

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: ROBERT E. GIBSON, Petitioner V.

FLORIDA BAR, ET AL.

CASE NO: 90-1102

PLACE: Washington, D.C.

DATE: November 6, 1991

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   ROBERT E. GIBSON,                   :

4                   Petitioner                   :

5                   v.                   :   No. 90-1102

6   FLORIDA BAR, ET AL.                   :

7   - - - - -X

8                                   Washington, D.C.

9                                   Wednesday, November 6, 1991

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:04 a.m.

13   APPEARANCES:

14   RAYMOND J. LaJEUNESSE, JR., ESQ., Springfield, Virginia;  
15                   on behalf of the Petitioner.

16   BARRY SCOTT RICHARD, ESQ., Tallahassee, Florida; on behalf  
17                   of the Respondent.

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1 PROCEEDINGS

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 90-1102, Robert Gibson v. the Florida Bar.

5 Mr. LaJeunesse.

6 ORAL ARGUMENT OF RAYMOND J. LaJEUNESSE, JR.

7 ON BEHALF OF THE PETITIONER

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

10 Petitioner Robert Gibson is required to be a  
11 member of the Florida Bar as a condition of his practice  
12 of his law in Florida by rule of the Florida supreme  
13 court. He brought this lawsuit challenging the  
14 constitutionality of the collection of compulsory bar dues  
15 that are used for political and ideological purposes, and  
16 on a first appeal the 11th Circuit held that the bar,  
17 indeed, was violating his First Amendment rights by using  
18 his compulsory dues for political and ideological purposes  
19 unrelated to the bar's core regulatory functions, thus  
20 anticipating this Court's decision in Keller v. California  
21 State Bar.

22 The 11th Circuit remanded the case for the  
23 district court to determine which of the past positions  
24 taken by the bar were constitutionally permissible and  
25 impermissible uses of Mr. Gibson's dues.



1           QUESTION: The context of the case has very much  
2 changed in -- well, I'll ask you, in light of the Florida  
3 supreme court's order that the State bar not engage in  
4 nonbar-related activities. Hasn't that certainly changed  
5 the significance and importance of this case, if not -- if  
6 not technically mooted it?

7           MR. LaJEUNESSE: I -- I don't think so, Your  
8 Honor. The -- the Frankel decision, which is the decision  
9 to which Justice Kennedy refers, merely held that the bar  
10 may not use compulsory dues for lobbying purposes which do  
11 not meet this Court's Keller test.

12           It did not go as far as Keller to hold that  
13 compulsory bar dues may not be used for all ideological  
14 activities not germane to the bar's core regulatory  
15 functions, so we still have a problem with regard to  
16 activities other than lobbying -- for example, public  
17 relations, education programs, publications, matters which  
18 were at issue in -- in Keller, in addition to lobbying.

19           QUESTION: Why would the -- why would -- is that  
20 clear? I mean, why would the Florida court hold that?

21           MR. LaJEUNESSE: That's --

22           QUESTION: It seems so silly.

23           MR. LaJEUNESSE: That's --

24           QUESTION: It achieves nothing --

25           MR. LaJEUNESSE: That's --

1 QUESTION: -- to say, you have to be partially  
2 constitutional.

3 MR. LaJEUNESSE: The -- the problem arises  
4 because the bar's procedure addresses only legislative  
5 issues.

6 QUESTION: Well, I can't imagine that that's  
7 what -- that's what the Florida courts mean. I mean, it  
8 seems to me they're trying to say, you -- you can only  
9 expend your money in a way that would be entirely  
10 constitutional, so that we don't have to play these games  
11 about segregating out the funds.

12 MR. LaJEUNESSE: Your Honor, I don't agree that  
13 that's correct. On the face of the bar's procedure, a  
14 member has a right to object only to the use of his dues  
15 when the bar takes a position on a legislative issue, and  
16 in any event, even if the Florida supreme court's Frankel  
17 decision were interpreted to be congruent with Keller in  
18 all respects, we still have a situation where the State  
19 has created a compelled association, the compulsory bar,  
20 and given the bar authority to potentially infringe on  
21 First Amendment rights by not only using the dues, but by  
22 using the dues for political and ideological purposes.

23 QUESTION: Well, you can't say, though --

24 MR. LaJEUNESSE: And --

25 QUESTION: That if a -- if a court has ordered

1 the bar to stay within constitutional bounds right across  
2 the board, that a -- that a bar association that claims  
3 it's living up to the law could predict in advance that  
4 it's not going to.

5 MR. LaJEUNESSE: Your Honor --

6 QUESTION: Now, how could -- how could you  
7 expect a bar to remit something in advance that it has no  
8 intention of owing you?

9 MR. LaJEUNESSE: Because the bar -- as in any  
10 circumstance where the State authorizes a situation which  
11 makes it possible for First Amendment rights to be  
12 infringed upon, the State also has an obligation to  
13 provide procedures --

14 QUESTION: Well, all right --

15 MR. LaJEUNESSE: -- that reduce the risk of that  
16 infringement.

17 QUESTION: But you -- but I would think  
18 you -- you claim that there should be a reduction in  
19 advance.

20 MR. LaJEUNESSE: That's correct, Your Honor.  
21 The bar --

22 QUESTION: But you -- but you can't -- even if  
23 the -- if the bar says we're not going to engage in any of  
24 the things that would -- would make us refund part of your  
25 dues, how can --

1 MR. LaJEUNESSE: How can --

2 QUESTION: How can you ask them to then estimate  
3 how much they're going to break the law in advance?

4 MR. LaJEUNESSE: In the same manner that this  
5 Court held that the unions could do it in the compulsory  
6 dues cases, that is, based upon prior experience. If we  
7 do not rely upon prior experience, past expenditures, in  
8 calculating this year's dues amount, you end up with a  
9 naked demand backed up by a bluff, the bluff of the bar  
10 that everything we do is chargeable with no appropriate  
11 justification, which is what this Court held was required  
12 in Hudson.

13 QUESTION: There's a big difference in the union  
14 cases, because there was no prohibition against engaging  
15 in the activity. The only prohibition was against having  
16 the members support those activities, and here you've got  
17 a prohibition against --

18 MR. LaJEUNESSE: I don't think the case is that  
19 different, Your Honor. In Hudson, under the Illinois  
20 statute and under the collective bargaining contract, the  
21 bar -- excuse me, the union was permitted to charge all  
22 nonmembers only a proportionate share of the cost of  
23 collective bargaining, that is, a constitutionally  
24 chargeable fair share fee -- all nonmembers -- so you had  
25 a State limitation on the substance of what could be



1 collected.

2 And this Court said in Hudson that it -- it's  
3 not only a substantive limitation that is necessary, but  
4 that the State has an obligation to provide procedural  
5 safeguards that make -- reduce the risk that the union, or  
6 in this case the bar, will go outside those substantive  
7 limitations, and those procedural safeguards are very  
8 close to the procedural safeguards that are necessary for  
9 any taking of property.

10 Due process safeguards of a prior notice, in  
11 this case a prior notice in which the bar would justify  
12 the amount of the fee, the compulsory dues that it's  
13 charging to a member who wishes to object, an opportunity  
14 for a hearing --

15 QUESTION: Yes, but supposing they send a notice  
16 out to the membership, we -- our legislative program for  
17 1992 contains the following 10 items, and we think they're  
18 all permissible under the Florida supreme court's  
19 decision, there's no reason why everybody shouldn't  
20 contribute, and -- period. How are you hurt by that  
21 notice, then?

22 MR. LaJEUNESSE: But that's not the notice here,  
23 Your Honor. The notice here, Your Honor, is a notice  
24 that's given after the bar has already taken the  
25 legislative position, and as the 11th Circuit recognized,

1 already spent some of the money, so you'll have -- the  
2 First Amendment right of the objector has already been  
3 irreparably harmed, and we -- and the only remedy is the  
4 rebate remedy, which this Court condemned with regard to  
5 the unions in both Ellis and in Hudson.

6 QUESTION: No, but I'm trying to figure out what  
7 happens under the new -- new regime in Florida. If  
8 they -- if they publicize their legislative program, what  
9 else are they supposed to do under your view of the law?

10 MR. LaJEUNESSE: At the beginning of the year,  
11 which they don't do now, Your Honor.

12 QUESTION: They send out a dues request, send in  
13 your \$100, or whatever it is, and by the way here's our  
14 legislative program. They just send that out, period.  
15 What more should they do?

16 MR. LaJEUNESSE: What more should they do, Your  
17 Honor? They should send out a comprehensive breakdown of  
18 their budget -- when I say budget, I mean prior year's  
19 expenditures, which should be the basis for the  
20 calculation of the dues amount, showing the major  
21 categories of expenditures, and in each category breaking  
22 it down between chargeable and nonchargeable expenditures,  
23 and a sufficient --

24 QUESTION: Yes, but -- but they don't raise  
25 chargeable expenses. I mean, there are no nonchargeable

1 expenses.

2 MR. LaJEUNESSE: If -- if they're claiming that  
3 all of their expenditures are chargeable --

4 QUESTION: But this is why it says they are  
5 going to presume they're going to try and --

6 MR. LaJEUNESSE: If they're claiming that all of  
7 their expenditures are chargeable, then they should not  
8 simply make that a boldfaced -- as I say, bluff, by saying  
9 all of our expenses are chargeable --

10 QUESTION: If you presume --

11 MR. LaJEUNESSE: But they should -- they should  
12 give some detail. What types of legislation are we  
13 supporting --

14 QUESTION: Your suggested hypothesis --

15 MR. LaJEUNESSE: How much are we spending on  
16 that legislation --

17 QUESTION: Let me finish my question, please.

18 MR. LaJEUNESSE: I'm sorry.

19 QUESTION: Let Justice Stevens finish his  
20 question --

21 QUESTION: I'm trying to have a little dialogue  
22 here.

23 QUESTION: -- before you try to answer.

24 QUESTION: My question is, assume a notice which  
25 tells the membership of the bar what the legislative

1 program is, and it says, we do not -- we think all of  
2 these are consistent with the Florida supreme court  
3 decision in these supplemental briefs. What more need  
4 they do?

5 MR. LaJEUNESSE: They need to at that point also  
6 attach some dollars so that when the member objects, that  
7 portion which is in dispute can be escrowed.

8 QUESTION: Yes, but your dispute would be -- you  
9 would say, you pick out some items on the legislative  
10 program and you say, well, this is not germane. This is  
11 not one of those -- this is not obeying the law. This is  
12 something outside of their permissible activities, and  
13 then you want to -- and then you want a hearing on that,  
14 and you -- and once you make that objection, I suppose you  
15 want, then, an escrow?

16 MR. LaJEUNESSE: I don't want -- I don't just  
17 want it, Your Honor. This Court held in Hudson --

18 QUESTION: Yes, yes.

19 MR. LaJEUNESSE: -- that an escrow was  
20 necessary.

21 QUESTION: But -- but you want it in -- you want  
22 it before they ever engage in the activity.

23 MR. LaJEUNESSE: That's correct, your Honor,  
24 because if they make a mistake -- and they admit in their  
25 brief that they're not infallible, and we know from



1 Frankel that they're not infallible because in the last  
2 fiscal year in fact they did --

3 QUESTION: But you -- you think that -- you  
4 think the -- the bar association should escrow anything  
5 you object to?

6 MR. LaJEUNESSE: No, Your Honor, I don't. I  
7 think they should follow the same type of procedure that  
8 this Court prescribed for the unions in Hudson, and that  
9 is, when they calculate the chargeable amount of the dues  
10 at the beginning of the fiscal year they do it based upon  
11 the prior year's experience --

12 QUESTION: Well, that's fine.

13 MR. LaJEUNESSE: And --

14 QUESTION: Yes, but -- they're -- they claim  
15 that everything is chargeable. The bar, as Justice  
16 Stevens says, as the bar says, everything is chargeable to  
17 you, and then it's up to you to object if you think --

18 MR. LaJEUNESSE: It is up --

19 QUESTION: -- it's not chargeable.

20 MR. LaJEUNESSE: It is up to the -- Mr. Gibson  
21 to object.

22 QUESTION: Yes.

23 MR. LaJEUNESSE: It is then up to the bar to  
24 justify that charge that they've claimed to an arbitrator  
25 and, in the interim, if they are going to escrow less than

1 100 percent of the dues, they must, as this Court held in  
2 Hudson with regard to the unions, verify by an independent  
3 auditor --

4 QUESTION: But in Hudson --

5 MR. LaJEUNESSE: -- that escrow of less than  
6 100 percent.

7 QUESTION: But in Hudson, it was the premise of  
8 the case that the union was going to expend chargeable and  
9 nonchargeable amounts. That is not the premise of this  
10 case, based on the questions that we've been asking you so  
11 far.

12 Assume, for the moment, that we read the Frankel  
13 opinion as saying that the bar may not engage in any  
14 activity which causes a nonchargeable expense. Assume it  
15 says that. If that is the order of the Supreme Court,  
16 what is the necessity for any sort of advance budget or  
17 escrow provision?

18 MR. LaJEUNESSE: In order to protect -- because,  
19 as the bar points out in its brief, the line between  
20 chargeable and nonchargeable activities is difficult to  
21 draw, and there has to -- and the bar can make mistakes.  
22 It has made mistakes.

23 QUESTION: Due process requires that you  
24 have -- when lines are difficult to draw, due process  
25 requires that you be able to object in advance? A lot of

1 lines are hard to draw. We just had a school case. Now,  
2 suppose you think that some of the courses in the school  
3 may be going to violate the First Amendment, or going to  
4 violate some other provision of the Constitution. Are you  
5 entitled, as a matter of due process, to notice in advance  
6 of what the courses are going to be, rather than just  
7 objecting when the problem comes up?

8 MR. LaJEUNESSE: I think you are under this  
9 Court's due process decisions when the taking of property  
10 is involved. We're talking here about taking a man's  
11 property.

12 QUESTION: They're not proposing to take  
13 property. Now, under the -- before the -- what was the  
14 name of the --

15 MR. LaJEUNESSE: Frankel decision.

16 QUESTION: Yes. Before Frankel, they were  
17 proposing to take property, and you could plausibly say  
18 well, let me know in advance how much you're going to  
19 take. But now they are not proposing to take property.

20 MR. LaJEUNESSE: After Frankel, Your Honor,  
21 they're still collecting the dues. Isn't that a taking of  
22 property?

23 QUESTION: Well, Mr. LaJeunesse, in -- under  
24 your view, I suppose a State withholding of income tax --

25 MR. LaJEUNESSE: No, Your Honor.

1 QUESTION: -- would be improper --

2 MR. LaJEUNESSE: There's a very --

3 QUESTION: -- because the State might violate  
4 the First Amendment somehow during the course of the year.

5 MR. LaJEUNESSE: No, Your Honor, there's a very  
6 fundamental distinction between the State taking taxes for  
7 the State's general purposes and the bar's taking  
8 compulsory dues for the purpose of compelling association  
9 with the bar. That is, the very purpose of the collection  
10 of dues is an infringement on First Amendment rights.

11 Now, this Court has held that to a limited  
12 extent that infringement is justified by a compelling  
13 governmental interest, but nonetheless there still must be  
14 a carefully tailored procedure to ensure that that  
15 infringement goes no further than necessary to meet the  
16 compelling governmental interest, which is the support of  
17 the bar's regulatory functions.

18 There's no reason -- and I must -- I must go  
19 back in response to Justice Kennedy that we -- we also  
20 have to consider the constitutionality of this procedure  
21 for the 5 years that it operated before Frankel, in which  
22 the bar was operating under the assumption that it could  
23 engage in nonchargeable activities so long as it had a  
24 procedure that met the requirements of Hudson. So that  
25 question is not moot.



1 QUESTION: Well, weren't they going to give you  
2 back your money for that activity? I would assume that if  
3 it is now, as I guess it has been by the Frankel decision,  
4 determined that a lot of that activity was unauthorized, I  
5 presume that you'd have kind of an automatic right to get  
6 you money back?

7 MR. LaJEUNESSE: No, Your Honor. The -- the  
8 district court --

9 QUESTION: Well, I know you --

10 MR. LaJEUNESSE: -- denied --

11 QUESTION: Under the decisions in this case, but  
12 just that under bar procedure --

13 MR. LaJEUNESSE: And under the bar -- the bar's  
14 procedure operates only prospectively.

15 QUESTION: I see.

16 MR. LaJEUNESSE: It didn't -- did not even --  
17 they gave a notice of the taking of a position of a  
18 legislative issue. You've got 45 days to object,  
19 specifying the issue to which you object, thus violating  
20 this Court's holding in Abood that you can only be  
21 required to make a general objection.

22 The procedure which would meet First Amendment  
23 due process in this case is one in which at the beginning  
24 of the fiscal year the bar would make a comprehensive  
25 disclosure based upon prior years' expenses, so that we

1 have actual expenses that can be independently verified,  
2 as this Court held was necessary in Hudson to avoid two  
3 things; (1) projected expenditures, as the bar uses here,  
4 are merely estimates, and the bar does not have to follow  
5 those estimates during the course of the fiscal year, and  
6 secondly, estimates cannot be audited. They cannot be  
7 verified, and thus you have no independent reliable check  
8 on the bar's self-interest in maximizing the amount of the  
9 fee.

10 QUESTION: May I ask just one factual question?  
11 Does the record tell us what percentage of the total dues  
12 is in dispute in this? I mean, how much -- if they  
13 followed your procedure, does the record tell us what  
14 percentage --

15 MR. LaJEUNESSE: Well, Your Honor --

16 QUESTION: Of the dues would have been withheld?

17 MR. LaJEUNESSE: I understand the question, Your  
18 Honor. The bar has never made a disclosure of the kind  
19 that would enable me to even estimate what portion in the  
20 past was used for chargeable and -- for nonchargeable  
21 purposes --

22 QUESTION: It depends on what -- what proportion  
23 they estimate. Did they at least -- at least tell us  
24 that?

25 MR. LaJEUNESSE: Well, they claim it was only

1 the legislative expenditures --

2 QUESTION: That amounts to what?

3 MR. LaJEUNESSE: Which is 5 percent --

4 QUESTION: 5 percent.

5 MR. LaJEUNESSE: But publication --

6 QUESTION: Now, let me ask you this question.

7 If they gave you prior figures instead of estimates and it  
8 proved the 5 or 6 percent was correct, it would satisfy  
9 you, I guess, if they just insisted you pay 95 percent of  
10 the dues the first time, and then you determine later.

11 MR. LaJEUNESSE: If they provided the notice  
12 justifying the 95 percent, yes.

13 QUESTION: Would it -- would it also -- and why  
14 would it not also satisfy you if they said well, that's  
15 the 5 percent in dispute, so we'll escrow that amount, and  
16 you get interest on it?

17 MR. LaJEUNESSE: If -- if that breakdown --

18 QUESTION: And that's what I think the court of  
19 appeals --

20 MR. LaJEUNESSE: Saying that all of these -- the  
21 95 percent is arguably chargeable and 5 percent is  
22 nonchargeable was audited, the 5 percent --

23 QUESTION: Well, that's subject --

24 MR. LaJEUNESSE: That they concede is  
25 nonchargeable shouldn't be escrowed, it should be --

1 QUESTION: Well, why should -- then I'm asking  
2 really -- the rest of your question is, what is the  
3 constitutional objection to an interest-bearing escrow?

4 MR. LaJEUNESSE: None, Your Honor, if it is  
5 independently verified as this Court required in Hudson.

6 QUESTION: So you're not arguing that there  
7 should be an absolute right to withholding the 5 percent.

8 MR. LaJEUNESSE: If they -- if they concede that  
9 5 percent is nonchargeable --

10 QUESTION: No, no, no. They concede that  
11 there's a legitimate argument. Say 5 percent of the  
12 budget goes for lobbying, and they think it's all proper,  
13 but when anybody makes an objection they say, well, we'll  
14 set up an escrow as to 5 percent of that objector's dues,  
15 and keep paying interest on them if it turns out -- then  
16 later on we'll work out the arbitration.

17 MR. LaJEUNESSE: I understand the question now,  
18 Your Honor. Yes, if they say that 5 percent of the amount  
19 that they claim is chargeable is reasonably disputable,  
20 and that calculation of 5 percent has been independently  
21 verified as the Court held was required in Hudson, then  
22 only that 5 percent need be escrowed.

23 QUESTION: But -- but really what I'm asking is,  
24 does the escrow plus interest satisfy your constitutional  
25 objection if all the other requirements are met?



1                   MR. LaJEUNESSE: If all the other requirements  
2 are met, if the requirement of adequate prior notice,  
3 exclusion from the amount collected of all admittedly  
4 verified nonchargeable expenses, then the escrow verified  
5 of the part that's reasonably in dispute does satisfy  
6 constitutional requirements.

7                   QUESTION: But are -- are you conceding that  
8 they don't have to escrow until someone affirmatively  
9 objects?

10                  QUESTION: Yes.

11                  MR. LaJEUNESSE: They -- they cannot spend -- in  
12 other words, they must be -- they cannot be permitted to  
13 spend monies that they admit are arguably nonchargeable.

14                  QUESTION: What event triggers their obligation  
15 to set up the escrow, on your view?

16                  MR. LaJEUNESSE: Under a proper procedure, if  
17 the notice is given prior to the taking, and the member  
18 has an opportunity to object prior to the taking, which is  
19 the normal case in due process --

20                  QUESTION: All right, so you're -- you're  
21 receding from your -- maybe I'm misunderstanding you.  
22 You're receding from the argument that it would be a  
23 violation to require the member to make an affirmative  
24 objection in every case because that would force him to  
25 reveal his opinions.

1 MR. LaJEUNESSE: No, I'm not, Your Honor. I'm  
2 saying that at the beginning of the fiscal year they would  
3 give a comprehensive notice explaining the basis for the  
4 dues amount.

5 QUESTION: Okay, so there's -- there's no  
6 objection to his saying, okay, I want the 5 percent  
7 escrowed. Your objection would simply be if they required  
8 him on an issue-by-issue basis later on.

9 MR. LaJEUNESSE: That's correct, Your Honor.

10 QUESTION: Okay.

11 MR. LaJEUNESSE: I don't think that -- this  
12 Court in Abood held that that issue-by-issue requirement,  
13 objection requirement was unconstitutional for two  
14 reasons, first because it requires the member to  
15 continually monitor, in this case the bar's publications  
16 in order to see what the bar is doing, see whether it's  
17 given this notice that it's taken a position on an  
18 objectionable issue, and -- a potentially objectionable  
19 issue -- and by requiring him to object to specific  
20 positions it invades privacy of belief, because by  
21 implication that says you're opposed to those issues to  
22 which you object.

23 And I would add here, there's a further problem  
24 that under the bar's scheme you have to participate in  
25 more than one arbitration, because under the bar's scheme

1 if you make an objection to a specific legislative issue,  
2 that sets in motion a process by which if the bar does not  
3 make a refund for that issue, does not agree with your  
4 objection, you go to arbitration within a time period on  
5 that issue.

6 So I think the -- to summarize, even after  
7 Frankel the bar has to justify its proposed taking of  
8 property, of the member's money, the dues amount, with a  
9 notice that explains that dues amount, and after Frankel  
10 justifies its claim that it's all chargeable, that has to  
11 be an audited explanation.

12 The nonmember can then make a single general  
13 objection, saying I think you've calculated the dues  
14 amount too high, that some of the activities you've  
15 included I don't agree with, but he doesn't have to  
16 specify what they are at that stage because that would  
17 violate the principle of Abood that he does not have to  
18 disclose his beliefs. The portion that then the auditor  
19 has determined falls within the arguably -- the arguable,  
20 the gray area, gets put into escrow while the arbitration  
21 occurs.

22 QUESTION: Do you think what the Florida court  
23 ordered in -- in the Frankel case is consistent with the  
24 First Amendment to the extent that it ordered the bar not  
25 to lobby on things outside these certain core subjects?

1 MR. LaJEUNESSE: Your Honor, I don't think the  
2 First Amendment requires that result.

3 QUESTION: Well, I know it doesn't require it,  
4 but is -- is this injunction that the court issued, is  
5 limiting the things the bar could lobby on -- lobby about,  
6 is that injunction consistent with the First Amendment?

7 MR. LaJEUNESSE: I -- I think the Florida bar  
8 can establish whatever limits it wants upon the functions  
9 in which the bar is engaged.

10 QUESTION: I know, but here -- here the supreme  
11 court of Florida ordered them to limit their lobbying to  
12 certain subjects.

13 MR. LaJEUNESSE: But on the ground that that did  
14 not fall within the statutory purposes of the Florida bar,  
15 or the State law purposes of the Florida bar.

16 QUESTION: So you think it would be consistent  
17 with --

18 MR. LaJEUNESSE: Your Honor, I do not think that  
19 the Florida supreme court is limited by the First  
20 Amendment from voluntarily circumscribing the functions of  
21 the State bar. Now, if that injunction had run against a  
22 voluntary section of the bar, or had run against the bar's  
23 political action committee, which are separate entities  
24 from the State bar, then that would be a question of  
25 limiting voluntary associations, but we are talking about



1 the State bar, which is a compulsory bar.

2 QUESTION: Do you agree that -- that if the  
3 Florida supreme court's injunction is followed, and only  
4 those subjects are lobbied, at least the lobbying  
5 activities will be in compliance with the First Amendment  
6 as far as being able to compel the dues are concerned?

7 MR. LaJEUNESSE: Your Honor, this case does not  
8 raise the issue of whether the bar's definition of what  
9 complies with Keller is proper or not. I would be giving  
10 my personal opinion outside --

11 QUESTION: You don't have a view on the matter?

12 MR. LaJEUNESSE: The issues presented by this  
13 case, were I to answer that question directly.

14 QUESTION: Well, we wouldn't want that.

15 (Laughter.)

16 QUESTION: Can I ask you one other question  
17 about your issue-by-issue argument?

18 MR. LaJEUNESSE: Yes, Your Honor.

19 QUESTION: If you follow the procedure you  
20 recommended, where you make an objection and you don't  
21 specify issue, they escrow some money and then they set up  
22 an arbitration and the arbitrator is to decide which  
23 matters are chargeable and which are not chargeable, may  
24 the arbitrator at that stage of the proceeding ask your  
25 client which issues he objects to?

1 MR. LaJEUNESSE: I think at the arbitration  
2 hearing the bar has the burden of justifying its  
3 expenditures, but once it makes a prima facie case that  
4 satisfies the arbitrator, any attorney participating in an  
5 arbitration would be foolish not to more specifically give  
6 his rebuttal to the bar's prima facie case.

7 QUESTION: Supposing they come in and they say  
8 we've lobbied for these 10 issues, and here's how much we  
9 spent on each one, and now does your client have a duty to  
10 say which ones he objects to at that point?

11 MR. LaJEUNESSE: I'm not sure he has a duty,  
12 Your Honor.

13 QUESTION: You don't think he does?

14 MR. LaJEUNESSE: He may -- he may lose the case  
15 before the arbitrator --

16 QUESTION: You don't think the arbitrator could  
17 say --

18 MR. LaJEUNESSE: Because the arbitrator knows  
19 the bar has made a prima facie case --

20 QUESTION: You don't think the arbitrator --

21 MR. LaJEUNESSE: And you haven't rebutted it.

22 QUESTION: Could he say to him, I don't want to  
23 have to decide ten issues if only two issues are in  
24 dispute, will you please tell me which ones you object to?  
25 You don't think that would be a reasonable part of the

1 procedure?

2 MR. LaJEUNESSE: It might be. I hadn't thought  
3 that through that point, Your Honor.

4 QUESTION: Do you have any constitutional  
5 objection to that as a part of the procedure? Has your  
6 issue-by-issue argument taken it that far?

7 MR. LaJEUNESSE: No, that's -- I think that's  
8 normal to litigation that you --

9 QUESTION: So your problem on issue-by-issue is  
10 purely the timing of your disclosure of what issues you  
11 object to?

12 MR. LaJEUNESSE: Because the bar is infringing  
13 on First Amendment rights and it has --

14 QUESTION: Your answer to my question is yes,  
15 the only objection is to the timing of when you must  
16 disclose which issues you find objectionable?

17 MR. LaJEUNESSE: I think some disclosure has to  
18 be made in the sense of the process of litigation. Once  
19 you participate in litigation, you sometimes have to  
20 disclose things that otherwise you could keep private  
21 under the First Amendment.

22 If there are no further questions, I'd like to  
23 reserve the balance of my time.

24 CHIEF JUSTICE REHNQUIST: Thank you,  
25 Mr. LaJeunesse. Mr. Richard, we'll hear from you.

1 ORAL ARGUMENT OF BARRY SCOTT RICHARD

2 ON BEHALF OF RESPONDENT

3 MR. RICHARD: Mr. Chief Justice, and may it  
4 please the Court:

5 With the Court's permission, I would like to  
6 begin by addressing questions that were raised by Justice  
7 Kennedy and Justice White. With regard to the Frankel  
8 decision, counsel has suggested that the Frankel decision  
9 was limited solely to legislative positions. The reason  
10 for that is because those were the only positions that  
11 were challenged in the Frankel case by the petitioners,  
12 just as they are the only petitions -- the only positions  
13 that have been challenged in this case.

14 However, it is clear from this Court's decisions  
15 that the Abood criteria, the requirements of Hudson, are  
16 not limited to legislative lobbying positions, and as far  
17 as the Florida bar is concerned, it reads its own Supreme  
18 Court decision as being as expansive as are the decisions  
19 of this Court in Keller.

20 It is our opinion that it would make no sense,  
21 as Justice Kennedy suggested, for the Florida supreme  
22 court to attempt to distinguish between the two and so, as  
23 we understand that ruling, we are limited as to all  
24 political and ideological purposes to the parameters of  
25 Keller and Abood.



1 With regard to Justice --

2 QUESTION: That seems to me very perceptive.

3 (Laughter.)

4 QUESTION: Very perceptive.

5 MR. RICHARD: I can read, Your Honor.

6 QUESTION: I'm sorry.

7 MR. RICHARD: Second, Your Honor, with regard to  
8 Justice Kennedy's suggestion that perhaps this case is  
9 moot if not insignificant, while it may be that with  
10 regard to Florida it is moot, the fact is a split  
11 continues to exist in the various circuits, and because  
12 this Court may want to address this issue, I will address  
13 it regardless of whether or not the Florida supreme court  
14 had taken the position that it did in the Frankel case,  
15 and I will do that in just a moment.

16 First, however, I would like to also address the  
17 question that was raised by Justice White regarding  
18 whether or not injunction would be at -- whether or not  
19 that Florida's interpretation -- that Florida's  
20 interpretation of the Frankel case -- is consistent with  
21 this Court's ruling in Keller. It is our position that it  
22 is, indeed, consistent. As this Court said in Keller, the  
23 issue is not the terminology but the manner in which it  
24 has been interpreted by the Court.

25 The reason that this Court struck down the

1 California court's interpretation is because even though,  
2 as this Court noted, its language appeared to be the same  
3 as the language of this Court, it had so broadly  
4 interpreted it that it essentially allowed any lobbying.

5 Quite the contrary. In its first test of the  
6 criteria that it had earlier established in the Schwarz  
7 case, the Florida supreme court gave an extremely narrow  
8 interpretation which clearly falls within the scope of  
9 Keller, and essentially what the Florida supreme court  
10 said in interpreting those additional three criteria was  
11 that it must be -- that when they say that it must be an  
12 issue upon which attorneys have special expertise, that  
13 means it must have to do with the administration of the  
14 system of justice as opposed to the subject matter of the  
15 legislation.

16 Now, the essential point here is that this Court  
17 does not have before it now a case in which the  
18 interpretation by the Florida supreme court by anybody's  
19 measure is beyond Keller or Abood, and there will be no  
20 issue until such time as a petitioner brings a case to  
21 this Court or another Federal court in which the Florida  
22 courts have interpreted it in an expansive manner that  
23 violates those cases.

24 Now, what I would like to do is to address this  
25 question, as I said, in an even broader sense. I think,

1 as comments from the Justices have already indicated, that  
2 there is no question that given the current interpretation  
3 by Florida's supreme court, that this case squarely meets  
4 the requirements of Abood and of Keller with regard to  
5 advance reduction, but I would suggest to this Court that  
6 even before the Frankel decision, and even with respect to  
7 those States that have not gone so far as Florida, advance  
8 reduction which has never been mandated by this Court  
9 simply makes no sense.

10 It rests upon the assumption that there is only  
11 one interest here to be served, the interest of the  
12 dissenters, and that that interest is to be served and  
13 that the convenience of the dissenters is to be served  
14 without regard for any other interest, and that flies in  
15 the face of what this Court has said consistently when it  
16 has cautioned district courts that they are to balance the  
17 interests of the dissenters against the right and the  
18 necessity for the organization to have the ability to fund  
19 those activities which are germane, and there is no way, I  
20 would respectfully suggest to this Court, that advance  
21 reduction can accomplish that purpose, and I will  
22 illustrate.

23 Let us assume that the dissenters have demanded  
24 their escrow and that a determination has been made at  
25 some point that it was 10 percent of the budget, and they

1 have received their 10 percent. Now, in what manner --

2 QUESTION: You're saying two different things.  
3 They have received their 10 percent, or the 10 percent has  
4 been put in escrow?

5 MR. RICHARD: It's been escrowed, and eventually  
6 let's assume it was determined that it was nonchargeable  
7 and they received the money. Let's assume the most  
8 extreme circumstance in which the determination was in  
9 their favor.

10 Now, in what manner are you to reduce next year,  
11 when what we are talking about -- well, let me put it this  
12 way, there are some circumstances in which reduction is  
13 certainly practicable. For instance, if you've got a  
14 labor union which knows that it is going to allocate  
15 10 percent of its budget to campaign contributions, surely  
16 that's a simple matter of reduction.

17 However, if you're dealing with a legislative  
18 situation, then as Justice Souter mentioned in the Chapman  
19 case in New Hampshire, it's an extremely complicated and  
20 never a wholly satisfactory system to advance reduce,  
21 because what do you reduce?

22 Florida's court is typical. It budgets a lump  
23 sum amount to lobbying. Why? Because nobody knows what  
24 percentage of lobbying is going to go to what issues in  
25 any given year. Nobody knows what issues are coming up,



1 nobody knows how many committees are going to take up a  
2 bill, nobody knows until it's all over, and then what you  
3 do is you sit down and you allocate it according to the  
4 percentage of the time that your lobbyists spent on one  
5 issue or another issue.

6 QUESTION: But Mr. Richard, let me just cut you  
7 off, if I may. As your opponent seems to say, past year's  
8 experience would be an adequate basis, and that certainly  
9 would be something you could use so you have some basis,  
10 and if your lobbying has been 5 percent in the prior year,  
11 why would it be -- I'm not saying it's constitutionally  
12 held, but I don't understand the administrative problem  
13 with saying if that's what it was last year, why that's  
14 the size of the escrow. Isn't that -- in fact, that's  
15 what I thought you did.

16 MR. RICHARD: No, it's not what --

17 QUESTION: You made future estimates, is what  
18 you did. That's a different --

19 MR. RICHARD: No, what Florida actually does,  
20 and counsel has objected it's not in the record, and it's  
21 not, but if it's of interest to you, what we do is,  
22 because we don't know in advance, we escrow 100 percent of  
23 the legislative budget until our auditor determines what  
24 it is, because we don't know any other way to do it.

25 QUESTION: What percent of the total charge to

1 the lawyer is the legislative budget? What -- what part  
2 of the dues are you talking about?

3 MR. RICHARD: The record here reflects that when  
4 this case began about 5 years ago it was around \$1.50. I  
5 don't know how accurate that is.

6 QUESTION: \$1.50 out of what? What's the total  
7 dues? I mean, at what percentage?

8 MR. RICHARD: I think my dues are around  
9 something between \$100 and \$200. I don't remember  
10 exactly.

11 QUESTION: It's a couple percent of the dues,  
12 what you're talking about?

13 MR. RICHARD: That's correct.

14 QUESTION: And you're only talking about  
15 escrowing that amount for those dissidents who object to  
16 use it for some lobbying.

17 MR. RICHARD: That would be correct.

18 QUESTION: So we're not talking about a big  
19 escrow.

20 MR. RICHARD: But the problem though, Your  
21 Honor, is this. The problem is one of principle, and if I  
22 can illustrate it I'll show you what I mean. Let's assume  
23 that we do what Your Honor has suggested as a hypothet,  
24 which is that we reduce in the future years by the  
25 previous year's budget.

1 QUESTION: So you won't reduce, you just escrow  
2 that portion of the dissenter's dues?

3 MR. RICHARD: I'm sorry, I misunderstood you.  
4 We do do that.

5 QUESTION: Yes. That's what I thought.

6 MR. RICHARD: Well, but we --

7 QUESTION: I thought he said he doesn't object  
8 to it as long as it's based on past year rather than  
9 future estimates.

10 MR. RICHARD: No, no. We do it more accurately.  
11 Instead of -- instead of -- instead of escrowing by last  
12 year we escrow by the total amount we budgeted this year  
13 for the whole legislative budget.

14 QUESTION: Which is -- which is more than he's  
15 really entitled to, obviously.

16 MR. RICHARD: That would be correct.

17 QUESTION: But it's still only a couple of  
18 percent of the total dues, as I understand you.

19 MR. RICHARD: That's correct, Your Honor.

20 QUESTION: Now -- and what's wrong with -- I  
21 mean, I --

22 MR. RICHARD: We have no objection to that.

23 QUESTION: I see. I just don't know what the  
24 fight is about here. That's hard --

25 QUESTION: Well --

1 MR. RICHARD: I'm not sure I do, either.

2 (Laughter.)

3 QUESTION: Well, I'll tell you what part of the  
4 fight is about. Part of the fight is about you then make  
5 the member, in order to get any of this money back, issue  
6 by issue, object to the expenditure on this, to the  
7 expenditure on that.

8 Suppose a member is just a cheapskate, and he  
9 says, I don't want to spend any money for lobbying. I  
10 don't care what the subjects of the lobbying are going to  
11 be, if they are not within that narrow range of things  
12 that you have the constitutional right to take it out of  
13 my hide, I don't want to contribute, and I want to let you  
14 know this up-front, and I don't want to have to follow  
15 your -- your stupid bulletin that comes around every month  
16 and read what you're lobbying about. I don't want to  
17 waste my time on that. Now, why isn't that entirely  
18 reasonable?

19 MR. RICHARD: It is reasonable, Your Honor.

20 QUESTION: But you don't let him do that.

21 MR. RICHARD: Yes, we do.

22 QUESTION: In advance he can say, I want no  
23 money -- no money spent?

24 MR. RICHARD: Yes, he may, Your Honor. The  
25 problem here is -- that's not where the problem lies here,



1 or the dispute.

2 The problem is, what kicks into play escrow and  
3 arbitration. The point here is that we are not dealing,  
4 as this Court was in the Abood case with what it referred  
5 to as the -- shifting -- the necessity to sift through  
6 shifting and numerous expenditures for nongermane  
7 purposes. Here's what we're dealing with here.

8 The Florida bar says -- and by the way, the  
9 rules which are in the record reflect that before the  
10 Florida Bar Board of Governors votes to take a position  
11 they must, by two-thirds vote, first agree that it is  
12 germane to what the Florida supreme court has said is its  
13 permissible area, so first they must make that decision so  
14 that in every case the board has already determined -- has  
15 already determined that it is germane.

16 Now, the petitioner comes along and says, we  
17 don't want you to spend our money on any nongermane  
18 purposes, and the answer a fortiori is, we're not.

19 QUESTION: Oh, I don't -- so you are  
20 really -- your answer here is -- you are including in  
21 your -- the Frankel decision in your answer?

22 MR. RICHARD: Well, even before the Frankel  
23 decision, Your Honor --

24 QUESTION: Yes, that's what I'm concerned about.  
25 I'm concerned about before Frankel.

1 MR. RICHARD: Because we are not saying to the  
2 individual, as was the case in Abood, you must tell us  
3 what your position is on each individual issue which is  
4 nongermane. All we're saying, as the 11th Circuit  
5 recognized is, where do you disagree with us as to what's  
6 germane? If it's nongermane we're not going to spend your  
7 money. If you think we're wrong --

8 QUESTION: I see.

9 MR. RICHARD: -- tell us what's nongermane so  
10 that we know what it is that we're disputing. As this  
11 Court said, what's the dispute? We're saying, what's the  
12 dispute.

13 Now, counsel, in what I think is a highly  
14 significant acknowledgement said, as this Court has said,  
15 once you get into the litigation process, you have to tell  
16 the court what your objection is.

17 QUESTION: I -- I see.

18 MR. RICHARD: I fail to see the distinction.  
19 Again, we thoroughly understand what this Court has said,  
20 and endorse it, which is that you cannot make the  
21 petitioner take -- announce his position on the subject  
22 matter one way or the other. All we're asking him then  
23 here is, where do you think we are wrong in our  
24 determination that it is germane or nongermane, and then  
25 we know how much escrow, we know whether or not to take it

1 to --

2 QUESTION: Well, if --

3 QUESTION: It's already escrowed, you would say?  
4 It is already.

5 MR. RICHARD: It's escrowed as soon as he tells  
6 us, right.

7 If I might, by the way, go back for just a  
8 moment to advance reduction, because there was a point I  
9 wanted to make there which I think has broader  
10 significance than this. The problem is this. If -- what  
11 I -- what in their briefs the petitioners were calling for  
12 was in fact not an escrow but an advance reduction the  
13 following year in their dues --

14 QUESTION: But he conceded today that he didn't  
15 ask for that.

16 MR. RICHARD: Well, if that's the case, then I  
17 have no problem.

18 QUESTION: At least, I so understood him because  
19 I gave him that very question, and he said the escrow was  
20 enough.

21 MR. RICHARD: My main concern with that is it  
22 does exactly what this Court's trying to avoid. It then  
23 shifts the burden to all the nondissenters to pick up a  
24 percentage that they may not --

25 QUESTION: Well, you're not going to -- under

1 the Frankel decision as you construe it, you're not going  
2 to escrow anything until somebody objects.

3 MR. RICHARD: That's correct, Your Honor.

4 QUESTION: Well, this -- I know that you think  
5 the Frankel decision really means to you that you should  
6 stay within this -- these germane areas in all of your  
7 activities, whether it's lobbying or publications. You  
8 include all of your -- all of your educational materials,  
9 don't you?

10 MR. RICHARD: Yes, Your Honor, that's correct.

11 QUESTION: Well now, how do we -- that's what  
12 you say you're going to do, but as a matter of fact the  
13 injunction that the Court issued against the bar was  
14 limited to those lobbying positions 6(a) through 6(h).

15 MR. RICHARD: That's correct.

16 QUESTION: So that's the only obligation that  
17 the bar must --

18 MR. RICHARD: Well --

19 QUESTION: Must observe.

20 MR. RICHARD: That's correct, because that was  
21 the only issue presented to the Court.

22 QUESTION: Exactly.

23 MR. RICHARD: But again, we read it as being  
24 broad and we would have no objection to this Court saying  
25 that -- that it --



1 QUESTION: Well, I know, but --

2 MR. RICHARD: Of course, this Court wouldn't say  
3 what the Supreme Court limits --

4 QUESTION: But technically -- technically you  
5 would not be in violation of the Supreme Court order if  
6 you -- if you lobbied on nongermane things that just  
7 didn't happen to be 6(a) through 6(h).

8 MR. RICHARD: But we would -- that's -- yes,  
9 Your Honor.

10 QUESTION: I know you say you're not going to do  
11 that. We don't know that.

12 MR. RICHARD: And if the petitioner says we have  
13 done it, which our rules provide them an opportunity to  
14 say, then we must immediately escrow his funds and  
15 eventually if he proves to be correct, either give the  
16 money back or -- or give it back with interest from the  
17 date that the position was taken by the bar.

18 QUESTION: Well --

19 MR. RICHARD: And we're bound to that by the  
20 11th Circuit's decision.

21 QUESTION: Well, you know that -- you know that  
22 in the past you have engaged in nongermane lobbying.

23 MR. RICHARD: That's correct.

24 QUESTION: And activities, because as Frankel  
25 well illustrates, and are we supposed to just believe that

1 your -- that the bar is going to refrain from nongermane  
2 activities that don't happen to be within 6(a) through  
3 6(h)?

4 MR. RICHARD: No, sir.

5 QUESTION: No? Well --

6 MR. RICHARD: That's not the question before the  
7 Court.

8 QUESTION: Well, I don't know why it isn't.

9 If -- if the bar happened to say -- say well, we're going  
10 to take these nongermane positions in lobbying which are  
11 not within 6(a) through 6(h) -- we know that we're going  
12 to do that -- and you budget something for those  
13 activities, don't you think you then would have to escrow  
14 that money?

15 MR. RICHARD: Well, I think we certainly would  
16 have to escrow it as soon as somebody files an objection,  
17 and I think that it would not be inappropriate if we knew  
18 in advance what the percentage was to escrow it even if  
19 they did not file an objection.

20 QUESTION: Yes, well, I suppose if you knew in  
21 advance and you thought that you were going to spend his  
22 money for nongermane activities that were not forbidden to  
23 you, you ought to give him his money back right away.

24 MR. RICHARD: Well --

25 QUESTION: You don't need to escrow if you

1 concede yourself that this is nongermane.

2 MR. RICHARD: If what Your Honor is saying --  
3 and I -- I believe I understand you -- this Court has said  
4 that there always must be an objection raised, that the  
5 initial burden is, of course, the petitioner. I  
6 understand, Your Honor, what you're saying is that once  
7 the petitioner has said, I file an objection, if the bar  
8 then knows that it's going to spend a percentage of money  
9 on a nongermane purpose, that it then must return that  
10 money to that petitioner and we would agree wholeheartedly  
11 with that. We have no problem with that suggestion.

12 The difficulty here is --

13 QUESTION: You've got to have an objection. You  
14 wouldn't know who to pay.

15 MR. RICHARD: Well, not only that, but what the  
16 petitioner, as I understand it, is suggesting, is that he  
17 does not even have to advise the bar when he thinks the  
18 bar has arrived at an incorrect decision as to whether or  
19 not it's germane. Now -- now what does that call upon us  
20 to do, then? Must we escrow automatically all funds,  
21 which flies in the face of this Court's continuing  
22 suggestion that the organization should not have to have a  
23 100 percent escrow, or are we to send every issue once a  
24 single petitioner has objected to costly arbitration,  
25 thereby again placing an undue burden upon the

1 nondissenters?

2 My point is that the Florida bar has adequately  
3 and constitutionally fully accommodated all First  
4 Amendment requirements as soon as we immediately escrow  
5 money which -- which accounts for the percentage of the  
6 item that the petitioner has suggested is not germane and  
7 given him an opportunity in Florida which is twofold,  
8 either to go to arbitration or to go directly to the  
9 supreme court on a petition. All I'm suggesting --

10 QUESTION: Or -- or if he objects and you say  
11 well, yes, this is a nongermane activity, you're going to  
12 give him his money back right then, I suppose? You're not  
13 going to just escrow it.

14 MR. RICHARD: Well, Your Honor, the -- the  
15 rule --

16 QUESTION: Right? No? Right?

17 MR. RICHARD: I would say we should. The rule  
18 doesn't speak to that since it doesn't recognize --

19 QUESTION: You mean you should, but you  
20 wouldn't?

21 MR. RICHARD: Well, no, sir.

22 (Laughter.)

23 MR. RICHARD: The reason I say that is because  
24 Florida's rule requires a decision before its ever  
25 announced that it's germane, so Florida doesn't recognize



1 its right to allocate that money to a nongermane purpose,  
2 so the decision's already been made by the board that it's  
3 germane.

4 Now, the question is whether there's an adequate  
5 system for the petitioner to disagree with us, and our  
6 position is there is a more than adequate system.

7 QUESTION: Mr. Richard, could I ask another  
8 question? What about what he paid in in the last few  
9 years for activity that has now by the Florida supreme  
10 court been determined to have been unauthorized?

11 MR. RICHARD: We have been ordered to refund  
12 with interest from the appropriate date all sums that were  
13 paid in by those who adequately raised the issue.

14 QUESTION: So does that mean that as between the  
15 dispute between these particular parties insofar as it  
16 relates to past payments he's got -- he either has or is  
17 entitled to his money?

18 MR. RICHARD: That is our understanding. Past  
19 payments as to those issues upon which he gave --

20 QUESTION: Is it your understanding that  
21 somebody's actually paid him?

22 MR. RICHARD: That somebody has paid him?

23 QUESTION: Has he got his money back?

24 MR. RICHARD: I don't know, Your Honor.

25 QUESTION: Because it seems to me if he has

1 maybe -- maybe the whole case is moot, or at least not  
2 much of a lawsuit.

3 MR. RICHARD: I couldn't honestly tell you  
4 whether or not he's gotten his money back. In light of  
5 the fact that the case is not finally adjudicated --

6 QUESTION: I suppose that -- I suppose that you  
7 could read this opinion -- this later opinion in -- as at  
8 least a declaratory judgment, that the Court says if a  
9 lobbying position does not fall within the guidelines set  
10 forth in Schwarz, it is outside the ambit of permissible  
11 bar lobbying activities, thus a petitioner may enjoin the  
12 bar from lobbying on that position. That is at  
13 least -- whether an injunction, regardless of how broad  
14 the injunction was, this is an opinion by the supreme  
15 court that you -- that -- that it's illegal for you to  
16 lobby on anything that doesn't satisfy Schwarz.

17 MR. RICHARD: Yes, sir. As a matter of fact, it  
18 occurred to me after you asked the question about the  
19 injunction before to make another comment that I forgot,  
20 so I'm glad you've raised it again.

21 The Florida supreme court in this case was not  
22 acting in an adjudicatory capacity with regard to the  
23 injunction. They were acting as the administrative head  
24 of the Florida bar, which in Florida the supreme court is,  
25 and they were advising the Florida bar that they could not

1 extend beyond Keller in any case.

2 The injunction was secondary, because the Court  
3 was saying this is an appropriate remedy, but the fact is  
4 that it was certainly the intention of the Court to advise  
5 the bar of its administrative limits. They said, your  
6 charter allows you not to go beyond this.

7 MR. RICHARD: With regard to the issue of  
8 notice, Your Honor, the Florida bar publishes all of the  
9 notice that I believe is reasonably possible, as well as  
10 all of the notice that is constitutionally required. We  
11 have a rule adopted and imposed by the supreme court that  
12 requires Florida to give notice of the entire budget  
13 process, point by point. We give notice to the membership  
14 as soon as it is adopted of every item in the budget, we  
15 give notice as the Court knows of every position taken  
16 politically. There is nothing more to tell the  
17 petitioners. If the petitioners are suggesting that we  
18 need to break the budget down into smaller quantities, I  
19 know of no constitutional provision that requires the  
20 Florida bar or any other agency to break its budget down  
21 into any particular size items. The point is, we're not,  
22 as is suggested in the brief of the petitioners, being  
23 disingenuous here or being arrogant. We are simply  
24 adopting the only budget that the bar is able to adopt,  
25 and we are attempting, as I believe most if not all bars

1 and this Court is, to struggle with the question of how to  
2 balance the legitimate rights of the petitioners against  
3 the necessity to ensure that the costs involved are evenly  
4 spread with regard to legitimate, germane functions.

5 Unless the Court has additional questions,  
6 Mr. Chief Justice, that concludes my remarks.

7 QUESTION: I'd -- I'd be interested in how large  
8 the -- how large the bar is in Florida. How many members,  
9 do you know?

10 MR. RICHARD: With the Court's permission, I  
11 quote 46,000. I'm advised by cocounsel, who is general  
12 counsel for the bar. I believe, by the way, that is in  
13 the record in one of the documents.

14 QUESTION: Thank you, Mr. Richard. Mr.  
15 LaJeunesse, you have a minute remaining.

16 REBUTTAL ARGUMENT OF RAYMOND J. LAJEUNESSE

17 ON BEHALF OF THE PETITIONER

18 MR. LAJEUNESSE: I'd like to very quickly make  
19 two or three points. One, Justice Stevens, I did not  
20 concede that if the bar, as was the case pre-Frankel,  
21 engages in constitutionally nonchargeable activities, that  
22 advance reduction is not required in addition to escrow.  
23 I think both are required if the bar is not limited by  
24 State law to only constitutionally chargeable purposes.

25 QUESTION: Don't you think it is now?



1 MR. LaJEUNESSE: I don't think so. I don't  
2 think it is now. I think that ruling and its own  
3 procedure applies only to legislative activities.

4 Now, we've had a statement from counsel here for  
5 the first time to this Court in argument that Frankel, and  
6 its own procedure, which says on the face you can object  
7 to legislative positions, period, only those legislative  
8 positions which the bar gives you notice of in its  
9 twice-monthly publication. That's all that procedure  
10 covers.

11 QUESTION: I see.

12 MR. LaJEUNESSE: The second point I'd like to  
13 make is that counsel suggested that Mr. Gibson is going to  
14 get some restitution as a result of the Frankel decision.  
15 That is simply not true. The Frankel decision only  
16 applies to parties in that case.

17 QUESTION: Okay, thank you, Mr. LaJeunesse.  
18 Your time has expired.

19 MR. LaJEUNESSE: Thank you, Your Honor.

20 CHIEF JUSTICE REHNQUIST: The case is submitted.

21 (Whereupon, at 11:55 a.m., the case in the  
22 above-entitled matter was submitted.)  
23  
24  
25

## CERTIFICATION

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

*NO. 90-1102 - ROBERT E. GIBSON, Petitioner V. FLORIDA BAR, ET AL.*

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

BY *alan friedman*

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