

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FEDERAL ELECTION COMMISSION, :

4 Petitioner :

5 v. : No. 02-403

6 CHRISTINE BEAUMONT, ET AL. :

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8 Washington, D. C.

9 Tuesday, March 25, 2003

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

13 APPEARANCES:

14 PAUL D. CLEMENT, ESQ., Deputy Solicitor General,
15 Department of Justice, Washington, D. C.; on behalf of
16 the Petitioner.

17 JAMES BOPP, JR., ESQ., Terre Haute, Indiana; on behalf of
18 the Respondents.

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P R O C E E D I N G S

(10:11 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 02-403, the Federal Election Commission v.
Christine Beaumont.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT
ON BEHALF OF THE PETITIONER

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

This Court's campaign finance cases consistently
emphasize the fundamental distinction between
contributions and expenditures. Direct transfers of cash
to a candidate pose unique risks of the appearance of
corruption or the threat of actual corruption while, at
the same time, imposing less significant interference with
First Amendment values. And so this Court's jurisprudence
consistently recognizes that there is less rigorous
scrutiny on limitations on contributions relative to
limitations on expenditures.

The court below lost sight of that fundamental
dichotomy. It held that corporations of the type that
this Court exempted from the general limitations on
corporate expenditures in Massachusetts Citizens for Life
were equally exempt from the broad prohibitions on

1 corporate contributions to candidates. That reasoning
2 ignores this Court's decision in Massachusetts Citizens
3 for Life itself, which specifically distinguished between
4 the expenditures and contributions of nonprofit
5 corporations.

6 More fundamentally, the decision below ignores
7 this Court's decision in National Right to Work Committee.
8 There this Court held that the broad limitations on
9 corporate contributions and the specific limitations on
10 solicitation embedded in that broad prohibition were
11 constitutional against a First Amendment challenge.

12 QUESTION: Mr. Clement, the Government does --
13 does not challenge the exemption of this not-for-profit
14 corporation from expenditure limitations?

15 MR. CLEMENT: That's right, Justice Scalia. The
16 court below addressed both an expenditure issue and a
17 prohibition issue with respect to contributions, and the
18 Government only took up the prohibition on contributions.
19 So that is the only issue before the Court.

20 I think it's important, though, to understand
21 that that is a distinction that the court below placed
22 insufficient emphasis on because that is a distinction
23 between contributions and expenditures that underlies the
24 last quarter century of this Court's campaign finance
25 jurisprudence.

1 And in National Right to Work Committee itself,
2 this Court recognized that the broad prohibitions on
3 contributions applied to all corporations, including those
4 like National Right to Work Committee itself that were
5 without great financial resources.

6 Nonetheless, in the particular context of
7 corporate contributions to candidates, this Court held
8 that it would not second guess Congress' decision that a
9 broad, prophylactic approach was necessary when corruption
10 was the evil feared.

11 QUESTION: Do you think after the decision in
12 Massachusetts -- the Massachusetts case, the NRWC would
13 have a right to make independent expenditures?

14 MR. CLEMENT: Well, I think it would, Chief
15 Justice Rehnquist, and I think that where I would point to
16 first is your dissent in that case because in that case in
17 your dissent, you made the argument that National Right to
18 Work Committee was essentially the same as Massachusetts
19 Citizens for Life. And the majority, in responding to
20 that argument, didn't draw any particular distinction
21 between National Right to Work Committee and Massachusetts
22 Citizens for Life, but rather drew a firm distinction
23 between the level of scrutiny that applies to limitations
24 on contributions and the level of scrutiny that applies to
25 limitations on expenditures.

1 So I would read that decision as saying that the
2 critical distinction is not the differences among the
3 types of corporations with respect to contribution bans,
4 but is the fact that contribution bans are much more
5 readily approved under First Amendment analysis than
6 expenditure bans.

7 And National Right to Work Committee obviously
8 wasn't the last word on that subject. This Court
9 reaffirmed the validity of a broad, prophylactic approach
10 to corporate contributions both in National Conservative
11 Political Action Committee and in Massachusetts Citizens
12 for Life itself. Particularly, in light of Massachusetts
13 Citizens for Life, a ban on corporate contributions by
14 nonprofits does not impose significant burdens on First
15 Amendment interests.

16 In the particular context of this type of
17 corporation, the corporation is free to engage in
18 unlimited spending on elections through the corporate
19 form, and the individual respondents are free to give
20 unlimited contributions to North Carolina Right to Life.
21 In addition and equally important, the individual members
22 of North Carolina Right to Life are free to give
23 contributions to the candidates of their choice up to the
24 constitutionally valid contribution limits.

25 Accordingly, this case doesn't involve the right

1 to associate together or the right to associate with
2 candidates of someone's individual choosing, but only the
3 right to assemble together collectively to give money to
4 candidates of an organization's collective choosing. And
5 even that rather attenuated First Amendment interest is
6 only affected to the extent that a corporation must direct
7 its contributions through a separate segregated fund with
8 enhanced disclosure and reporting and bookkeeping
9 requirements.

10 QUESTION: Why -- why is that an attenuated
11 First Amendment right? Isn't that the right that enables
12 the formation of political parties, people forming
13 together in order to collectively give money to particular
14 candidates?

15 MR. CLEMENT: Well, certainly in -- in the first
16 point, parties are subject to a different type of
17 regulation under the campaign finance laws.

18 But secondly --

19 QUESTION: Well, it may well be, but -- but I --
20 I wouldn't shrug off as inconsequential the importance of
21 individuals being able to band together to support
22 individual candidates. That's the whole basis for our --
23 our party system

24 MR. CLEMENT: And -- and I don't want to suggest
25 that there's no First Amendment interest on the other side

1 of -- of the argument in this case, but what I did mean to
2 suggest is that interest is less significant than the
3 interest in individuals banding together to make
4 expenditures that they might otherwise not be able to
5 make.

6 And I think even in the party context, this
7 Court recognized that distinction in the Colorado
8 Republican cases where it held that limitations on what
9 the -- the party can spend to support a candidate are not
10 subject to limitation, but what -- but there -- but there
11 are valid limitations on what the party can contribute to
12 a candidate of its choosing.

13 Now, in contrast to the rather minimal First
14 Amendment interests that are interfered with by section
15 441b, it plays an important role in safeguarding the
16 integrity of the election process. This Court in -- in
17 National Right to Work Committee already has recognized
18 that corporate contributions pose a risk of the reality
19 and appearance of corruption and that a broad,
20 prophylactic limitation on all corporations, including
21 those without great financial resources, is an appropriate
22 response to that threat.

23 All corporations, regardless of their size, also
24 pose risks of circumvention and of undermining the
25 workability of candidate disclosure requirements.

1 As this Court recognized in Cedric Kushner
2 Promotions against King, the whole point of a corporation,
3 its basic purpose and fundamental reason for -- for
4 existing is to create legal separateness between the
5 individuals that form and run the corporation and the
6 artificial corporate entity itself.

7 Giving such an artificial entity the right to
8 contribute in its own name, independent of the individuals
9 that underlie the corporation, obviously poses a distinct
10 risk to a campaign finance system that is based largely on
11 individual contribution limits. Section 441b addresses
12 that risk by requiring that those contributions be made
13 through a segregated fund subject to enhanced bookkeeping
14 and disclosure requirements.

15 Those bookkeeping and disclosure requirements,
16 in turn, make the campaign disclosure forms that
17 individual candidates have to file work in a meaningful
18 fashion. If those candidate disclosure forms simply
19 revealed that the candidate received money from an
20 artificial entity with either an ambiguous name or what
21 this Court in Citizens Against Rent Control v. Berkeley
22 termed a seductive name that tends to conceal the true
23 identity and true source of the funds, then those campaign
24 finance forms -- or disclosure forms will not provide
25 meaningful information.

1 If, on the other hand, 441b makes the underlying
2 corporations use a segregated fund that discloses the
3 individual sources of the contributions, then the
4 disclosure forms can work in a meaningful fashion.

5 I think it bears emphasis, as this Court
6 recognized in Massachusetts Citizens for Life, that the
7 distinction between contributions and expenditures applies
8 with full force in the context of nonprofit organizations.
9 A limitation on expenditures can prevent an organization's
10 members, who might otherwise not have the resources to
11 reach a certain audience, to pool their resources together
12 to reach that audience.

13 There is no comparable function or benefit from
14 the pooling of individual candidate contributions. The
15 individual candidates themselves can perform that pooling
16 function by assembling together candidate contributions of
17 whatever size in order to reach an audience or to engage
18 in political speech.

19 The intermediate pooling function that the
20 nonprofit corporation serves can only benefit by either
21 circumventing the individual contribution requirements or
22 assembling an aggregate contribution of a sufficient size
23 to potentially capture the attention of a candidate for
24 purposes of a quid pro quo. To be sure, the same
25 provisions of the campaign finance laws allow corporations

1 to assemble funds in -- in aggregate amounts through a
2 segregated fund, but only with the additional safeguards
3 that are imposed, including enhanced disclosure
4 requirements.

5 Congress, in adopting section 441b, drew an
6 important distinction between corporations and their
7 ability to contribute and individuals. In the expenditure
8 context, the limitations on corporate expenditures stand
9 in stark contrast to the general right of individuals to
10 engage in unlimited independent expenditures.

11 But no one has a right to engage in unlimited
12 corporate -- in unlimited contributions to candidates.
13 Congress addresses the threat of individual contributions
14 through dollar amounts. It addresses the distinct risks
15 of corporate contributions through the requirement of a
16 segregated fund, higher limits, and enhanced disclosure
17 requirements.

18 Respondents effectively ask this Court to
19 disregard and second guess Congress' decision to treat
20 corporations differently from individuals for purposes of
21 candidate contributions. With respect, I think
22 essentially respondents ask this Court to treat North
23 Carolina Right --

24 QUESTION: Can you summarize briefly what the
25 enhanced disclosure requirements are?

1 MR. CLEMENT: Certainly, Chief Justice
2 Rehnquist. The -- the main difference is that in the
3 context of a segregated fund, all -- both all incoming
4 contributions to the segregated fund and all disbursements
5 must be disclosed.

6 QUESTION: You're talking about PACs. Right?

7 MR. CLEMENT: PACs. I mean, the PACs generally
8 -- there are segregated funds in the particular context of
9 corporations and labor unions.

10 QUESTION: And the donor is listed.

11 MR. CLEMENT: The donor is listed. There are
12 specific provisions for very small donations where the
13 name only goes to the FEC and is not publicly disclosed.
14 But there's a -- but really, everything that comes in and
15 comes out of the segregated fund is traceable either by
16 the FEC or through the public in disclosure requirements.

17 In the context of the corporation generally,
18 only -- only donations that are given over \$200 and for
19 the express purpose of -- of political activity have to be
20 disclosed. And that does create a significant loophole.

21 In the --

22 QUESTION: Mr. Clement, is this -- is this
23 section 441b related or affected in any way by the McCain-
24 Feingold legislation?

25 MR. CLEMENT: Justice O'Connor, it really isn't,

1 at least as this case comes to this Court. The
2 prohibitions on corporate contributions have been in the
3 law since 1907 and have been left completely unaffected by
4 the Bipartisan Campaign Finance Reform Act.

5 It is true that certain limitations on
6 electioneering activity, which is a new term introduced
7 into the law by the Bipartisan Campaign Finance Reform
8 Act, do apply to corporations. So in considering
9 challenges to the McCain-Feingold legislation, this Court
10 may have to consider the restrictions on corporations
11 engaged in expenditures and these new electioneering
12 activities, but not --

13 QUESTION: But at least the issue here in this
14 case is unaffected by that.

15 MR. CLEMENT: The issue of corporate
16 contributions is miraculously unaffected by the many
17 reforms that are put in place by the Bipartisan Campaign
18 Reform Act.

19 (Laughter.)

20 MR. CLEMENT: In the end --

21 QUESTION: What is the -- what is the limitation
22 of the PAC? How much can they contribute, say, to a
23 Senator?

24 MR. CLEMENT: A -- a political action committee
25 or any segregated fund can give \$5,000.

1 QUESTION: This -- this -- you're saying that
2 this particular kind of organization can't contribute
3 directly, but it could set up a -- what you call a
4 segregated fund, which I was thinking of as a PAC. And so
5 if that segregated fund now wants to make a contribution
6 to Senator Smith for his reelection campaign, is there a
7 limit as to how much they can give? I'd think so.

8 MR. CLEMENT: There is indeed, Justice Breyer.
9 It's \$5,000.

10 QUESTION: \$5,000.

11 MR. CLEMENT: And two points of emphasis just on
12 that question. One is that respondents here don't just
13 have the right to set up a segregated fund, but they've
14 actually already done that. They've already set up a
15 segregated fund. And I know that this Court in
16 Massachusetts Citizens for Life emphasized that there are
17 unique restrictions and burdens on setting up a segregated
18 fund, and I think that's true in the context of
19 expenditures.

20 But I do think it's easy to exaggerate the
21 burdens that are imposed in setting up a segregated fund.
22 Although a segregated fund is like a PAC, there's no
23 requirement that they have separate offices or separate
24 officers. They have to have a distinct leadership and --
25 and -- but it can be the same leadership as the

1 corporation itself.

2 QUESTION: I mean, could they have two members?

3 MR. CLEMENT: I don't know of any particular
4 limit on -- on the members.

5 But the point is all that's really required is
6 segregation of funds and keeping it separate. It's not an
7 onerous requirement. And I think it's no accident that in
8 the four cases that this Court has had that involved a
9 nonprofit corporation, National Right to Work Committee,
10 Massachusetts Citizens for Life, Austin against Michigan
11 Chamber of Commerce, and this case, all four of those
12 nonprofits had already set up segregated funds before the
13 case got to this Court. So I don't think, at least in the
14 contribution context, that those are onerous requirements.

15 QUESTION: Well --

16 QUESTION: In Massachusetts Citizens for Life,
17 there was a separate PAC?

18 MR. CLEMENT: There was. This Court in footnote
19 8 suggested that that wasn't dispositive of its reasoning
20 because other -- other entities could set -- be in a
21 position that were similar to Massachusetts Citizens for
22 Life, might not be able to afford those burdens. But
23 Massachusetts Citizens --

24 QUESTION: But the Court did say for that type
25 of -- for that type of corporation, not a commercial

1 corporation, that was burdensome and unnecessary because
2 the risk of corruption for that kind of corporation was
3 significantly less than for commercial corporations. And
4 that would apply here as well. If the -- if the evil is
5 corruption, I'm buying the candidate by my dollars, then
6 that risk is less for an advocacy organization. Is that
7 -- isn't --

8 MR. CLEMENT: I don't want to suggest that the
9 -- that it may not be true that the risks are slightly
10 less in the context of a nonprofit advocacy corporation
11 than in the context of something like General Motors.

12 But I think in the particular context of
13 candidate contributions by corporations, this Court has
14 repeatedly decided that it's willing to accept a broad,
15 prophylactic approach and to limit all corporate
16 contributions, including contributions by corporations
17 without great financial resources. The Court said as much
18 in National Right to Work Committee. It repeated that
19 again in National Conservative Political Action Committee,
20 but I think most tellingly, it said that in Massachusetts
21 Citizens for Life itself.

22 And in particular, if you look at footnote 13 of
23 the Massachusetts Citizens for Life decision, the Court
24 there specifically said that it understood that
25 Massachusetts Citizens for Life would continue to be

1 subjected to the National Right to Work Committee regime
2 for purposes of its contributions, and it was talking
3 about the fact that it didn't have -- that Massachusetts
4 Citizens for Life, for example, didn't have shareholders.
5 But it was quick to -- to reinforce that that didn't mean
6 that it didn't have members for purposes of National Right
7 to Work Committee that it could solicit, subject of course
8 to the overall limit that it could not give direct
9 contributions to candidates.

10 QUESTION: That was an assumption in the case.
11 You don't -- you don't -- you don't assert that it was a
12 holding of the case?

13 MR. CLEMENT: Well, I don't think it's
14 necessarily the holding of the case because, obviously,
15 that case involved expenditures. But I do think that when
16 this Court distinguishes a prior precedent of the Court,
17 that that's not a part of the opinion that a lower court
18 is free to ignore. I think that part of the opinion is
19 critical to the reasoning of the Court and should be given
20 stare decisis effect. And I don't think there's any
21 reason that's been brought to bear here to revisit this
22 Court's distinction in Massachusetts Citizens for Life
23 between contributions and expenditures, which after all,
24 is the fundamental building block of this Court's campaign
25 finance jurisprudence.

1 QUESTION: You think whenever we distinguish a
2 prior case in one of our opinions, that -- that
3 distinguishing has stare decisis effect.

4 MR. CLEMENT: I would think that in many
5 respects that's the most important part of the opinion.
6 It's not to say that the Court can't subsequently revisit
7 that part of the opinion. I mean, that's certainly what
8 this Court can do, but I think for purposes of a lower
9 court, anyway, if -- if this Court distinguishes two cases
10 on the ground that the prior case involved a corporation
11 that had less than \$10,000 and a subsequent case comes
12 along where there's \$9,999 involved, I would think the
13 lower court would be well served to heed the distinction
14 that this Court drew. And I think in this particular
15 context, obviously, this Court is free to reconsider its
16 prior precedents, but I don't think there's any reason to
17 do so.

18 The distinction between contributions and
19 expenditures has proved workable particularly in the
20 context of nonprofit corporations. As I say, this isn't
21 some abstract application of the contribution/expenditure
22 dichotomy that this Court has never considered.
23 Massachusetts Citizens for Life involved a nonprofit
24 corporation and this Court was at pains, pretty much at
25 every step in the Court's reasoning, to distinguish

1 between contributions and expenditures.

2 In the end, I think respondents ask this Court
3 effectively to disregard Congress' decision to treat
4 corporate contributions distinctly from individual
5 contributions. They effectively ask this Court to treat
6 North Carolina Right to Life Incorporated as if it were
7 not incorporated, but there's no reason to disregard
8 either respondents' decision to incorporate or Congress'
9 decision to subject all corporations to the same regime,
10 segregated funds, distinct disclosure requirements, and
11 higher limits, in fact, on their contributions.

12 If there are no further questions, I'll reserve
13 the rest of my time for rebuttal.

14 QUESTION: Very well, Mr. Clement.

15 Mr. Bopp, we'll hear from you.

16 ORAL ARGUMENT OF JAMES BOPP, JR.

17 ON BEHALF OF THE RESPONDENTS

18 MR. BOPP: Mr. Chief Justice, and may it please
19 the Court:

20 Expressive associations play a vital role in our
21 democratic republic. Because they attract financial
22 support due to their political ideas, not their prowess in
23 the economic marketplace, their participation in our
24 political process poses no threat of corruption, as long
25 as they do not serve as a conduit for business corporation

1 contributions.

2 QUESTION: I -- I don't understand that. If --
3 if I bribe somebody, a Senator, out of -- out of political
4 motivation because I'm an environmentalist or whatever,
5 that's not corruption? It's only -- it's only if I have
6 some economic motive that it's corruption?

7 MR. BOPP: Well, that's classic quid pro quo
8 corruption which is dealt with by contribution limits,
9 now --

10 QUESTION: Well, I mean, I -- it may well be,
11 but I don't see that the distinction between whether it's
12 an economic actor or a political actor has anything to do
13 with whether there's corruption or not.

14 MR. BOPP: Well, there has been some controversy
15 on this Court on -- on whether or not the -- the decisions
16 of this Court in Mass. Citizens and on Austin were in
17 accordance with the Constitution, but in both cases the
18 Court distinguished between the types of corruption that
19 are entailed by the corporate form, which is the potential
20 for unfair employment of wealth for political purposes.
21 This applies to economic corporations, that -- that is,
22 those that are not, as Mass. Citizens or North Carolina
23 Right to Life, formed to advance political ideas.

24 QUESTION: Well, but you can have an immense
25 corporation formed to advance political ideas. I -- I

1 don't -- this one happens to be a small one, but --

2 MR. BOPP: Yes. And --

3 QUESTION: -- if you attract enough people, you
4 can have an immense organization. What's the organization
5 for -- American Association of Retired Persons. I mean,
6 that's an immense organization with -- with a large amount
7 of available money.

8 MR. BOPP: That's right and the size of the
9 organization is not the issue. The issue in this Court's
10 jurisprudence is whether -- is the nature of the
11 organization itself and not the corporate form per se. If
12 the nature of --

13 QUESTION: Well, Mr. Bopp, would you say that
14 the AARP, which was referred to by Justice Scalia, the
15 National Right to Work Committee, which was involved in
16 that opinion, and Massachusetts Citizens for Life are all
17 in the same boat?

18 MR. BOPP: I don't believe so, Your Honor. I
19 think we do --

20 QUESTION: Why not?

21 MR. BOPP: Well, the -- the Court in Mass.
22 Citizens established some criteria to determine whether or
23 not an organization, a corporation, benefitted from the
24 MCFL exemption. And those include whether or not there
25 are incentives to disassociate -- lack of incentives to

1 disassociate by, for instance, having insurance plans and
2 other benefits of membership that are economically
3 related.

4 Secondly, you would look to the amount of
5 corporate -- business corporation contributions or
6 business activities. If those are too much or those are
7 not insignificant, in -- in comparison with the total sums
8 raised, then again they would not qualify.

9 QUESTION: Mr. Bopp, on that point I thought
10 that Massachusetts Citizens for Life went further. It
11 said having a policy against accepting corporate
12 contributions, which is one difference between your
13 organization and Massachusetts Citizens for Life. They
14 said they would take no money from corporations. You
15 accept money from corporations. You get very little from
16 business corporations, but you don't have a policy of
17 turning them away.

18 MR. BOPP: That's correct, Your Honor. And the
19 -- all the circuits that have considered this, which have
20 been four of the circuits, all agree that the features
21 explained and -- and characterizing Mass. Citizens in --
22 in the Supreme Court's decision were not constitutional
23 requirements, but descriptions of the organization before
24 it. And all of them have agreed that -- that not-for-
25 profit ideological corporations can still qualify for the

1 -- for the Massachusetts Citizens exemption.

2 QUESTION: Well, would you call AARP an
3 ideological organization?

4 MR. BOPP: I think they have a mixture of
5 political and nonpolitical purposes and are, therefore,
6 more like Austin -- the -- the Michigan Chamber of
7 Commerce and Austin that had a mixture of political and
8 nonpolitical purposes and therefore did not qualify for
9 the MCFL exemption.

10 And to complete my answer --

11 QUESTION: I'll bet the members also get
12 benefits --

13 MR. BOPP: Yes.

14 QUESTION: -- and -- and that criterion would --
15 would make it different from --

16 MR. BOPP: There were also incentives that were
17 economic in nature that would cause people to be reluctant
18 to disassociate with Michigan Chamber of Commerce if it --
19 if it proved to be that they disagreed with their
20 political ideas or the advancement of their political
21 ideas.

22 And the four circuits that have considered the
23 question of the amount of business corporation
24 contributions have all said that as long as they are
25 insignificant, in comparison with the total revenue of the

1 organization, they still -- they do not serve as a conduit
2 for business corporation contributions and still qualify
3 for the exemption.

4 QUESTION: But they could serve as a conduit for
5 a very large donor, a very wealthy person, who wants to
6 avoid the personal limitations on how much that individual
7 could give.

8 MR. BOPP: Well, it is true that there are no
9 contribution limits to not-for-profit corporations.
10 However, the intent of a donor to circumvent those limits
11 would be -- contributing to a not-for-profit would be a
12 highly inefficient and ineffective way of doing so because
13 the political activities of not-for-profit corporations,
14 both because of the major purpose test that would cause an
15 organization to become a PAC if political activity became
16 their major purpose, and the Internal Revenue Service's
17 limitations on the activities of 501(c)(4) organizations,
18 which is what the regulations require you to be qualified
19 as in -- in order to qualify for the MCFL exemption, all
20 -- all mean that a very small percentage of any
21 contribution to a not-for-profit corporation could ever be
22 used for political activity.

23 Furthermore, contributing to a not-for-profit
24 versus a PAC and a -- or a political party is also an
25 unfavorable prospect for a donor. I mean, after all, the

1 -- a not-for-profit under the 441a contribution limits is
2 limited to a \$2,000 contribution, where a PAC can give
3 \$5,000 and political parties can give much more.

4 Furthermore, all of the money that PACs or
5 political parties receive in their hard money accounts can
6 be used for political activity, whereas I've mentioned for
7 not-for-profits it's really a very small percentage in
8 order to continue to qualify under the MCFL exemption and
9 continue to not be deemed a PAC for -- for the purposes of
10 the Federal Election Campaign Act.

11 Now, the disclosure interest that there -- that
12 there is for contributions can be readily and in a
13 narrowly tailored way dealt with by simply requiring that
14 any contribution to a not-for-profit that is to be used
15 for or is intended to be used for contributions to
16 candidates must be reported and is -- and is thereby
17 subject to the aggregate contribution limits. This is a
18 much more narrowly tailored way to deal with disclosure
19 and the aggregate contribution limits than prohibiting the
20 organization completely from making any contribution.

21 QUESTION: What you do then -- this is what I
22 understand you to be saying. The -- one of their
23 justifications that has been advanced for this restriction
24 on contributions I've interpreted as the following. We
25 have five people. These five people each write a check to

1 Candidate Smith for \$2,000. They get annoyed. They think
2 they should be able to give \$4,000, which the law forbids.
3 So they form a committee, a nonprofit corporation, called
4 the \$4,000 for Smith Corporation.

5 (Laughter.)

6 QUESTION: And now each of them writes another
7 check for \$2,000, gives it to the corporation, and the
8 corporation gives it to Smith. And I think the Government
9 says, well, Congress wanted to stop that. It's not
10 actually going to limit them to zero. They're going to be
11 limited to \$5,000 as a group provided they jump through
12 certain hoops.

13 All right. Now, what's --

14 MR. BOPP: Well, if they're a PAC --

15 QUESTION: -- what's wrong with that argument?

16 MR. BOPP: Well, if they're -- if they're a PAC,
17 then they can give \$5,000 out of the -- out of the \$10,000
18 that you posit. If they're a not-for-profit corporation,
19 the most they can give --

20 QUESTION: I know, but do you see what I'm
21 saying? I'm saying Congress doesn't want to have groups
22 called the \$4,000 for Smith group even if they call
23 themselves something different.

24 MR. BOPP: I agree.

25 QUESTION: They want to limit each of those

1 members to \$2,000.

2 MR. BOPP: Agreed.

3 QUESTION: And that's what they do, though for a
4 variety of other reasons, not directly relevant to my
5 question, they've allowed those people to get together,
6 jump through various hoops called the PAC hoops, and give
7 up to \$5,000 extra. So if Congress wanted to, they might
8 say none.

9 MR. BOPP: Yes.

10 QUESTION: All right. Now, that's their --
11 that's basically the argument, and I want to get a
12 straight, you know, direct reply to it.

13 MR. BOPP: Well, the -- the desire of subjecting
14 the aggregate contribution limit or a contribution in
15 excess of \$2,000, one direct and one through another
16 source, is dealt with two ways and can be.

17 One is if the contribution made to this group
18 that you posit is earmarked, then that contribution is
19 considered to be a contribution not just to the group but
20 also to the candidate him or herself. So that earmarked
21 contribution is subject to the \$2,000 limit, and the
22 contribution used for that would be in violation of the
23 act currently.

24 MR. BOPP: Yes.

25 QUESTION: All right. So now -- is that --

1 MR. BOPP: That is current law. And -- and so
2 that prospect is prohibited and appropriately so.

3 Secondly, as the Federal Election Campaign Act
4 previously required, that anyone contributing to a
5 organization, not a PAC, that contributes money for an
6 independent expenditure, that that contribution must be
7 reported by the group that does the independent
8 expenditure. Congress could require the same thing here.
9 They could require money given more generally, not
10 earmarked, but more generally for candidates to be
11 reported by the -- the group and thereby subject to the
12 aggregate contribution limits.

13 QUESTION: Mr. Bopp, isn't it also the case that
14 the -- that the corporation that Justice Breyer posits
15 would not qualify as -- as a 501 exempt organization if
16 the only thing it's using its money for is to make
17 contributions to political candidates?

18 MR. BOPP: That would also be true. They --

19 QUESTION: I'm just trying --

20 QUESTION: It has to be -- it has to be a
21 relatively insignificant part of its overall activity.

22 MR. BOPP: Yes. The Internal Revenue Service
23 would treat the organization that he described as a
24 political organization --

25 QUESTION: So these five people would had to --

1 have to get together with maybe 100,000 other people so
2 that their -- their little portion is so watered down that
3 it's not a significant part of the corporation's business.

4 MR. BOPP: That's exactly --

5 QUESTION: I didn't think there was a numerical
6 limit. And my question which tried to eliminate
7 extraneous points I think you understood perfectly well
8 there. I mean a 503(c) corporation but -- et cetera.

9 But I want to go back to your answer. The --
10 the -- because I'm trying to get clear about this. And
11 the -- what you're saying is that Congress could take my
12 group, with whatever else they have to do to qualify them
13 -- they could take my group and you're saying Congress
14 could just say, very well, we will limit the corporation
15 so that it can only give money from these five people
16 insofar as they haven't met their \$2,000 individual limit.

17 MR. BOPP: That would be an effect of what I
18 said, yes.

19 QUESTION: And -- and moreover, it could require
20 reporting so we know who they are.

21 MR. BOPP: Yes.

22 QUESTION: All right. Now, is that a less
23 restrictive alternative than what Congress has actually
24 done, which is to say, proceed through a segregated fund?

25 MR. BOPP: Yes, much less restrictive.

1 QUESTION: Because? Because?

2 MR. BOPP: Well, because this Court held in
3 Mass. Citizens and Austin that the PAC requirements, both
4 administrative, including record keeping, appointment of a
5 treasurer, filing regular reports, et cetera, and the
6 limits that are imposed upon PACs -- there's a \$5,000
7 contribution limit to PACs, et cetera -- all impose an --
8 a constitutionally burden -- a burden on constitutionally
9 exercised rights that did not -- that did not pass
10 constitutional muster. So -- so while it is true that you
11 can do it under a PAC, that imposes an unconstitutional
12 burden on the First Amendment activities.

13 And that, of course, all goes back to, you know,
14 is there a justification for this. In other words, we
15 have a prohibited source --

16 QUESTION: Well, just before you go on, I don't
17 see why your proposal doesn't have all of the same
18 administrative inconveniences.

19 MR. BOPP: Well, there's a one-page report.
20 There are organizations that can do independent
21 expenditures that are not PACs. There's a one -- one-
22 page report to file, and that -- and that report would say
23 how much is being spent on the independent expenditure and
24 how much has been donated to the organization for the
25 purpose of that independent expenditure.

1 Similarly, a report like that could be filed for
2 contributions so that we could capture those people who
3 are trying to circumvent the limits to -- to make
4 undisclosed or excessive contributions. We would capture
5 them because then the only choice left to the donor would
6 be a completely undifferentiated, unearmarked contribution
7 that is going to be used by the organization 95, 98
8 percent for other purposes, for lobbying, for education,
9 for other charitable activity.

10 QUESTION: Mr. Bopp, the Court basically decided
11 this issue in National Right to Work Committee case,
12 didn't it? You just want us to distinguish your type of
13 nonprofit corporation.

14 MR. BOPP: Well, we are asking you to
15 distinguish the Massachusetts Citizens for Life type --

16 QUESTION: I think that's very hard to do. I
17 mean, we dealt with this precise issue in that case.

18 MR. BOPP: But there was no issue in that case
19 about whether or not the organization itself should not be
20 viewed as a prohibited source of -- of making independent
21 expenditures or making contributions in that case.

22 QUESTION: But the organization opted for the
23 corporate form --

24 MR. BOPP: Yes.

25 QUESTION: -- knowing about these limitations.

1 MR. BOPP: Yes, but this Court has -- was clear
2 in Mass. Citizens that it's not the corporate form per se,
3 but the potential for unfair deployment of wealth for
4 political purposes and held that these types of
5 organizations pose no threat, no threat whatsoever.

6 QUESTION: Well, it couldn't have been a holding
7 in -- in the Massachusetts case because there you were
8 talking about independent expenditures rather than
9 contributions.

10 MR. BOPP: Well, but -- but --

11 QUESTION: Certainly the Massachusetts case
12 doesn't control the outcome here.

13 MR. BOPP: Well, we -- we believe that it --
14 that the holding of the Court in Mass. Citizens -- that
15 this organization serves no potential for corruption of
16 the democratic process, was essential for the Court to
17 hold that no independent -- that independent expenditures
18 would be allowed because, after all --

19 QUESTION: Mr. Bopp, at least three times in the
20 text of the Court's opinion in Massachusetts Citizens for
21 Life, at least three times, it distinguishes direct
22 contributions to candidates from expenditures, and each
23 time it explains why it reached the result it did. It
24 makes that distinction.

25 MR. BOPP: Yes.

1 QUESTION: And I think that -- that that's so
2 central to Massachusetts Citizens for Life. So if -- if
3 we just had this opinion shorn of all but however,
4 remember that this is not a contribution to a candidate
5 and then citing back to the -- the earlier decision that
6 Justice O'Connor mentioned, the National Right to Work
7 Committee, to distinguish it from this case, but it just
8 seems so all over Massachusetts Citizens for Life that it
9 is drawing this bright line between contributions to
10 candidates and independent expenditures.

11 MR. BOPP: But in -- but in Right to Work, it
12 wasn't a prohibition on contributions. It was a -- a
13 limit on the amount of contributions. And we agree that
14 limits on amounts --

15 QUESTION: Yes, but I'm -- I'm talking about
16 Massachusetts Citizens for Life and the line that Justice
17 Brennan drew in the Massachusetts Citizens for Life
18 between contributions to candidates. Every time he talks
19 about the holding in this case, he said, remember, this is
20 not contributions to candidates.

21 MR. BOPP: Yes, Your Honor, that's correct.
22 That's what you said. But the -- the case did not involve
23 -- neither Mass. Citizens nor Right to Work involved a
24 limit on the amount of contributions, that is, like a
25 \$2,000 limit. We have not challenged that.

1 QUESTION: Mr. Bopp, do you challenge the
2 distinction for First Amendment purposes between
3 restricting contributions and restricting expenditures?

4 MR. BOPP: Only as to a prohibition on them
5 That is, this Court in Buckley and reaffirmed in Shrink
6 said that there were both speech and association aspects
7 of making a contribution. That is, it's a -- as far as
8 speech is concerned, this is a general expression of
9 support that is found in the undifferentiated act of
10 contributing.

11 Well, here they are prohibited from
12 contributing. They cannot -- these organizations cannot
13 give one cent. Therefore, that's --

14 QUESTION: So -- so you're -- you're saying
15 there is a distinction --

16 MR. BOPP: Yes, as to a prohibition.

17 QUESTION: -- for -- for valid First Amendment
18 purposes between the -- the contribution limit and the --
19 and the expenditure limit, but that distinction is not
20 strong enough to forbid an entire prohibition.

21 MR. BOPP: That's correct because both the
22 speech aspects and association aspects of contributing
23 that are -- that remain after limits on the amounts are
24 imposed because the speech aspect is a general expression
25 of support and the association aspect is to serve to

1 affiliate a person with the candidate. You have your name
2 now through the -- the method of the contribution
3 affiliated with the candidate.

4 When you have a zero contribution limit, then
5 there is no speech and no association that is allowed
6 through the act of contributing. Therefore --

7 QUESTION: But you can say -- you can --

8 QUESTION: I don't think any of our cases have
9 sliced the onion quite that fine to get into these nuances
10 that there's a difference between prohibiting a
11 contribution and limiting it. I think our distinctions
12 have been primarily that contributions may be quite
13 substantially regulated, independent expenditures cannot
14 be.

15 MR. BOPP: Well, that is -- that is generally a
16 correct characterization of your jurisprudence, but you
17 have to examine why. Why is it that contributions are
18 subject to a lower level of scrutiny? And the -- the why
19 is is that the speech and association aspects of giving a
20 smaller contribution remain, but if you can't give any
21 contribution, then both that speech and association
22 aspect --

23 QUESTION: But when you say can't give any, you
24 are overlooking or saying the PAC doesn't count.

25 MR. BOPP: Yes.

1 QUESTION: It isn't an absolute no contribution.
2 It is, if you do it, you have to do it through this arm
3 that you create, this segregated fund, this 501 -- of the
4 501(c)(4) organization. You can -- you can do it but you
5 have to do it in a rather cumbersome way.

6 MR. BOPP: Yes.

7 QUESTION: So it isn't you cannot make any
8 contributions.

9 MR. BOPP: Well, not only is it cumbersome, but
10 it's constitutionally -- it's an unconstitutional burden
11 this Court has held in Mass. Citizens and in Austin to
12 require First Amendment political activity to be done
13 through a PAC. So --

14 QUESTION: Not First Amendment activity in -- in
15 the Massachusetts case itself, as I just said. I don't
16 want to repeat that except that Justice Brennan did repeat
17 it at least three times.

18 MR. BOPP: Yes. And I'm aware of that, but I'm
19 just asking this Court to -- to consider not -- not to
20 apply what is dicta in Mass. Citizens since it did not
21 involve contributions -- to -- to just apply that, but to
22 consider the rationale.

23 And in North -- in -- in National Right to Work,
24 the Court was considering not a prohibition on soliciting
25 contributions from members to its PAC, it was considering

1 a limit on what is considered to be a member. So once
2 again, that case involved contribution limits, not
3 prohibition.

4 QUESTION: Mr. Bopp, that -- that First
5 Amendment right that you talk about as the associational
6 interest, the -- the ability to give at least a dollar
7 will identify you with a -- with the candidate, is that
8 really a First Amendment interest that applies to the
9 association, or does it apply to the members of the
10 association? And as Mr. Clement pointed out, the
11 individual members of the association remain free to give
12 a dollar, indeed up to \$2,000, to the particular
13 candidate.

14 All you're really talking about here is -- is
15 not the ability of individuals to identify themselves with
16 a candidate, but the ability of individuals by pooling
17 their resources to help a candidate significantly. It
18 seems to me that that's the only interest at -- at issue
19 here.

20 MR. BOPP: Well, there's valid reasons unlike
21 the representation -- or the argument of the Government
22 for people to want to pool their resources in an
23 association. That those valid reasons are, in fact, why
24 people already contribute to PACs and the political party
25 --

1 QUESTION: But among those reasons is not in
2 order to identify myself with that candidate.

3 MR. BOPP: Well, but the --

4 QUESTION: To -- to do that, all you have to do
5 is reach in your pocket and give them a dollar.

6 MR. BOPP: That is true, but many people choose
7 to pool their resources because they want the group, which
8 has a separate existence and has a political purpose,
9 unlike them as an individual -- you know, they are not as
10 identified with a particular point of view or political
11 idea like a group would be, like -- like NARAL would be.
12 So if -- so they choose then to pool their resources with
13 the group in order to make the much more powerful
14 statement about the political ideas that they are
15 attempting to support and they want candidates to be
16 associated with.

17 Now, in addition, the fact that the group can
18 aggregate these small contributions and then make a large
19 contribution to a particular candidate enhances the -- the
20 contribution that the individual would otherwise made --
21 be made because it is being done by the group and in an
22 aggregate. So there are justifiable reasons why people
23 want to associate.

24 And then further, the association --

25 QUESTION: Mr. Bopp, it seems to me that your

1 argument really would go just the same way to an amount
2 limitation as to a total prohibition.

3 MR. BOPP: No, because amount limitations do
4 not --

5 QUESTION: Everybody can just contribute \$10.
6 Wouldn't that -- would that be okay with you?

7 MR. BOPP: You mean the -- the amount that --

8 QUESTION: Say the amount limitation was very
9 low. As I understand it, you're trying to draw a
10 categorical distinction between total prohibition and
11 amount limitation.

12 MR. BOPP: Yes.

13 QUESTION: And I don't know -- I don't see that
14 your argument really is directed to that.

15 MR. BOPP: Well, it goes to the source of the --
16 of the rights, the First Amendment rights, that are
17 implicated by a -- by an amount limitation as opposed to a
18 prohibition.

19 QUESTION: But it seems to me an amount
20 limitation that's very, very low would have the same vice
21 under your argument as a total prohibition.

22 MR. BOPP: Well, potentially, but that would be
23 a case to be decided at that point. And -- now, this
24 Court has upheld the \$5,000 limit, for instance, to
25 political action committees. And -- but you would have to

1 consider -- if it got too low, I mean, there's certainly a
2 potential for contributions that are too low -- as
3 Justices Breyer and Ginsburg explained in *Shrink*, there is
4 certainly a potential if they're too low to be
5 unconstitutional.

6 But here we're not talking about and have not
7 challenged the -- the \$2,000 limit. We accept that. We
8 just don't accept the proposition that because the
9 organization poses no threat of corruption to the
10 political process, that they should be completely
11 prohibited from making a contribution.

12 So -- so we view this then as a source
13 limitation, not as an amount limitation, and as a result,
14 the -- the contribution jurisprudence of this Court that
15 have accepted greater regulation of contributions is not
16 applicable.

17 If there are no other questions, thank you.

18 QUESTION: Thank you, Mr. Bopp.

19 Mr. Clement, you have 11 minutes remaining.

20 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

21 ON BEHALF OF THE PETITIONER

22 MR. CLEMENT: Thank you, Mr. Chief Justice, and
23 may it please the Court:

24 Let me begin with the distinction that
25 respondents rely on between limits on contributions and

1 prohibitions on contributions. Even if there is something
2 to that distinction -- and I rather doubt there is for
3 some of the reasons unearthed by Justice Stevens' colloquy
4 with -- with counsel for respondent. Even if that were a
5 valid distinction, this case does not involve an absolute
6 prohibition.

7 This Court, both in *Massachusetts Citizens for*
8 *Life* and *Austin*, and in fact, much earlier in *Pipefitters*,
9 made clear that the limitations on corporate and labor
10 union contributions in section 441b are not a, quote,
11 absolute prohibition, but rather just a limitation on
12 contributions. The availability of the segregated funds
13 to make the contributions is another way of making this a
14 limitation, a particular limitation designed for the
15 unique risks of artificial entities like corporations and
16 labor unions.

17 And I think any effort to distinguish the
18 discussion in *Massachusetts Citizens for Life* and its
19 distinguished -- distinctions between contributions and
20 expenditures on the grounds that a prohibition might be
21 different just doesn't work because both *Massachusetts*
22 *Citizens for Life* and *National Right to Work Committee*
23 involved this very provision, section 441b. So whatever
24 there might be in the case of an absolute prohibition on
25 somebody's right to make contributions, 441b either isn't

1 that or isn't that in -- in a constitutionally relevant
2 way after this Court's decisions in Massachusetts Citizens
3 for Life and National Right to Work Committee.

4 Some discussion was had about fine distinctions
5 that potentially could be drawn between the American
6 Association of Retired Persons, National Right to Work
7 Committee, Massachusetts Citizens for Life, and North
8 Carolina Citizens Right to Life. The point of section
9 441b in the contribution context is that Congress has not
10 found a need to draw those kind of fine distinctions.

11 MCFL itself, of course, drew some of those
12 distinctions in the contribution context -- in the
13 expenditure context, rather, but drew a distinction
14 between contributions in light of the inherently greater
15 risk of corruption from contributions.

16 Another suggestion was made that perhaps there
17 is a seemingly less restrictive alternative. As with
18 independent expenditures made by nonprofit associations,
19 perhaps contributions that are made to the association
20 with the purpose of them being used for contributions to
21 candidates could be disclosed.

22 QUESTION: Have we actually held, Mr. Clement,
23 that in regulating contributions, the Government must find
24 the least restrictive means?

25 MR. CLEMENT: No, and to the contrary. This

1 Court has not held that. It did not apply a least
2 restrictive alternative analysis in National Right to Work
3 Committee. In the California Medical Association case, a
4 plurality of the Court, in fact, affirmatively held that
5 the least restrictive alternative was not required in the
6 context of contributions. So I don't think there is that
7 requirement.

8 But I want to address the -- the supposed less
9 restrictive alternative precisely because I believe that
10 less restrictive alternative is illusory because the
11 suggestion is that -- that individuals could say -- could
12 disclose when they give a contribution to a nonprofit
13 organization for the purpose of a contribution. Well, if
14 that's going to have the effect of avoiding the
15 circumvention rationale, I wonder whether people are
16 really going to volunteer the information that the
17 contribution to the nonprofit is for that purpose.

18 And additionally, even if that is a permissible
19 way and would be enforceable in the real political world,
20 that really doesn't give you much of a different result
21 than what Congress has specifically provided for with the
22 segregated fund.

23 And indeed, the segregated fund actually is
24 responsive to the kind of First Amendment associational
25 interests that underlie this Court's concerns in Buckley

1 and even going back to NAACP against Button. The concern
2 is that disclosure requirements imposed on organizations
3 could be a backhanded way to get at membership lists. The
4 segregated fund prevents that by keeping the membership
5 lists and the organization itself separate from the
6 political activity of the organization. Indeed, if
7 Congress hadn't provided for segregated funds as a
8 requirement for all corporations, but simply made that
9 available, I would think that many nonprofit corporations
10 would avail themselves of that option precisely to avoid
11 the interference with associational interests as in cases
12 like NAACP against Button.

13 The last point I'd like to talk about is simply
14 this idea that again underlies much of respondents'
15 arguments that because there is no threat from
16 expenditures to these types of corporations, there is
17 therefore no threat to these type of corporations engaging
18 in corporate contributions. If that analysis were applied
19 across the board, it would undermine the entirety of this
20 Court's campaign finance jurisprudence which is based on
21 the fundamental recognition that contributions involve
22 greater risks than expenditures, and -- and expenditures,
23 therefore, are largely unregulated because they are --
24 presumably do not pose as great a risk as contributions.

25 If there are no further questions, I'd like the

1 court below reversed.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Clement.

4 The case is submitted.

5 (Whereupon, at 11:02 a.m., the case in the
6 above-entitled matter was submitted.)

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