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PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: EDDIE KELLER, ET AL., Petitioners

V. STATE BAR OF CALIFORNIA, ET AL.

CASE NO: 88-1905

PLACE: Washington, D.C.

DATE: February 27, 1990

PAGES: 1 - 57

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IN THE SUPREME COURT OF THE UNITED STATES

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EDDIE KELLER, ET AL., :

Petitioners :

V. : No. 88-1905

STATE BAR OF CALIFORNIA, :

ET AL. :

- - - - -x

Washington, D.C.

Tuesday, February 27, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:01 p.m.

APPEARANCES:

ANTHONY T. CASO, ESQ., Sacramento, California; on behalf of the Petitioners.

SETH M. HUFSTEDLER, ESQ., Los Angeles, California; on behalf of the Respondents.

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C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
ANTHONY T. CASO, ESQ.	
On behalf of the Petitioners	3
SETH M. HUFSTEDLER, ESQ.	
On behalf of the Respondents	19
<u>REBUTTAL ARGUMENT OF:</u>	
ANTHONY T. CASO, ESQ.	
On behalf of the Petitioners	45

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4
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6
7
8
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10
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P R O C E E D I N G S

(2:01 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-1905, Eddie Keller v. the State Bar of California.

Mr. Caso, you may proceed whenever you're ready.

ORAL ARGUMENT OF ANTHONY T. CASO
ON BEHALF OF THE PETITIONERS

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

Rightly or wrongly individuals in our society are judged, categorized and characterized by their associations. It is in fact how we define ourselves. Today's case concerns the freedom to choose those types of associations by which we will be judged.

An example from recent history is very relevant. Earlier this month at its convention, the American Bar Association adopted a resolution on the question of abortion rights. A 40-year member of that Association, an officer, was so offended by that particular ideological position that he felt compelled to announce his resignation. The members of the California Bar Association have no similar right.

This case does not challenge the right of

1 California to regulate attorneys through a mandatory bar
2 association. Instead, it asks whether having done so, may
3 it also authorize the bar to, in the words of the
4 California Supreme Court, comment generally upon matters
5 pending before the legislature.

6 So, both the right to the freedom of association
7 and the freedom of speech are before the Court in this
8 case. Speech rights are implicated by compelled dues
9 payments that are then used for political and ideological
10 purposes, while association rights are implicated by
11 compelled membership in an expressive association.

12 Infringements upon these rights may be justified
13 only by a compelling state interest. The bar in this case
14 identifies no such interest, yet, instead, seeks a blanket
15 exemption under the so-called government speech doctrine.

16 All attorneys in California are required both to
17 -- to belong and pay an annual dues payment to the State
18 Bar in order to maintain their license to practice law.
19 In addition to its many regulatory activities, the bar
20 also engages in activities we've identified as political
21 and ideological. These include lobbying on issues that
22 range from environmental questions to criminal penalties.

23 QUESTION: May they lobby on any subject
24 permissibly against the views of some minority?

25 MR. CASO: If it is -- if it is supported by a

1 compelling governmental interest. In other words, if
2 there is a reason for California to force these people
3 together into an association and pay a fee for that
4 purpose.

5 QUESTION: So -- so your answer to my question
6 is that they can -- they can lobby for nothing unless
7 there's a compelling interest for it?

8 MR. CASO: Yes.

9 QUESTION: Could they lobby for a pro bono
10 requirement for all attorneys in the state?

11 MR. CASO: Again, if the state identifies that
12 as an interest for forcing all attorneys into an
13 association --

14 QUESTION: Well, that -- take this -- take this
15 case. Suppose that you prevail on -- on your theory,
16 could the bar association lobby the legislature for a
17 requirement that all lawyers in the State of California
18 devote 30 hours a year for pro bono work?

19 MR. CASO: I don't believe so because I believe
20 that there's an underlying public policy purpose behind
21 such legislation that doesn't extend to a reason for
22 California to force these people into a group, to force
23 them to pay a fee to make that type of a political
24 judgment.

25 QUESTION: Well, do you have to start kind of

1 building the wheel from scratch every -- every question
2 you get to with respect to the State Bar? Couldn't one
3 say there is sufficient reason to -- for California to
4 require an integrated bar in the interest of attorney --
5 to start out with, in the interest of maintaining attorney
6 discipline and that sort of thing?

7 MR. CASO: Indeed, that is what this Court did
8 in Lathrop. But when the state also authorizes the bar to
9 go beyond that, it's Petitioners' position that they must
10 identify what state interest they are fulfilling.

11 QUESTION: Well, but couldn't you say some of
12 these things are at least offshoots of the need to
13 regulate the practice
14 of -- regulate the practice of law?

15 MR. CASO: If indeed they are offshoots. And
16 the way the Court's test would -- would look at that is,
17 is this actually advancing the compelling state interest
18 in the least drastic means.

19 QUESTION: Well, do -- but do you think the
20 Lathrop decision that a state may integrate its bar is
21 based on a compelling necessity for integrating the State
22 Bar?

23 MR. CASO: I'm not sure that the Court in
24 Lathrop used those terms. I know when -- at the end of
25 the analysis in the plurality decision the court was just

1 looking at, given these things that the bar is doing, the
2 state is promoting an interest to improve the delivery of
3 quality legal services. So, it's not looking at the types
4 of political conduct that the bar in this case engages in.

5 QUESTION: Indeed, Lathrop didn't involve speech
6 at all, did it? So you'd never get into -- what was it --
7 a speech case?

8 MR. CASO: It was both --

9 QUESTION: Was it --

10 MR. CASO: -- a speech and association case, and
11 only the association issue was decided.

12 QUESTION: Only the association issue was
13 decided. There wasn't any compelled speech by anybody.

14 I thought your position was -- and your answers
15 didn't seem to indicate this -- but I thought your
16 position was that it can't be a compelling state interest
17 to -- to make the -- the organized bar lobby.

18 MR. CASO: It -- it -- there can be underlying
19 compelling state interest. And let's take the Lathrop
20 example.

21 QUESTION: To make them lobby. What -- what --
22 what would be the -- the example in which it would be
23 necessary for the State Bar to lobby to compel --

24 MR. CASO: Well, to take the Lathrop example,
25 improving the quality of legal services. If the state

1 legislature holds sway on those particular issues, the bar
2 should be able to go to the legislature and lobby, for
3 instance, on an issue relating to the qualifications for a
4 law school, the qualifications one must possess before
5 they could take a bar examination.

6 QUESTION: And then you're saying there's a
7 compelling state interest that the bar association must
8 lobby on qualifications for law schools?

9 MR. CASO: No, Your Honor. I'm saying there is
10 a compelling state interest -- the base compelling is what
11 I believe was recognized in Lathrop, was improving the
12 quality and delivery of legal services. And that base
13 would then allow the bar to go and lobby on issues that
14 are related to that, that actually advance that interest.

15 QUESTION: But the bar wouldn't have to do that?

16 MR. CASO: It would not have to do that. It
17 wouldn't be --

18 QUESTION: It may authorize to --

19 MR. CASO: It would be authorized.

20 QUESTION: Uh-huh.

21 QUESTION: Well, what if I disagree with that
22 position of the bar even though it's an issue that relates
23 to lawyers?

24 MR. CASO: And again --

25 QUESTION: My dues are still going to -- to

1 subsidize that lobbying against a position --

2 MR. CASO: Precisely, and your rights are --

3 QUESTION: But you say that would be okay?

4 MR. CASO: Your rights are infringed. It's okay
5 because the state has identified a compelling interest
6 that allows it to overcome your individual right of
7 dissent in that circumstance.

8 QUESTION: What is that?

9 MR. CASO: Again, I'm going back to Lathrop.
10 The interest recognized was improving the quality and
11 delivery of legal services. California, in this case, has
12 identified no interest at all. There is none in this
13 record.

14 QUESTION: Now, does Abood speak in terms of a
15 justification by a compelling state interest in every
16 case, or does it talk about germaneness to the purpose?

17 MR. CASO: Abood first talks about the
18 importance of the state's interest. It doesn't use the
19 word compelling state interest. Germaneness comes in --

20 QUESTION: Do you rely on Abood?

21 MR. CASO: Yes, Your Honor.

22 QUESTION: Uh-huh.

23 MR. CASO: The germaneness question in Abood
24 comes into then is what we're allowing issues to be spent
25 upon, is that germane to the state's interest? In other

1 words, is it related? Is the state's interest actually
2 advanced?

3 When this Court decided the decision in Chicago
4 Teachers v. Hudson, it did refer in a footnote to the
5 compelling state interest test in association and speech
6 cases of this type.

7 QUESTION: Exactly what do we have before us
8 here? What are the activities of the bar that are left in
9 this case that are now before us that we have to apply
10 this test to?

11 MR. CASO: In this case, we have the entire
12 range of bar conduct. They have been prohibited from
13 doing nothing. The court below said laws are the business
14 of lawyers and, therefore, we give the State Bar of
15 California the right to comment generally on all matters
16 that come before the legislature without restriction.

17 QUESTION: And did the courts below say it would
18 be all right for the bar to support political candidates
19 as well and make contributions to them?

20 MR. CASO: That was the one restriction, was the
21 political campaign. There is a question about ballot
22 initiatives, because the record does reflect that the bar
23 had adopted resolutions supporting ballot initiatives, but
24 the court did not specifically say that that was not okay.

25 QUESTION: Under -- the under the ruling below,

1 is the State Bar free to give endorsements to judicial
2 candidates on retention elections?

3 MR. CASO: I don't believe so. Nor are they
4 allowed to do so under legislation that was passed after
5 they had done so in this case.

6 QUESTION: Okay. So can we agree with you
7 without overruling Lathrop?

8 MR. CASO: Certainly. In fact, we would be --

9 QUESTION: How?

10 MR. CASO: We would be adopting Lathrop as the
11 base and this is what we have found to be a sufficient
12 interest for the state to force all attorneys into an
13 association. If they wish to do something beyond those
14 things, beyond the delivery -- improving the quality of
15 legal services or improving its delivery, they must
16 identify what the state's interest is. They have not done
17 that.

18 QUESTION: Uh-huh.

19 QUESTION: But you say Lathrop was (inaudible).

20 MR. CASO: I would argue that the interest found
21 by the Court to justify the association in Lathrop arises
22 to the level of a compelling interest, as did the dissent
23 in the California Supreme Court.

24 QUESTION: Neither Lathrop or Abood, which is
25 certainly a related case on the other side, uses that

1 term?

2 MR. CASO: That's true, Your Honor. The -- the
3 phrase "compelling state interest" first appeared in a
4 compelled fee case in a Chicago Teacher's Union case in a
5 footnote in which it referenced the decision in Roberts v.
6 Jaycees, and the compelling state interest was used in
7 restricting association rights. And, again, we have here
8 an expressive association.

9 The bar looks to shield its conduct as a
10 governmental entity. It says the First Amendment doesn't
11 apply to us in this case, dissenters have no right to
12 complain.

13 We have to look at what type of an entity the
14 bar is, how it functions. It functions, for the most
15 part, as a an autonomous entity. It's governed by a Board
16 of Governors that's partially elected, partially
17 appointed. It's given extensive control over bar
18 operations.

19 It's not supported by general tax revenues;
20 instead, it's supported by compelled dues payments of the
21 petitioners. This money goes directly to the State Bar's
22 treasury, not to the state treasury. When the bar seeks
23 to spend that fund, it spends it on the authority of the
24 vote of the Board of Governors. It need not go to the
25 legislature for an appropriation, it need not be reviewed

1 by the governor, it is not subject to the governor's veto,
2 line item veto, or reduction of powers.

3 QUESTION: Mr. Caso, how many members of the bar
4 are there?

5 MR. CASO: I believe approximately 120,000.

6 QUESTION: Why is it different than a city
7 having a population of 120,000?

8 MR. CASO: Because the state has compelled this
9 group together.

10 QUESTION: And you don't have to live in
11 Berkeley --

12 MR. CASO: Cities -- cities have at least some
13 element of voluntariness. In fact, that's what the right
14 to travel is all about. But here we are compelled
15 together into an association if you wish to practice this
16 occupation.

17 QUESTION: Well, you don't have to be a lawyer,
18 just as you don't have to live in Boise. I mean, it seems
19 to me there's a certain amount of voluntary --
20 voluntariness in both of those things, isn't there?

21 MR. CASO: There is, and the teachers in Abood
22 don't have to be teachers in that school district either.
23 Again, we've -- we've taken this particular discrete
24 group, a more compelling --

25 QUESTION: No, but they had to have the union.

1 They had to have the -- be represented by the union.
2 to do in MR. CASO: They didn't have to work in that
3 school district. They could have moved. but then it later
4 claims me QUESTION: No, I know. But if -- the fact of
5 working in the school district is not what gave rise to
6 their problem. I mean, had there been no union, they
7 could have worked in the school district and had no its
8 compelled speech. advancing the administration of justice
9 and so for MR. CASO: Uh-huh.

10 QUESTION: But just living in Berkeley or Boise,
11 or wherever it is, or being a member of the bar is what The
12 does it here. preme Court defined the term administration

13 of justice MR. CASO: Here it's the fact that one wants to
14 practice this particular profession, the state places a
15 burden on that. e bar's purpose. Now, laws are the

16 business QUESTION: Right. fore, they may comment on any
17 issue that MR. CASO: It says in order to do so you have to
18 belong to this group and you have to pay this group a fee.
19 And so we look to why can the state do that, where is the
20 state's interest? the Abood test of germaneness, at least

21 as we have If it's a regulatory interest, that's fine. But
22 does that interest extend to allowing that group to engage
23 in the type of political activity at issue here? on

24 anything And the question comes up is what type of an
25 entity is the bar. It is in fact -- at least, purports to

1 be -- the sum of its members. When it speaks, it purports
2 to do in a representative capacity. The bar may attempt
3 to deny this in a portion of its brief, but then it later
4 claims majority support for some of its positions.

5 QUESTION: Well, even if Abood applies here,
6 wouldn't you say that a good many of the State Bar's
7 ideological activities and positions are germane to its
8 purpose in the -- advancing the administration of justice
9 and so forth?

10 MR. CASO: Well, the precise definition of that
11 term is the precise problem in this case, Your Honor. The
12 California Supreme Court defined the term administration
13 of justice to be essentially meaningless. We have no idea
14 what those words mean. When they looked at that, they
15 said, that's the bar's purpose. Now, laws are the
16 business of lawyers; therefore, they may comment on any
17 issue that comes before the legislature. That -- that
18 becomes administration of justice.

19 QUESTION: Well, I'm just asking you whether
20 that wouldn't meet the Abood test of germaneness, at least
21 as we have articulated it in that case.

22 MR. CASO: You -- you would first have to find
23 that a grant of authority that broad to comment on
24 anything that comes before the legislature is itself a
25 sufficient interest of the state to compel attorneys into

1 an association, to compel them to pay a fee.

2 Then they can argue that what we do is related
3 to that. But the first step is, is that an important
4 enough interest? We argue that it has to be a compelling
5 interest.

6 QUESTION: Although nothing in our cases, in
7 Lathrop or Abood, says that?

8 MR. CASO: Abood, I believe, uses the words
9 "sufficiently important." Hudson, Chicago Teacher's Union
10 uses the words "compelling state interest," as does
11 Roberts v. Jaycees.

12 QUESTION: Your principal argument seems to be
13 that a lawyer who disagrees with the position is going to
14 be somehow branded in the community for having views that
15 he or she doesn't really espouse. But as a practical
16 matter, I am unimpressed by that argument. Everybody
17 knows that lawyers don't agree on very much.

18 (Laughter.)

19 MR. CASO: But lawyers are very public people,
20 Your Honor, and they are going to be branded by these
21 positions simply because the only essence of the bar's
22 speech is that it claims to be that of its members.

23 In other words, let me put it in the words of
24 the California legislature --

25 QUESTION: Well, it claims to be -- it claims to

1 be the members of the majority or the Board of Governors.
2 Whatever. That's all.

3 MR. CASO: Let -- let me take an example from
4 recent history. A judge in California, Judge Walker, has
5 just gone through a very bruising confirmation process.
6 One of the issues was he belonged to a private club that
7 had a restrictive membership policy. That policy was
8 branded on him even though he got up and said, "I disagree
9 with that." He got up, and he attempted to change that
10 policy, but until he resigned, he was branded with that
11 policy.

12 We are very public people. These positions --
13 the association itself is a factor in how the public
14 defines us.

15 QUESTION: Well, Mr. Caso, in our Abood
16 decision, which dealt with teachers, and a couple of other
17 decisions dealing with, I believe, other -- other union
18 members, it seems to me the ground upon which objection
19 was made by the dissidents was not that they were tarred
20 with the brush approved by the majority but that their
21 money was being taken to express views with which they
22 didn't agree.

23 MR. CASO: Precisely, Your Honor. Those were
24 speech cases. And like I said, this case has both
25 elements, speech and association.

1 QUESTION: So, insofar as you're talking about
2 speech here you subscribe to the arguments made by -- made
3 by the people similarly situated in -- in Abood and
4 Hudson?

5 MR. CASO: Correctly, Your Honor. And again, it
6 has both those elements. And the reason Abood came out
7 differently -- you remember in Abood the petitioners in
8 that case asked for an injunction against the activity and
9 the court says, no, you can't have it. And the reason is
10 that the underlying union in Abood is itself a voluntary
11 organization. People that have an independent First
12 Amendment right to join together on political issues.
13 That's what a union is.

14 The California Bar is not a similar entity.
15 There are no voluntary members. There is no underlying
16 core that's exercising First Amendments. It's an
17 artificial construct that exists only by compulsion of the
18 state.

19 To effectuate these rights I believe the Court
20 has a range of alternatives. For the speech -- freedom of
21 speech issues, the remedy is clearly laid out in the
22 Hudson decision, and it's very clear and easy for anyone
23 to follow.

24 As far as associational rights, I believe this
25 Court can identify those clearly permissible activities

1 which the state does have an interest to compel attorneys
2 together into an association and, indeed, they've done so
3 in the Lathrop case.

4 Again, I --

5 QUESTION: Are the two -- are the two
6 coextensive, and would -- would you agree that any member
7 of the California Bar has to pay for whatever activities
8 we conclude the bar association may engage in?

9 MR. CASO: Yes, Your Honor. If you agree with
10 me on the association issue, then there is going to be no
11 dues reduction plan. If, on the other hand, you just
12 focus on the speech problem, then a Hudson-type remedy
13 will have to be established.

14 So, in other words, the association issue will
15 subsume the speech, but the speech alone requires a
16 different remedy if that's the only remedy that you are
17 willing to give relief on.

18 If there are no further questions of the Court,
19 I will reserve my remainder.

20 QUESTION: Very well, Mr. Caso.

21 Mr. Hufstedler.

22 ORAL ARGUMENT OF SETH M. HUFSTEDLER

23 ON BEHALF OF THE RESPONDENTS

24 MR. HUFSTEDLER: Mr. Chief Justice, and may it
25 please the Court:

1 One of the first questions of the Court dealt
2 with what it is that we have left in this case, and I must
3 say that I have had a great deal of difficulty trying to
4 determine what the petitioners' position is on that from
5 the beginning.

6 I should tell you, first of all, that in all the
7 formal pleadings in this case, the complaints, the attempt
8 to get a preliminary injunction against the State Bar, the
9 motion for a partial summary judgment, all asked that the
10 State Bar be prevented from doing these things, from using
11 its name in any way in any legislative activity, from ever
12 appearing before the legislature as a State Bar on any
13 issue and ever advising any member of the public of its
14 position on any legislative matter. That was the
15 injunction they sought to obtain and that's what their
16 complaint asks.

17 QUESTION: But, Mr. Hufstedler, didn't they also
18 ask for a refund of money that had been used to support
19 political activities?

20 MR. HUFSTEDLER: No, Justice Stevens, they
21 didn't, and so far as I can determine, until today, other
22 than saying Hudson should control here, they have never
23 said, we really ought to --

24 QUESTION: Paragraph 3 of the prayer of the
25 complaint asked for an injunction compelling Respondent

1 Defendants to reimburse the treasury of the State Bar and
2 so forth and so on. I thought it's just exactly what you
3 -- page 7 of the --

4 MR. HUFSTEDLER: Oh, no.

5 QUESTION: -- of the --

6 MR. HUFSTEDLER: No, Your Honor. You're quite
7 right, that's what it says, but that's not -- they didn't
8 ask that they be reimbursed.

9 QUESTION: No, but they asked that --

10 MR. HUFSTEDLER: They asked that the members of
11 the Board of Governors of the State Bar repay the State
12 Bar for the expenditures that had taken place.

13 QUESTION: I see.

14 MR. HUFSTEDLER: They didn't ever ask that they,
15 as members of the bar, be repaid for a share of their
16 dues.

17 QUESTION: Are they barred, as a matter of
18 pleading, you say, from asking for this relief now?

19 MR. HUFSTEDLER: No, Your Honor. I wouldn't
20 urge that question; I don't think so. I'm simply trying
21 to define what I think it is that they have asked for and
22 how I think unreasonable some of their demands have been.

23 Now, let's come down to the present day, and for
24 the first time -- the first time -- on the last page of
25 their closing brief they tell us now presumably what we're

1 talking about. And they say their position is not that
2 they object to the bar advising the governor --

3 QUESTION: This -- this is their reply brief,
4 Mr. Hufstedler?

5 MR. HUFSTEDLER: This is their reply brief, page
6 12 -- 11 and 12, actually, the conclusion, the very last
7 -- the next two pages and the last paragraph.

8 If you'll look at the conclusion, for example,
9 they say they don't challenge the bar's power to appoint a
10 member of the Law Revision Commission. It's all right for
11 the bar to get involved in changing the laws and improving
12 the laws.

13 They don't even object to the bar advising the
14 governor on the qualification of judicial appointees.
15 What could be a more political or ideological approach
16 than speech to the governor about what the bar thinks
17 about judicial appointees?

18 Nor, now, do they say, for the first time -- all
19 of these are for the first time --

20 QUESTION: I suppose that depends on what you
21 mean by qualifications, Mr. -- Mr. Hufstedler.

22 MR. HUFSTEDLER: Oh, I -- certainly, that's
23 quite right. And I must say that's a perfectly legitimate
24 inquiry into almost anything we talk about here today
25 because the entire record is almost all in generic terms

1 and so we have that problem as we go along.

2 But if you look at the last page at the top,
3 they say, "Instead, it is the bar's political and
4 ideological advocacy." Now, I think this Court has
5 already said that political in this context doesn't mean
6 much. Whether you're looking at the language in Lathrop
7 or whether you're looking at the language in Abood, those
8 don't any longer add anything to what we're talking about.
9 What they're talking is legislative advocacy.

10 And they say, "Instead, it is the bar's
11 political and ideological advocacy, unrelated to the
12 regulation of the practice of law or the improvement of
13 the judicial system." For the first time now we have a
14 concession that the bar can do those things with regard to
15 the regulation of the profession, the practice of the law.
16 Furthermore, not just in that area, which was the area
17 primarily dealt with in Lathrop, but with regard to
18 improvement in the judicial system.

19 Now, it is our position that the State Bar is
20 entitled to take positions, legislatively and otherwise,
21 on matters affecting the judicial system or, more broadly,
22 in the words of the statute of California, which
23 authorized the State Bar, to act in the aid of the
24 administration of justice.

25 QUESTION: Well, you don't take the position

1 then, Mr. Hufstedler, that the State Bar is precisely the
2 equivalent of, say, the corporate City of Sacramento or
3 the City of San Diego, which I presume could take
4 positions on almost anything they wanted to without
5 violating the Constitution?

6 MR. HUFSTEDLER: I quite agree, Your Honor. We
7 -- you're correct, we do not take that position. To the
8 contrary, as indicated, we have statutory authorization,
9 and it is to act, as I've indicated, in the areas of
10 administration of justice, advancing the science of
11 jurisprudence, period.

12 QUESTION: Supposing that the California statute
13 authorizing the State Bar had said in effect you -- you
14 may lobby and so forth to the same extent that the city or
15 state may lobby and may take positions, would you -- would
16 you think that the Constitution might raise any problems
17 treating the State Bar that way?

18 MR. HUFSTEDLER: I don't think so, but I think
19 there's an intermediate question that has to be asked and
20 that's what's the State Bar authorized to do. The State
21 Bar is only authorized to do what I said. It's not
22 authorized to act outside the scope of --

23 QUESTION: But what -- what did the court below
24 say the bar was authorized to do?

25 MR. HUFSTEDLER: To pursue the administration of

1 justice. Actually, Your Honor, the statement is really
2 quite clear.

3 QUESTION: You don't think it said that they can
4 lobby on any kind of a law before the legislature?

5 MR. HUFSTEDLER: No. It did say that laws are
6 the business of lawyers and that they may have expertise
7 to help with respect to that. But the overall view, as
8 stated in the first paragraph when the court determines
9 what they're going to talk about and what they're going to
10 hold, and they say -- and this is the first paragraph of
11 Justice Broussard's opinion.

12 Upon analysis, et cetera, "We conclude that the
13 State Bar may use dues to finance any activity except the
14 election campaigning which is germane to its statutory
15 mission to promote" -- quote -- "the improvement of the
16 administration of justice."

17 QUESTION: Which includes laws, and laws are the
18 business of lawyers, so --

19 MR. HUFSTEDLER: It does indeed.

20 QUESTION: -- I -- I read the court's opinion as
21 I thought you did, to say that the California State Bar
22 can -- can lobby about any law whatever.

23 MR. HUFSTEDLER: Well, I would -- I'd have to
24 say now -- really, perhaps, I'm only quibbling with that,
25 Your Honor. If, for example, the State Bar did what the

1 ABA did and what was cited as a horrible example here to
2 you today -- if the Board of Governors said, we want to go
3 out and support any position with respect to abortion, I
4 don't think that per se is included within the
5 administration of justice.

6 Or let's take a more concrete example because
7 this one is in the record, it's the one area where the
8 complaint is made that the State Bar has done something it
9 shouldn't do, and it's an area I would say to you that
10 probably is not within the administration of justice. So,
11 we can start with those propositions.

12 The Conference of Delegates in California
13 adopted a resolution favoring nuclear freeze. Now, in my
14 view, that's not an area of the administration of justice.
15 It might involve some kind of a statute, but I think under
16 the statutes of California the State Bar is not authorized
17 to lobby on that proposition.

18 QUESTION: Well, does a nuclear freeze or the
19 abortion controversy -- does that raise a constitutional
20 problem? Let's assume that the statute was not written to
21 confine the bar to the administration of justice, so the
22 bar may lobby on matters in the public interest.

23 MR. HUFSTEDLER: Certainly that would be in the
24 public interest and the lawyers might have some expertise
25 on some particular grounds. Let's take --

1 QUESTION: Well, would there be a constitutional
2 problem? I mean, I take it what's before us is -- is
3 really a constitutional case.

4 MR. HUFSTEDLER: Yes, all right.

5 QUESTION: And if you're -- if you're trying to
6 say that we needn't be concerned because a number of these
7 issues won't arise, that's one thing. But in order to
8 test the constitutional theory, what's your answer about
9 the nuclear freeze and the abortion controversy?

10 MR. HUFSTEDLER: All right, I am saying the
11 former, and let me address the latter. With regard to the
12 constitutional question, it seems to me the issues are
13 clear. This Court has laid them down.

14 First of all, so far as a state government in
15 its activities is concerned, it must have a legitimate
16 state goal in order to adopt a program that it wants to go
17 forward with. The first test this Court has said is is
18 this a legitimate government interest.

19 Now, let me say to you here in answer to your
20 question, as the briefs say and despite the contrary claim
21 that we haven't made it clear. We have identified from
22 the beginning that the interest we're talking about is the
23 interest in the advancement of the administration of
24 justice.

25 Now, the first question is, is that a legitimate

1 state goal? It seems to me no one can have any doubt.
2 Not only the advancement of the administration of justice
3 is a legitimate goal, not only is it an important goal --
4 and although I -- I would dispute the fact that any of
5 these cases require that it be compelling, I can't think
6 of a more compelling interest than advancing the interest
7 in the administration of justice.

8 So, the first question is is the administration
9 of justice an important governmental interest that
10 qualifies? It seems to me the answer is yes.

11 Now, the second constitutional question, as I
12 understand it, that this Court has laid down is, all
13 right, if the legislature has adopted that goal, have they
14 adopted reasonable means in order to pursue it? Here they
15 have adopted a State Bar Act, they have created a state
16 bar as a governmental agency to carry out the state
17 purpose of bringing the lawyers' expertise to be available
18 both to the public generally and to the legislature on the
19 questions of the administration of justice.

20 QUESTION: It's done more than create a state
21 agency which is usually staffed by people who volunteer to
22 staff it. It's created the agency and impressed every
23 lawyer in California into -- into service as a member of
24 it. Now, that's --

25 MR. HUFSTEDLER: Well --

1 QUESTION: -- that's a good deal different,
2 it --

3 MR. HUFSTEDLER: Well, that's only --

4 QUESTION: -- seems to me.

5 QUESTION: That's only partly right, Your Honor.
6 It has made every member a member of the State Bar and
7 require that they pay a fee in order to practice law. It
8 has not impressed them into service. That's the important
9 thing. As a lawyer in California, I don't have to do
10 thing one for the State Bar.

11 QUESTION: You have to be a member of the State
12 Bar. You have to be a member of that agency that you were
13 just talking about, don't you?

14 MR. HUFSTEDLER: All right. And let's talk
15 about what that means. That means I have to pay dues,
16 period. I don't have to do another single thing. I don't
17 have to go to a meeting.

18 QUESTION: Okay.

19 MR. HUFSTEDLER: It's true I have to follow --

20 QUESTION: It means two things. You have to
21 support its activities, including its speech, with your
22 money, and it means, secondly, that you have to be
23 associated with that agency of which you're a member. So
24 that somebody can come up to you and say, hey, I see that
25 your -- your bar association just endorsed a nuclear

1 freeze.

2 MR. HUFSTEDLER: All -- all true.

3 QUESTION: Don't you have any control over those
4 guys?

5 MR. HUFSTEDLER: All true with a couple
6 exceptions. Certainly they are members and certainly they
7 pay, and there is no other obligation.

8 Now, you included in your question, and I can
9 understand why, the observation that, well, your bar just
10 endorsed a nuclear freeze. And that's the other point I
11 want to talk about -- on the nuclear freeze, as an
12 example.

13 The bar didn't endorse a nuclear freeze. It's
14 very important to understand what the Conference does and
15 why it is important in California. In connection with the
16 annual meeting of the lawyers in California, the State Bar
17 has a Conference of Delegates to which any bar association
18 can send delegates, and in fact, any ten lawyers in the
19 state can get together and send a delegate if they wish to
20 do so.

21 There they discuss primarily the nuts and bolts
22 of practicing law. In the record you have the information
23 for the year 1982. There were 181 resolutions; 39 of them
24 dealt with the Code of Civil Procedure and the evidence
25 code. The nuts and bolts.

1 But in the course of that somebody put in a
2 resolution that the State Bar should endorse the nuclear
3 freeze. The Conference discussed it, passed the
4 resolution. The Conference has no binding authority on
5 anyone. Free speech. The members of the Association can
6 come together and talk and you can hear what these people
7 say and exchange their ideas.

8 QUESTION: But is the Conference of Delegates
9 financed by the bar dues?

10 MR. HUFSTEDLER: It is indeed, Your Honor. It
11 is indeed. But the point is the State Bar took no action
12 whatsoever on that. The State Bar --

13 QUESTION: Yes, but there are other -- there are
14 other examples in the record, are there not, of things for
15 which the bar lobbied that could be characterized as not
16 strictly professional issues, such as armor-piercing
17 bullets and environmental law?

18 MR. HUFSTEDLER: I don't think so, Your Honor.
19 And let me tell you about armor-piercing bullets. Yes,
20 indeed, there was some discussion and there was some
21 lobbying with respect to armor-piercing bullets. And why?
22 That statute redefined the definition of first-degree
23 murder and created a first-degree murder claim in
24 California if somebody were murdered with an armor-
25 piercing bullet.

1 Now, that's the sort of thing that relates
2 directly to the administration of justice, the definition
3 of first-degree murder, and that's what lawyers talked
4 about so far as the as the bullet --

5 QUESTION: Yes, but isn't it also an issue on
6 which policy-makers could have disagreements that are
7 unrelated to their professional skills?

8 MR. HUFSTEDLER: Of course they could. No doubt
9 about that.

10 QUESTION: I don't know why it has anything to
11 do with the administration of justice in any -- in any
12 sense that lawyers are expert about. I mean, whether you
13 should -- you should provide that offense for someone who
14 uses an armor-piercing bullet or not, you either think yes
15 or you think no. I don't know -- what -- does it have to
16 do with the Rules of Civil Procedure or -- it seems to me
17 imminently a political issue having very little to do with
18 the expertise of lawyers.

19 MR. HUFSTEDLER: It seems to me, Your Honor,
20 when you deal with the section in California which deals
21 with the various elements of first-degree murder and what
22 is required that that's something that lawyers not only
23 have a great deal of expertise in that they can assist
24 with, but it also could very well affect the volume of
25 cases in California, the trial calendars and various other

1 procedural matters.

2 QUESTION: Well, Mr. Hufstedler, what if in the
3 same general area there were a referendum in California to
4 abolish capital punishment as it is provided in whatever
5 section it is of the California criminal code. Now, may
6 the bar constitutionally and statutorily take a position
7 on that?

8 MR. HUFSTEDLER: My view would be no, that --
9 again, it depends.

10 QUESTION: I can't imagine anything that's more
11 germane to the administration of justice.

12 MR. HUFSTEDLER: Well, certainly for somebody
13 who is charged with it, I think that's quite right. But
14 let me -- let me -- let me sort these out just a bit,
15 because I think the armor-piercing bullet case is an
16 example.

17 Each of these things have various kinds of
18 elements that do go directly to the administration of
19 justice and they have various underlying policy elements.
20 Now, if the question put before the State Bar was should
21 there be capital punishment or should there not be capital
22 punishment, I suggest to you that's not a matter of
23 administration of justice. That's an underlying policy
24 matter and, therefore, the State Bar should stay out of
25 that, as indeed they have.

1 QUESTION: But I -- but the message you want to
2 leave us with is that constitutionally even if the State
3 Bar could and did take an issue on that there's no
4 constitutional violation?

5 MR. HUFSTEDLER: That's true. That's true.
6 With this exception and this qualification. One would
7 have to decide that if the state bar -- let's suppose the
8 state legislature passed a statute and said, state bar,
9 you go out and formulate a position on capital punishment
10 and report it to the legislature. Suppose they did that.

11 Now, if they did that, I would have no doubt of
12 its constitutionality because, one, the state has a
13 perfectly legitimate interest in determining what the
14 views are of people who have knowledge in that area, and
15 this is a rational way of having that information
16 collected and made available -- it need not be exclusive.
17 And, therefore, I would say that's constitutional.

18 I would say the state bar doesn't do it not
19 because there's a constitutional --

20 QUESTION: Yes, but you left out one step, Mr.
21 Hufstedler. You said they could be asked to formulate a
22 position. Surely they could do that. Could they go
23 further and lobby for that position using the funds that
24 these other people who don't agree with the position have
25 donated? That's the question.

1 MR. HUFSTEDLER: All right. It certainly is.
2 And the answer to that -- my answer to that would be yes,
3 Justice Stevens, and let me tell you why. And each time
4 you come back to what is really the very important
5 question here and the crux.

6 These people are required to pay dues to the
7 State Bar, and if they are required to pay dues, shouldn't
8 we act as though this were a private organization and they
9 have -- because their dues are being used some way they
10 don't want to they ought to have some kind of relief. The
11 answer to that question is no for two reasons, both of
12 which it seems to me give you a complete answer here.

13 The first is that this is a state agency, and
14 it's a legitimate, genuine state agency. I can --

15 QUESTION: Well, let's talk about that for a
16 minute. The court below seemed to go off on the theory
17 that because it's a state agency the First Amendment is
18 inapplicable.

19 MR. HUFSTEDLER: Well --

20 QUESTION: I thought that was a little curious.

21 MR. HUFSTEDLER: I --

22 QUESTION: Do you defend that position?

23 MR. HUFSTEDLER: I don't defend that position.
24 I really don't think that's what the state -- what the
25 court there intended to say in any event. I think what

1 the court said is this is a state agency. Clearly the
2 Constitution's First Amendment applies to the state, the
3 federal government. That's what it and the Fourteenth
4 Amendment do. But the point is that when the state imposes a
5 tax -- let me use the word tax for the moment -- upon each
6 lawyer for the right to practice law in California, it now
7 has a tax which it can use for any legitimate, authorized
8 purpose. And if that purpose is a constitutional purpose,
9 we don't then have the negative First Amendment rights
10 applicable to the activity of a government agency.

11 Now, that's the first ground and that's why the
12 California Supreme Court talked about that question. This
13 is a state --
14 QUESTION: Well, I -- I'm not sure. Is it a
15 function of -- of the standing doctrine that doesn't let
16 taxpayers come in and challenge these things? It isn't
17 that the First Amendment doesn't apply, I suppose.

18 MR. HUFSTEDLER: No, you're certainly right
19 about that.

20 QUESTION: It's a standing question.

21 MR. HUFSTEDLER: Yes, it is a standing question.

22 QUESTION: But I suppose members of the State
23 Bar have been recognized as having standing to challenge
24 what the State Bar does with their dues.

1 MR. HUFSTEDLER: Well, I think this will be the
2 question that decides that issue probably. Certainly, the
3 California court said no. But to answer your question,
4 yes, I think in broad terms it's a standing question. But
5 let me state it a little bit broader.

6 I think the view is that our social contract is
7 that you can't demit, you can't secede from a government
8 institution. Probably the best -- the clearest case that
9 has come down from this Court is United States against Lee
10 where the Amish being required to pay taxes in violation
11 of their religious views for Social Security. I think --

12 QUESTION: Well, that's -- that's why this whole
13 government argument, it seems to me, may cut against you.
14 It seems to me that you may have a harder case because
15 you're a governmental agency --

16 MR. HUFSTEDLER: Well --

17 QUESTION: -- for that very reason, that the
18 lawyer can't get out.

19 MR. HUFSTEDLER: There are some --

20 QUESTION: And that the bar does have certain
21 immunities and powers that make it even more potent.

22 MR. HUFSTEDLER: Well, there are certainly some
23 drawbacks to being a government agency. For example, we
24 can't campaign, we can't contribute to candidates. If we
25 weren't a government agency, of course we could do that

1 sort of thing. We would have a First Amendment right and
2 we could do so. So, there are some disadvantages.

3 But as a government institution -- you remember,
4 I'm sure, what Harlan said in Lathrop. He thought it was
5 beyond any doubt that the government could charge lawyers
6 a fee for practicing law and he thought there was no
7 question they could use those fees to set up a law
8 revision commission or some such institution to comment on
9 the change of laws.

10 And that's essentially the argument, that this
11 is a tax; you can't demit from the payment of the tax even
12 though you disagree with it.

13 QUESTION: But there has to be a line somewhere.
14 Do you think a state can create an agency with the use of
15 general -- general funds that it charges with the mission
16 of lobbying for -- on particular referendum issues? It's
17 the state's referendum lobbying agency, and it goes out
18 and advertises and --

19 MR. HUFSTEDLER: Well, of course, you're
20 asking --

21 QUESTION: -- speaks to the public on
22 referendums.

23 MR. HUFSTEDLER: -- a basic constitutional
24 problem. My answer would have to be to you, if it meets
25 the constitutional requirements of this Court, yes, it

1 could. But it would have to meet those requirements --

2 QUESTION: Right. I'm sort of asking you that.
3 Do you think it meets the constitutional requirements of
4 this Court?

5 MR. HUFSTEDLER: I would think you'd have to
6 know what it was about. If you established a -- an agency
7 which was to campaign on any issue that came along --

8 QUESTION: Yeah. Not partisan campaigns but --
9 but on any -- on any issue --

10 MR. HUFSTEDLER: Well, let me broaden --

11 QUESTION: -- whether it's armor-piercing
12 bullets or capital punishment or abortion, or whatnot, tax
13 funds are going to fund this agency which intervenes in
14 the -- in the political process by -- by lobbying with
15 legislators and by campaigning with the public.

16 MR. HUFSTEDLER: Well, let me -- let me broaden
17 the question just a bit and then narrow it back to your
18 question. If the state should come up with an agency
19 which said on every issue which comes up before the public
20 we want you to examine it, examine what the issues are on
21 both sides, and publish what those issues and analyses are
22 so the voters can view them, I would say, yes, no doubt
23 about it at all.

24 Now, if the State Bar said -- or, if the state
25 said, we're going to pass a statute and you're going to go

1 out and pick one side of every issue and then go out and
2 campaign only for that side, I would have serious doubts
3 that that was a legitimate public issue and would pass
4 original constitutional muster for a legitimate government
5 purpose.

6 QUESTION: Yet the governor of California may go
7 from place to place in the state and take positions on
8 just one side of issues and certainly no one can challenge
9 the fact that the state may be paying for his trips.

10 MR. HUFSTEDLER: Absolutely certain that elected
11 officials can do so and can endorse any issue they wish to
12 do so, and that's paid for by taxes and you can't demit,
13 you can't refuse to pay taxes or get part of it back
14 because somebody did.

15 QUESTION: In Justice Scalia's hypothetical with
16 this do-good agency that can lobby on any issue, could
17 only the lawyers be compelled to pay dues to that to
18 support its activities?

19 MR. HUFSTEDLER: Well, I would suppose it would
20 have to have a fairly close relationship to lawyers. But
21 I have no doubt that without being confiscatory the state
22 can impose a tax upon lawyers for the right to practice
23 law and then use those funds however it sees fit for any
24 legitimate purpose. I think --

25 QUESTION: Well, if they couldn't, though, it

1 wouldn't be a speech or association issue, would it?

2 MR. HUFSTEDLER: No, it wouldn't be at all. It
3 wouldn't be at all.

4 QUESTION: It would be something else.

5 MR. HUFSTEDLER: I think that's right.

6 QUESTION: When I asked you about the lobbying
7 for capital punishment you said there were two answers,
8 one was the state agency answer and you never told us your
9 second.

10 MR. HUFSTEDLER: You're quite right and I do
11 want to tell you the state answer, and I appreciate the
12 opportunity to do so.

13 Under the Abood, the labor union-type cases,
14 which is the basic authority that's relied on here by the
15 petitioners, it seems to us that you reach the same
16 result. And let me see if I can't say it in four or five
17 sentences and then to the extent we need to discuss it
18 further we can.

19 But the Abood and their -- and its progeny are
20 quite clear, that the first thing you look at is what is
21 the government interest that justifies compelling
22 membership in the labor union. And in the labor union
23 cases it's collective bargaining and labor peace, and
24 that's clear.

25 And the test is not a compelling interest test

1 but quite clearly is the activity germane then to
2 collective bargaining. And if it is germane, the
3 compelled duties may be used for it.

4 Now, let's move over to the State Bar. The
5 labor union analogy per se clearly doesn't fit. The State
6 Bar does nothing by way of collective bargaining, and yet
7 that's the sole ground that justifies dues there. So you
8 have to kind of throw that out and look back a step in
9 more general principles.

10 What's the purpose of the State Bar? Now, the
11 California Constitution, the California Supreme Court, the
12 California statutes make that clear. It is to aid in the
13 administration of justice, and that includes regulation of
14 the profession.

15 Now, I suggest to you that those duties, those
16 interests, the regulation of the profession, the
17 advancement of the administration of justice, are every
18 bit as compelling as labor peace, and those are the
19 interests which correspond to collective bargaining which
20 justify bringing all of the lawyers together in a
21 compulsory association. The association portion has long
22 since been established in Lathrop and we're dealing now
23 with the dues side of it.

24 QUESTION: Now --

25 MR. HUFSTEDLER: Therefore, the compelling

1 interest -- I'll be through with this in just a moment.

2 QUESTION: Sure.

3 MR. HUFSTEDLER: The compelling interest that
4 permits us to go forward here, or the important interest,
5 is the administration of justice and the regulation of the
6 profession and, therefore, under exactly the same parallel
7 reasoning, so long as these activities are germane to the
8 administration of justice, the compelled dues are
9 appropriate.

10 QUESTION: I'm -- I'm not sure I agree with your
11 -- your compelling interest analysis. It doesn't seem to
12 me that you just pick a general goal like administration
13 or justice or labor peace and that that's the compelling
14 interest. It seems to me you look to see whether you need
15 an organization such as a labor union in order to conduct
16 collective bargaining. You obviously do. That is the
17 compelling interest, the compelling need for that kind of
18 an organization.

19 And I suppose the appropriate question here is
20 do you need this kind of a compulsory association in order
21 to improve the administrative -- the administration of
22 justice instead of relying upon voluntary organization?
23 At least for some -- for some areas.

24 Now, perhaps you do for disbarment and -- and
25 things of that sort, policing the ethics of the

1 profession. But for recommendations on laws, do you need
2 this kind of an association as opposed to the numerous
3 voluntary bar associations that exist throughout the
4 country?

5 MR. HUFSTEDLER: Let -- let me --

6 QUESTION: And that's -- that's a much different
7 questions, it seems to me.

8 MR. HUFSTEDLER: It is a much different
9 question, and I suggest it's not a question that the cases
10 would support. I don't believe any of these cases say, is
11 this the exclusive way or is this the need. I think it
12 talks about compelling interest in the sense of the
13 importance of the interest, not the fact that it is an
14 exclusive interest or that it can't be done any other way.

15 Let me conclude because my time obviously is
16 about out, and I'd like to conclude with this thought.
17 The State of California has set up an integrated bar
18 association for the purpose of getting certain advantages
19 in the state. And those advantages are to get the common
20 collective view of lawyers on these various interests that
21 they have undertaken, the advancement of the
22 administration of justice and the regulation of the
23 profession.

24 Now, I suggest to you that it is appropriate to
25 let the State of California set up its own government

1 regulatory body and to impose taxes, impose dues, whatever
2 the label is, upon the lawyers to support that
3 organization as a matter of taxes and to accomplish a
4 legitimate, important, indeed, if necessary, even
5 compelling state interest: the advancement of the
6 administration of justice. That's why we believe this is
7 ultimately important.

8 And I would conclude with the final thought that
9 if you look at the amount of money the State Bar spends
10 for these few items of lobbying that the complaint is made
11 about here, you'll find it's a tiny fraction of 1 percent,
12 because seven-eighths of the budget, as the record shows,
13 goes for regulation of the profession and discipline --
14 two-thirds go to discipline alone -- and that only a tiny
15 portion deals with these very few instances that have been
16 suggested, all of which in our view are entirely
17 justified.

18 QUESTION: Thank you, Mr. Hufstedler.

19 Mr. Caso, you have 11 minutes remaining.

20 REBUTTAL ARGUMENT OF ANTHONY T. CASO

21 ON BEHALF OF THE PETITIONERS

22 MR. CASO: Thank you, Your Honor.

23 Indeed, the vast majority of the bar's budget
24 does go to these other activities and thus, unlike what
25 the bar's amici would say, the world will not end if

1 Petitioners prevail in this case.
2 A question from the bench related to what was
3 the scope of authority to the bar under the decision of
4 the California Supreme Court. In Volume III of the
5 Appendix at page 576, the court notes, "If the bar is
6 considered a governmental agency, then the distinction
7 between revenue derived from mandatory dues and revenue
8 from other sources is immaterial. A governmental agency
9 may use unrestricted revenue, whether derived from taxes,
10 dues, fees, tolls, tuition, donation, or other sources,
11 for any purpose within its authority."

12 Now, what is the bar's authority? It continues
13 the use the phrase, "administration of justice." Indeed,
14 this Court used that phrase in the Lathrop case.

15 QUESTION: Well, what if -- what if we agree
16 with you, what will our judgment be?

17 MR. CASO: Your judgment will be that the -- the
18 bar can do those things that the state has an interest in,
19 and if it wishes to do other things, it must --

20 QUESTION: That the state has an interest in.

21 MR. CASO: That the state has an important or
22 compelling interest.

23 QUESTION: Well, the state obviously thinks it
24 has an interest in all these things. But you think --

25 MR. CASO: There --

1 QUESTION: You think there -- we would have to
2 -- we would have to say there may be an integrated bar but
3 only for certain purposes?

4 MR. CASO: The Court has already ruled that
5 there may be a mandatory bar association when the state's
6 purpose is to improve the quality and delivery of legal
7 services. The question now is --

8 QUESTION: Not -- not --

9 MR. CASO: -- is having done that --

10 QUESTION: Not the administration of justice?

11 MR. CASO: What does that term mean?

12 QUESTION: I -- I don't know.

13 MR. CASO: Under -- in the court below, that
14 term is limitless, Your Honor.

15 QUESTION: What does improving the quality --
16 the delivery of legal services mean?

17 MR. CASO: In Lathrop, the Court looked at very
18 specific examples of what was happening, continuing legal
19 education, admission and discipline of attorneys. Ethics,
20 opinions of the advisory --

21 QUESTION: Well, do you think -- do you think
22 the reform -- that reformation of the tort -- law of torts
23 would be improving the delivery of legal services?

24 MR. CASO: No, Your Honor. That doesn't relate
25 to the delivery of legal services. That's the mechanical

1 function that attorneys do. We go out and represent
2 people, that's the delivery of legal services. And I
3 think that's what the Court was talking about in the
4 Lathrop decision, improving the quality of that.

5 QUESTION: May I ask you this question, because
6 the administration of justice obviously can be a large or
7 small term --

8 MR. CASO: That's right.

9 QUESTION: -- depending on what you include in
10 it.

11 Your opponent suggested really what you're
12 fighting about is less than a very small fraction of one
13 percent of the budget of the bar association. And you
14 sort of accepted that when you got up a moment ago and
15 said, that proves that the case really won't hurt anybody
16 because you'd just have to take ten cents a year of their
17 dues, or something like that.

18 Do you agree that the area of controversy is
19 that small?

20 MR. CASO: I'm not sure it is that small. When
21 this case began in 19 --

22 QUESTION: Well, how about -- what's your
23 judgment? I mean, obviously at least two-thirds of it is
24 noncontroversial. The discipline stuff is okay, I guess
25 --

1 MR. CASO: Yes, Your Honor. Let me explain. In
2 1982, when this case began, the bar was identifying
3 approximately 16 to 17 percent of its budget as
4 administration of justice functions.

5 Since that time, however, there's been a
6 tremendous increase in dues that's devoted exclusively to
7 discipline. And I haven't attempted to calculate what
8 percentage of its budget, but at that time, when this case
9 began, the dues were approximately \$200. We were talking
10 about 16 to 17 percent of its budget as the total amount
11 devoted to this type of activity.

12 QUESTION: Yes, but you don't object to all of
13 this --

14 MR. CASO: Correct.

15 QUESTION: -- as I understand your brief. You
16 agree that you can reform the Rules of Civil Procedure and
17 that sort of thing, don't you? Have -- have bar money
18 spent on -- or do you think it can do nothing to change
19 the law?

20 MR. CASO: It can change the law when the --

21 QUESTION: I mean to lobby for --

22 MR. CASO: -- state has that interest. Again,
23 we have to start from the state ground, is that the state
24 has to identify why is it doing this.

25 QUESTION: Well, it wants to improve the

1 administration of justice, and there's an area of dispute
2 about what that includes. And I'm just trying to
3 understand because I really think there is some vagueness
4 in your position as to how many of these things you really
5 object to.

6 Do you have any idea of what percent of the
7 budget you think is improperly spent?

8 MR. CASO: I go back to the 1982 figures as my
9 base point. And I would say the great majority of that 16
10 to 17 percent would fall within an objectionable portion.
11 And the reason again, Your Honor, just to say
12 administration of justice -- and that's all the California
13 Supreme Court -- just to say the words --

14 QUESTION: Well, I know, but, see, you do have a
15 remedy on specific issues you disagree with. You could go
16 into state court and say this is beyond the statutory
17 definition. You probably could get Mr. Hufstedler to
18 argue your case for you on some of these things --

19 MR. CASO: But -- but the --

20 QUESTION: -- like the nuclear freeze.

21 MR. CASO: -- California Supreme Court has --
22 has laid down the definition of what those terms mean in
23 California, what those terms mean in this statute. Laws
24 are the business of lawyers is what they said.

25 QUESTION: But what exactly --

1 courts in MR. CASO: Anything -- decision it will be -- I
2 don't -- QUESTION: -- in this statute are you opposed
3 to? What words? ON: If you get a -- if we agree with you,
4 you don't MR. CASO: We're not opposed to the words in the
5 statute. to -- to have a little refund of dues or do you
6 want an QUESTION: Well -- the bar from doing these things
7 as long as MR. CASO: It's the way California defined them,
8 Your Honor. And let me give you an example. association rights
9 we want an QUESTION: In line with Justice Stevens, we have
10 to say -- you want us to say something specific, don't
11 you? ch rights --
12 MR. CASO: Yes, Your Honor. do you --
13 QUESTION: What do you want us to say he
14 specifically? Words, please.
15 MR. CASO: The remedy this Court should issue is
16 that -- to decide the bar is well within its power to use
17 mandatory association and mandatory fees to finance those
18 activities related to the delivery of quality legal we
19 services, as this Court determined in Lathrop. If the bar
20 wishes to go further, it must identify an interest of the
21 state that is compelling.
22 QUESTION: But it doesn't -- it doesn't -- I
23 thought you were -- you wanted -- you were asking perhaps
24 an injunction against the bar from doing those things.
25 claims. MR. CASO: Certainly when I go back to the

1 courts in California with this decision it will be -- I
2 don't --

3 QUESTION: If you get a -- if we agree with you,
4 you don't -- you're not -- wouldn't -- would it solve your
5 problem to -- to have a little refund of dues or do you
6 want an injunction against the bar from doing these things
7 as long as they have an integrated bar?

8 MR. CASO: Your Honor, on the association rights
9 we want an injunction. On the speech rights, if -- if
10 that's all the Court is going to grant relief on is the
11 speech rights --

12 QUESTION: It isn't going to do you --

13 MR. CASO: -- then the refund solves the
14 problem.

15 QUESTION: It isn't going to satisfy you to --
16 to have the -- the kind of a solution that there is in the
17 labor union area?

18 MR. CASO: That does not take care of what we
19 assert are the association rights at stake here because
20 this is an expressive association that they're compelled
21 to be members of.

22 QUESTION: No, but it does take care of your
23 free speech claim.

24 MR. CASO: It does take care of the speech
25 claims.

1 QUESTION: A refund of about \$10 out of the \$200
2 would do it.

3 MR. CASO: Sure. And, Your Honor, perhaps it's
4 best to look at this case, can California --

5 QUESTION: Well, according to Mr. Hufstedler --

6 MR. CASO: -- compel all doctors --

7 QUESTION: -- a refund of about 25 cents out of
8 that \$200 would do it. That's what I'm trying to figure
9 out. Whether it's \$10 or 15 cents.

10 QUESTION: Counsel, I still don't understand how
11 your compelling interest works. That the bar can go
12 further, it can do these activities if the state
13 identifies a very significant and important interest you
14 said.

15 MR. CASO: Interest that would --

16 QUESTION: I think you could make --

17 MR. CASO: Okay.

18 QUESTION: -- a very rational argument -- a lot
19 of people could -- that nothing is more important to
20 morality and to continued law than a nuclear freeze.

21 MR. CASO: Okay. But that interest has to be
22 related --

23 QUESTION: And so are we supposed to judge
24 whether or not each of these issues on an issue-by-issue
25 basis is somehow compelling?

1 MR. CASO: No. No, Your Honor. The interest
2 has to be -- has to grant the state a reason to compel
3 these people here, attorneys only, into a group for that
4 purpose. That's where the -- if you go back to the Abood
5 case, the reason --

6 QUESTION: But would you apply some test that if
7 there is a voluntary association of lawyers that's willing
8 to provide the -- the analysis or the advice there's --
9 there's prima facia no compelling state interest in
10 impressing every lawyer in the state to supporting such an
11 enterprise?

12 MR. CASO: Certainly I don't think you can
13 delegate to a voluntary association a regulatory function.

14 QUESTION: I'm not saying delegating. I'm
15 saying whenever you have a voluntary association of
16 lawyers that has come forward and said these are our
17 comments on the Rules of Civil Procedure, whatever they
18 are, you prima facia don't need a mandatory state
19 association of lawyers to do the same thing.

20 MR. CASO: Well, certainly, and there are a
21 number of those associations, and the legislature is
22 better served because only those people that want to
23 belong to that association are making that message and the
24 legislature is better able to evaluate it in that respect.

25 QUESTION: And what do you need a mandatory

1 association of all the state lawyers for? For discipline
2 matters? For what?

3 MR. CASO: Well, this Court has recognized
4 that's okay for the state to do, for discipline matters,
5 for continuing legal education, for ethics requirements.
6 These are things that the state can compel attorneys into
7 an association for.

8 The court below would say it can go beyond that
9 and "comment generally on any matter before the
10 legislature."

11 QUESTION: How do you expect us to write
12 something that you won't write yourself?

13 MR. CASO: I'm sorry, Your Honor. I go back to
14 the fact that --

15 QUESTION: No. Where in your papers do you say
16 what you want?

17 MR. CASO: Well, again, I'd just have to go back
18 to the fact that California has --

19 QUESTION: Is it written down so I can read it?

20 MR. CASO: Unfortunately I didn't provide a real
21 clear --

22 QUESTION: Sir?

23 MR. CASO: I did not provide a clear definition
24 of that in my papers, and I apologize for that, Your
25 Honor.

1 QUESTION: Well, what can we do?

2 MR. CASO: What you can do is reverse the
3 decision --

4 QUESTION: If you're not clear about it, how do
5 you expect us to be clear about it?

6 MR. CASO: What you can do is reverse the
7 decision of the California Supreme Court that says that
8 the State Bar --

9 QUESTION: Just reverse?

10 MR. CASO: -- is a governmental agency and can
11 do --

12 QUESTION: Just say we reverse? Just say we
13 reverse?

14 MR. CASO: No, Your Honor. You can reverse the
15 decision on those grounds and require the state to
16 articulate an interest, which it has not done in this case
17 because it never reached that level of analysis. It said
18 this is a governmental agency, it can do anything any
19 other governmental agency can do without First Amendment
20 restriction as far dissenting minorities or dissenting
21 members. The state has not articulated that interest.

22 Thank you, Your Honor.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Caso.

24 The case is submitted.

25 (Whereupon, at 2:58 p.m., the case in the above-

1 entitled matter was submitted.)

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No. 88-1905 - EDDIE KELLER, ET AL., Petitioners V. STATE BAR OF CALIFORNIA,

ET AL.

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