the outside world, enhancing
16 the weak voices of the members, goes to the heart of the
17 American way of life and American history, especially
18 where the message concerns those who would be our
19 leaders.

20 Freedom of the press is implicated because
21 that cherished freedom applies to the humblest handbills
22 handed out on a corner by Tom Payne equally with the
23 slick products of our modern dailies. Freedom of the
24 press is not a captive of the media conglomerates.

25 The First Circuit has held that, although the

1 statute applies, overruling three reasons that the
2 district court found the statute should not be deemed to
3 apply, still the statute was unconstitutional. And
4 legislation which implicates those three concerns to the
5 extend that I have articulated will only be allowed to
6 impose restrictions if they serve the most evil and
7 survive strict scrutiny from this Court, and indeed
8 serve that substantial evil in the least restrictive
9 manner.

10 Now, with respect to corruption, the Court, as
11 I have indicated, has implicated -- has said, has held
12 loudly, that contributions do give rise to that
13 propensity because the candidate my repay out of the
14 public trust, but independent expenditures do not.

15 Now, if this Court were to recognize another
16 purpose to be served, a compelling purpose that will
17 allow quantitative restrictions on speech -- that is
18 what this is, a quantitative restriction on speech by a
19 quantitative restriction on money.

20 If this Court were to find that the
21 requirement of keeping business money out of elections
22 were, despite the previous holdings of this Court, a
23 compelling purpose, it can be served by statutes less
24 restrictive than this, because this statute prohibits
25 Mass Citizens for Life from spending \$9800 here to

1 distribute voting records of 492 candidates by means of
2 a newsletter, although they never had any business money
3 in their till and they never made a contribution to any
4 candidate or a coordinated expenditure in their whole
5 existence.

6 A statute could be articulated that would try
7 to keep out business money by disclosure. If you want
8 to make an independent expenditure, Mr. Charitable
9 Corporation, tell us all your business money and so on.
10 Lesser restrictive, but still intrusive, methods could
11 be devised.

12 But these blanket prohibitions that prohibit
13 the independent expenditure of this organization that
14 never had any business money cannot be justified.

15 Now, the disclosure that the FEC says is to be
16 served here justifies this intrusion into the heart of
17 the First Amendment on the grounds of disclosure. I'll
18 say three things on that:

19 One, Section 441(b) is not a disclosure
20 statute; two, there is disclosure already required in
21 the statutes; three, further disclosure more burdensome
22 and intrusive is not warranted.

23 First, Section 441(b) as interpreted by the
24 FEC is not a disclosure statute. It is an absolute
25 prohibition. It must rise or fall depending upon

1 whether an absolute prohibition is warranted under these
2 circumstances.

3 Section 441(b) does not say: You corporations
4 spend what you want, only disclose what you're about.
5 Section 441(b) says: You people have chosen a tainted
6 form in which to conduct your activities; the assets
7 that you accumulate from your day to day activities are
8 poison; they must be walled off from the political
9 process, even in the form of independent expenditures.

10 Section 441(b) says, as the FEC points out:
11 If you wish to set up a committee, and if that committee
12 then solicits special contributions from your members,
13 not from people who may be sympathetically inclined but
14 from people whose names appear in your card index, then
15 you may use that money for independent expenditures, but
16 you may not use your corporate till to pay for your
17 message, your political message, no matter how modest
18 the amount.

19 This cannot be squared with freedom of
20 association.

21 The second point --

22 QUESTION: Well, where does your corporate
23 till come from, Mr. Fox, other than from the
24 contributions of members?

25 MR. FOX: Garage sales, dances. They're all

1 individual contributions or --

2 QUESTION: But aren't those individuals who
3 contribute members?

4 MR. FOX: Well, this case pointed out some
5 very weak bookkeeping records on the part of this
6 organization. The organization claimed 50,000 members,
7 the organization had 6,000 dues-paying members. The
8 articles of organization in the state house said we have
9 no members.

10 "Members" was a loose concept with these
11 people. But with all these hundred chapters throughout
12 the towns and people coming and going, contributions
13 would be made and so on. And they considered them
14 members, but they weren't in some official sense.

15 QUESTION: Your charter does not provide for
16 members?

17 MR. FOX: It did not provide for members. It
18 said "none" in that.

19 QUESTION: Who elects the officers and
20 directors?

21 MR. FOX: Well, at that time the officers --
22 there were maybe 25 of them, or a board of directors --
23 would elect themselves, and people would come on and
24 replace them. It was very loose. It has been tightened
25 up since the FEC brought this lawsuit.

1 But I want to make the point on disclosure
2 that anyone who makes any independent expenditure for
3 \$250 or more must disclose it. That purposes is already
4 served. If this organization were allowed to make such
5 independent expenditures, they would have to reveal that
6 they make the expenditures.

7 But the purpose of keeping business money out
8 of the electoral process is not served by this statute
9 because of its underinclusive impact. A business
10 organization, a partnership, an association, limited
11 partnerships, a joint venture, need not have any limit
12 on the amount of money that it can spend independently,
13 no limit.

14 True, it must disclose if it spends more than
15 \$250. And if any contribution in furtherance of an
16 independent expenditure is received, that must be
17 disclosed, as must anyone who makes a disclosure making
18 an independent expenditure.

19 But these entities that are out in the
20 business world making literally millions and millions
21 and millions of dollars from commerce may spend in an
22 unlimited amount, as long as the major purpose does not
23 become the election of candidates, in which case they
24 transform themselves into a political committee.

25 So there is no purpose to be served by

1 allowing an organization making \$30 million a year to
2 spend unlimited amounts and not allowing an ideological
3 incorporated organization from spending anything, if
4 your purpose is to keep business money out of the
5 electoral processes.

6 One further statutory point. There is an
7 exemption under the general definition of expenditure
8 for newspapers and periodical publications. Those terms
9 are not defined in the statute or in the regs. I think
10 that this Court should conclude that Congress did not
11 mean to squelch a publication like this when it granted
12 that exemption. It would be a non-constitutional way to
13 affirm the Court of Appeals.

14 In conclusion on this matter, when one
15 considers all the election law cases that this Court has
16 had in the last 40 years -- UAW, CIO, the Pipefitters in
17 the seventies, NCPAC, National Right to Work -- this
18 case involving a \$9800 expenditure to publish a
19 newsletter containing 492 candidates' positions, \$20
20 apiece, constitutes the most insignificant, the most
21 puny threat of any case that has come before this
22 Court.

23 But when you consider the fundamental
24 principles that bind us together -- freedom of
25 association, that ability of individual of like minds to

1 gather together and enhance their weak, faint voices;
2 freedom of the press; freedom of speech -- this perhaps
3 is the most significant of all.

4 The idea that even now, in the last two
5 decades of the twentieth century, an organization like
6 Mass Citizens must stand before this bar and justify
7 having produced a newsletter containing voting records
8 is appalling.

9 The basic problem with the FEC's case is it
10 was brought 200 years too late.

11 Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fox.

13 Mr. Steele, do you have anything more? You
14 have about six minutes.

15 MR. STEELE: If there are no questions from
16 the Court, I would conclude my argument.

17 (Whereupon, at 2:54 p.m., argument in the
18 above-entitled matter was submitted.)
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CERTIFICATION

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

#85-701 - FEDERAL ELECTION COMMISSION, Appellant V. MASSACHUSETTS

CITIZENS FOR LIFE, INC.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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