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PROCEEDINGS BEFORE

THE SUPREME COURT  
OF THE  
UNITED STATES

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**CAPTION:** RICHARD H. AUSTIN, MICHIGAN SECRETARY OF STATE AND FRANK  
J. KELLEY, MICHIGAN ATTORNEY GENERAL, Appellants V.  
MICHIGAN CHAMBER OF COMMERCE

**CASE NO:** 88-1569

**PLACE:** WASHINGTON, D.C.

**DATE:** October 31, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD H. AUSTIN, MICHIGAN :  
SECRETARY OF STATE AND FRANK :  
J. KELLEY, MICHIGAN ATTORNEY :  
GENERAL, :  
Appellants :  
v. : No. 88-1569  
MICHIGAN CHAMBER OF COMMERCE :

-----x  
Washington, D.C.  
Tuesday, October 31, 1989

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

LOUIS J. CARUSO, ESQ., Solicitor General of Michigan,  
Lansing, Michigan; on behalf of the Appellants.  
RICHARD D. McLELLAN, ESQ., Lansing, Michigan; on behalf of the  
Respondent.

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1 The prevention of corruption and the appearance of corruption  
2 in the electoral process by a legislative scheme aimed in part  
3 at corporations reflects a legislative judgment that the  
4 special characteristics of a corporation require particularly  
5 careful regulation and should be given considerable deference  
6 by the court.

7 It is Michigan's position that the potential danger  
8 from corporate independent expenditures in connection with  
9 candidate elections poses a sufficient compelling interest  
10 that permits Michigan to regulate those corporations that do  
11 not fall within the exception set out by this Court in Federal  
12 Election Commission v. Massachusetts Citizens for Life, that  
13 the Chamber is unlike that corporation the Court dealt with in  
14 MCFL and may be regulated.

15 Now, I am not unmindful that in Buckley and in National  
16 Conservative Political Action cases, that the Court struck  
17 down independent limitations on independent expenditures.  
18 However, in Buckley, the Court dealt with individuals and  
19 groups, and not with corporations. And in the NCPAC case, the  
20 spending limits applied to any group, association, as well as  
21 corporations, all impermissibly, as the court said, lumped  
22 together. The court found the regulation in NCPAC over  
23 inclusive, and not narrowly drawn. And the group at which the  
24 regulation was aimed was not regulated -- historically was not  
25 regulated to justify deference by the court to legislative

1 judgment in that case, as the court had done in National Right  
2 to Work case when it permitted inclusion of nonprofit  
3 corporations in the legislative regulatory scheme to stand.  
4 Here the prohibition applies only to corporations.

5 QUESTION: Why are labor unions excluded from the  
6 scheme, Mr. Caruso?

7 MR. CARUSO: Labor unions --

8 QUESTION: Do they not pose some of the same dangers  
9 that corporate expenditures do?

10 MR. CARUSO: Justice O'Connor, labor unions are not  
11 excluded as such. They are not included when you read the  
12 particular language. If a labor union is incorporated, it is  
13 included. As a matter of fact, I believe there are 22 major  
14 labor unions in the State of Michigan incorporated, including  
15 the MEA, and they are included. And with respect to not  
16 including them expressly, whether they are incorporated or not  
17 incorporated, this Court has said many times we defer to  
18 legislative judgment as to those entities that require  
19 regulation. There may be some entities that pose the same  
20 problem and the same potential threat to the electoral process  
21 as do corporations, but we defer to the legislative judgment  
22 in this area, and that, and perhaps at some particular time  
23 the legislature may see fit to include labor unions, labor  
24 unions if they are not incorporated, but they have not done so  
25 at this time.

1           QUESTION: General Caruso, why is there a greater risk  
2 to the political process from an independent political  
3 expenditure by a family corporation, closely held corporation,  
4 eight family members, and they want to spend the corporation's  
5 money for a particular candidate whom they think will favor  
6 their business. That -- that is prohibited by this. But if  
7 Donald Trump wants to come in and spend as much money as he  
8 likes, that is perfectly all right. Why wouldn't it make much  
9 more sense, if you are worried about the problem, to establish  
10 an amount of money as the criterion?

11           MR. CARUSO: Well, the Court has viewed that political  
12 corporations, that corporations are given by state authorities  
13 certain benefits by virtue of the corporate form. They are  
14 given certain benefits in respect of liability, certain  
15 benefits in respect of taxes, certain benefits in respect of  
16 perpetual life. And what this Court has seen in the past,  
17 that that -- the legislature has seen this and has provided  
18 against their taking advantage of that -- those particular  
19 advantages given to corporations and turning them into an  
20 advantage in the electoral process and in the political arena.

21           Now, the Court has said that the legislature's judgment  
22 in this area is one that we will defer to. Now, with respect  
23 to an individual, for example, doctors --

24           QUESTION: Well, let me ask this. We are talking  
25 about, you -- everyone concedes, I take it, that an

1 expenditure in election, direct expenditure is speech. It is  
2 speech we are talking about, an expenditure --

3 MR. CARUSO: Yes, that is correct, Justice Kennedy.

4 QUESTION: And I take it that the state must establish  
5 a compelling interest to restrict that speech?

6 MR. CARUSO: That is correct.

7 QUESTION: And that the means be narrowly tailored.

8 MR. CARUSO: And the means are to be narrowly tailored,  
9 that is correct.

10 QUESTION: All right. Then it -- it seems to me that  
11 Justice Scalia's question indicates that you have to give a  
12 specific reason why a corporation of that type presents more a  
13 danger than Donald Trump, and I didn't really hear the answer  
14 to that question.

15 MR. CARUSO: Well, the thing of it is --

16 QUESTION: And it has to be answered in the terms of a  
17 compelling interest that is narrowly tailored.

18 MR. CARUSO: The compelling interest is the fact that  
19 they have been given certain advantages by the state  
20 legislature for other purposes.

21 QUESTION: Well, that's not an interest.

22 MR. CARUSO: Well, it's the fact, the fact --

23 QUESTION: That's not an interest, that is just a  
24 rationale, that's just a rationale for the legislative  
25 exercise of power. That is not an interest. An interest is



1 an evil that has to be corrected.

2 MR. CARUSO: The evil is the fact that by virtue of the  
3 fact that they are incorporated, corporations, they gain an  
4 advantage, and they are able to amass great wealth in the  
5 economic sphere --

6 QUESTION: But you have just been put -- you've just  
7 been put a hypothetical where that is not the case.

8 MR. CARUSO: Not in the family corporation case, that  
9 is true. But in the traditional corporations it is true.  
10 Now, the fact that a family corporation, as compared to a  
11 large corporation, do not have equal funds. Nevertheless, it  
12 doesn't make any difference according to the decision in MCFL.  
13 This Court said the big corporations as well as those less  
14 fortunate are nevertheless -- may come within the prohibition  
15 because we refer -- defer to the legislative judgment. As a  
16 matter of fact --

17 QUESTION: But, but -- that does not sound to me --  
18 that does not sound to me like a compelling interest, and it  
19 does not sound to me like scrutiny. That is just legislative  
20 deference.

21 MR. CARUSO: That is, the fact is that the evil is a  
22 potential corruption of injecting monies that have been  
23 generated through the corporate process in the economic sphere  
24 to effect an equal -- to unequal a playing field in the  
25 political arena. And this is what the -- what is aimed at.

1 Now, historically, corporations have been regulated.  
2 For example, in Michigan historically they have been regulated  
3 since 1913, and they have been regulated to begin with with  
4 the, first was the Corrupt Practices Act since 1913. And it  
5 was not until 1976 that the Campaign Finance Act as we know it  
6 today, came along. And for the first time the legislature  
7 included within the prohibition independent expenditures.  
8 Here -- heretofore, the impediment of the prohibition related  
9 only to contributions. But in 1976 they added independent  
10 expenditures. And at the same time they did that they  
11 permitted corporations to establish separate segregated funds  
12 by using corporate monies. They also --

13 QUESTION: As I understand -- as I understand this  
14 statute, if a candidate Smith has been a member of the Ku Klux  
15 Klan, the ACLU cannot take out an advertisement explaining  
16 that fact and asking people to vote for Jones. Or am I  
17 incorrect? Can the ACLU do that, the ACLU being a nonprofit  
18 corporation?

19 MR. CARUSO: The ACLU? I don't know whether they are -  
20 -

21 QUESTION: It is a nonprofit corporation.

22 MR. CARUSO: Nonprofit corporation. If they do not  
23 come within the exception that has been cast by this Court in  
24 MCFL I would say that that prohibition, yes, unless they did  
25 it through a segregated fund. Now, the fact is that there are

1 --

2 QUESTION: I find it very hard to see that, the fact  
3 that they can make this expenditure through a fund in any way  
4 really mitigates the evil, but it certainly does diminish the  
5 message. I am not interested in what a PAC says, I am  
6 interested in what the ACLU says.

7 MR. CARUSO: The thing of it is, the segregated fund,  
8 they can do this, simply because the money contributed to a  
9 segregated fund is money given for political purposes. It is  
10 given, in Michigan it is restricted to -- in a membership  
11 corporation, to the members, to the officers -- and to the  
12 officials who occupy a managerial position. With respect to  
13 profit corporations, it is similarly limited to stockholders,  
14 employees who have managerial positions and the officers of  
15 that corporation. And the fund is given voluntarily, it is  
16 given for specific purposes, for political activity.

17 Now, if we are permitting these corporations to use  
18 funds that have been generated for another purpose into the  
19 political arena, we are causing what the, this Court has, what  
20 the legislature believes to be a potential threat to the  
21 economic market, or to the political marketplace, and causing  
22 an unfair advantage to corporations over private parties. I  
23 would respect --

24 QUESTION: Mr. Caruso, there is some kind of a media  
25 exception in the statute. Can the corporation, under the

1 statute, publish something that would include some candidate  
2 endorsement and sell it as a magazine or distribute it, and  
3 fall under the media exception?

4 MR. CARUSO: There is a media exception, but that media  
5 exception, Justice O'Connor, has to do specifically with news  
6 stories, commentaries, editorials, and the regular course of  
7 publication and broadcasting. So, if they are incorporated  
8 and it is a news media, they may sell those magazines. But  
9 what --

10 QUESTION: If they publish something, they can  
11 editorially endorse a candidate.

12 MR. CARUSO: That is correct. They may be able to do  
13 that. But what they cannot do, they are not excluded from the  
14 act, but if they are incorporated and a newspaper wants to pay  
15 for an ad in another newspaper, or pay for an ad through some  
16 broadcasting station, I think they would be precluded by this  
17 statute because the exception only applies to news stories,  
18 commentaries, editorials and the regular course of business.

19 QUESTION: Why doesn't that distort the electoral  
20 process?

21 MR. CARUSO: Pardon?

22 QUESTION: Why doesn't that distort the electoral  
23 process? I find it difficult to see what the evil being  
24 driven at here is. When it is a contribution to the candidate  
25 you can say, well, some candidates just have too much money at

1 their disposal.

2 MR. CARUSO: Well, the fact is that --

3 QUESTION: But here the only evil, as I understand it,  
4 is that there will be too much speech on one side of the  
5 issue, funded by vast amounts of money. Is that right? We  
6 mistrust too much speech.

7 MR. CARUSO: Well, I couldn't put it that quite way. We  
8 mistrust too much speech, but the thing of it is they get --

9 QUESTION: Well how else would you put it?

10 MR. CARUSO: They get speech, they are able to get a  
11 great deal of speech, and perhaps very effective speech, by  
12 virtue of the fact that the state has given them an advantage  
13 to develop -- to acquire these monies, limited liability and  
14 so forth, and then -- and put -- and direct this thing toward  
15 the, in the electoral process, which -- which the legislature  
16 has seen for many years to prohibit and which this Court says  
17 that they will defer to that judgment, even though they  
18 recognize -- and they said this -- and you said this in MCFL,  
19 even though you recognize there are other entities that  
20 perhaps pose as much a danger or a greater danger than  
21 corporations do. But nevertheless, if the fact is that the --

22 QUESTION: Danger of what? It depends on what the  
23 danger is. If you are giving the money directly to a  
24 candidate there is a much greater danger of subverting the  
25 political process by getting some commitments from that

1 candidate that you wouldn't otherwise -- that you have no  
2 entitlement to. But here we are talking about whether a  
3 corporation, just like a private individual, can go out and  
4 express to the public that corporation's view, with, I assume,  
5 indication that this is the view of General Motors. I mean,  
6 your election law requires that -- that identification be  
7 given of --

8 MR. CARUSO: That is right.

9 QUESTION: So, you think that is a threat to the  
10 democratic process, that the state is going to be swept away  
11 by ads signed by General Motors, or whatever.

12 MR. CARUSO: Well, the thing of it is, here again,  
13 insofar as making contributions is concerned and independent  
14 expenditures is concerned, in today's society I don't see the  
15 effect being any different. In other words, this Court has  
16 prohibited in the past contributions by corporations, but they  
17 have not reached and answered the question on independent  
18 expenditures.

19 QUESTION: Quite so.

20 MR. CARUSO: Pardon?

21 QUESTION: Yes. That's --

22 MR. CARUSO: Independent expenditures, I believe,  
23 today, with the political consultants, they abound in the  
24 states, and with the sophisticated news media we have today,  
25 electronic systems that we have, I think that money,

1 independent expenditures can be very skillfully manipulated in  
2 such a way that it would be just as much a benefit to that  
3 candidate and -- as contributions.

4 QUESTION: Right. People are getting too much  
5 information. That's the problem.

6 MR. CARUSO: Pardon?

7 QUESTION: The people get too much -- they get talked  
8 at too much. That is an evil.

9 MR. CARUSO: The evil is that they get talked at too  
10 much by -- because money has been made available.

11 QUESTION: Well, I don't care why. What is the evil in  
12 being talked at too much? I mean, I understand the evil of  
13 giving money directly to a candidate. It is close, you know,  
14 could be very close to a bribe. But this is not giving money  
15 to a candidate, it is just talking. And you are saying that  
16 that is an evil.

17 MR. CARUSO: It's more than just a bribe. Heretofore  
18 it was considered -- contributions were outlawed on the basis  
19 that there is a quid pro -- a quid pro quo, in other words, an  
20 exchange, which doesn't exist in independent expenditures  
21 perhaps. I think that it does. Nevertheless, the fact is  
22 that the corporations have an unfair advantage in the  
23 marketplace because they are in a position of generating  
24 monies, they are in a position of not being subjected to the  
25 liability that individuals are and these other entities are,

1 and the legislature has historically regulated corporations  
2 for so many years. And the whole, sole reason they regulating  
3 these corporations for so many years is simply because they do  
4 occupy that special position and the advantages given to these  
5 corporations by the legislature.

6 QUESTION: (Inaudible) from giving contributions to  
7 religious charities, to religions?

8 MR. CARUSO: Why, I suppose it can. I don't think that  
9 the Michigan Campaign Finance Act prohibits that. As a matter  
10 of fact, the Michigan Campaign Finance Act permits  
11 corporations to make direct expenditures and contributions  
12 without limit to ballot questions.

13 QUESTION: Can it prohibit corporations from  
14 contributing to one party but not to another?

15 MR. CARUSO: To one party and not to another? I  
16 wouldn't think so. I don't think they should be permitted to  
17 contribute to any party.

18 QUESTION: I suppose you would think that the  
19 legislature could prohibit the nonprofit corporation from  
20 publishing a journal then, the AMA monthly journal.

21 MR. CARUSO: To do -- to say what?

22 QUESTION: Well, if corporations can be regulated, if  
23 there is too much speech, if that is an evil, why can't the  
24 state prohibit the American Medical Association from  
25 publishing its monthly journal?



1 MR. CARUSO: I don't believe they can prohibit that.  
2 That is not the issue here. The issue here, Justice Kennedy -

3 - QUESTION: Well, you're saying -- you're saying that  
4 corporations have too much power, that there is too much  
5 speech, that this is an evil, the corporations gather great  
6 deals of money, that they are created by the state.  
7 Therefore, we give legislative deference. All of those  
8 arguments can be made to support the proposition that the AMA  
9 journal, that the ACLU newsletter, ought to be regulated by  
10 the state.

11 MR. CARUSO: But not in -- in candidate elections is  
12 what we are talking about. Not anything other than candidate  
13 elections.

14 QUESTION: We are talking about a matter of principle.  
15 And we are asking you to tell us what the evil is in the  
16 speech that nonprofit corporations present in election  
17 campaigns. And all of the comments you have made so far would  
18 equally support the proposition that you can prohibit the  
19 publication of their monthly newspaper, or prohibit them from  
20 giving to churches, as Justice Scalia suggested, or that you  
21 can require them to give to one party and not to the other.

22 MR. CARUSO: I don't know of anything like that being  
23 in the Campaign Finance Act. Here again I say that the evil  
24 is that they are -- they have members, people involved in  
25 corporations, they give money to corporations, they invest

1 money in corporations, not for the purposes of becoming  
2 involved in the political process. They become -- the  
3 purposes they give money to the corporations for the most part  
4 is for economic benefit.

5 QUESTION: And the ACLU?

6 MR. CARUSO: The ACLU, that is --

7 QUESTION: People give money to the ACLU for economic  
8 benefit?

9 MR. CARUSO: And here again, as I say, the ACLU may  
10 well come within the exception of the MCFL decision. In other  
11 words, if it is a politically, if it is a political action  
12 group and it is an ideological group --

13 QUESTION: Have you read the amicus briefs in this  
14 case?

15 MR. CARUSO: Pardon?

16 QUESTION: The ACLU has filed an amicus brief in this  
17 case.

18 MR. CARUSO: Yes, they have.

19 QUESTION: Have you read it?

20 MR. CARUSO: Yes.

21 QUESTION: Don't they indicate in that case that they  
22 take corporate contributions, and therefore they do not  
23 qualify under the third prong of the test that we set forth in  
24 the Massachusetts case?

25 MR. CARUSO: If that is the case, if that is correct,

1 then I suggest --

2 QUESTION: Well, do you have any reason to doubt that  
3 what they've said is correct?

4 MR. CARUSO: No, I have no, no --

5 QUESTION: All right, then the ACLU doesn't qualify  
6 under that case.

7 MR. CARUSO: Then I would say that -- I would say that  
8 the ACLU, if they take corporate contributions, if they get  
9 involved in the electoral process, they are a conduit for  
10 these corporations to put money into the electoral process.  
11 And that is the thing that Congress doesn't want to happen,  
12 that is the thing that the Michigan legislature does not want  
13 to happen.

14 QUESTION: Isn't it true that the ACLU is a membership,  
15 nonprofit corporation?

16 MR. CARUSO: Yes.

17 QUESTION: That is a little different from General  
18 Motors, isn't it?

19 MR. CARUSO: It's totally different than General  
20 Motors.

21 QUESTION: How does it compare with the Michigan  
22 Chamber of Commerce?

23 MR. CARUSO: Pardon?

24 QUESTION: I mean, we're talking about a nonprofit  
25 membership corporation on the one hand, versus a profit-making

1 corporation like General Motors on the other. How about the  
2 Michigan Chamber of Commerce, which is the corporation  
3 involved here?

4 MR. CARUSO: The Michigan Chamber of Commerce, I would  
5 say, looking at it on a spectrum, the Chamber -- the General  
6 Motors at one end and MCFL, that type of corporation at the  
7 other, the Chamber comes some place in between, and we suggest  
8 closer to General Motors than the MCFL. And the reason for  
9 that is they have been established by business corporations,  
10 they have an 8,000 membership, 75 percent of those members are  
11 business corporations, and they pay dues, they pay substantial  
12 dues. They have a very sound membership base, and a very  
13 sound financial resource to draw on. That definitely can  
14 become a conduit with respect to the political process.

15 With respect to MCFL, the case this Court dealt with  
16 earlier, there was no possibility that they could become a  
17 conduit for political expenditures. They absolutely refused  
18 to accept any money from business corporations. And there  
19 wasn't any threat that they posed to the electoral process  
20 whatsoever.

21 That is not so here with respect to General Motors --I  
22 mean to the Chamber of Commerce. Now, the Chamber of Commerce  
23 has very effectively set up the segregated funds. They have a  
24 segregated fund, and they have had since it has been  
25 authorized in 1976 by the Michigan legislature, and they have

1 developed kits for the local branches to use. They are  
2 effectively in the political process, but through the separate  
3 segregated funds. So those monies that are used by the  
4 separate, by the Chamber through the separate segregated fund,  
5 are monies given for political purposes and not for some other  
6 purpose. There are so many people that, corporations and  
7 business entities, that join General Motors for many benefits,  
8 and they may not want to associate themselves in any kind of  
9 political activity. But if they are permitted to make  
10 independent expenditures, they have no choice in the matter,  
11 because they face too many disincentives to leave the Chamber,  
12 unlike some other companies. But at any rate, the Chamber is  
13 in a situation where they can have a serious impact on the  
14 political process.

15 QUESTION: By which you mean a lot of speech.

16 MR. CARUSO: Well, if that is the way you want to cast  
17 it, Justice Scalia, a lot of speech, I suppose that is true.  
18 But it is --

19 QUESTION: But no other thing that you are directing  
20 this narrowly at except that they'll have too much speech.

21 MR. CARUSO: Pardon? I didn't -- I'm sorry --

22 QUESTION: I mean, there is no other element of a  
23 corporation that accounts for the legislature's restriction  
24 here, except the fact that they will have a lot of -- of  
25 political speech.

1 MR. CARUSO: They have a very, their presence, a  
2 corporations presence in the political marketplace is very  
3 formidable. Just the very presence is formidable. To think  
4 that they are in to advocate the election of a particular  
5 candidate, aside from the fact that they have, some of these  
6 business corporations generate a great deal of money that they  
7 can inject into the electoral process, I say, causing an  
8 unbalanced playing field. They nevertheless are -- for the  
9 most part they are well organized and they can turn this  
10 advantage that they have into very serious problems with the -  
11 -

12 QUESTION: What, isn't one of the reasons you are  
13 urging why corporations like this were treated differently, or  
14 could be treated differently from individuals, was that the  
15 stockholders of the member corporations could find their funds  
16 put to uses that they had not intended?

17 MR. CARUSO: That is exactly right. As I have  
18 mentioned earlier, Justice, Mr. Chief Justice, that these  
19 monies that are put in by the stockholders by way of  
20 investments is for economic benefit and economic gain, to earn  
21 profits. And they certainly do not anticipate those monies  
22 being used in the -- to -- in the electoral process to urge  
23 the election of a particular candidate. And they have free  
24 speech rights. Their free speech rights might be violated by  
25 the fact that the corporation is going out and spending monies

1 that has been put in for other purposes. They may not want  
2 this candidate elected for their own particular reasons. And  
3 yet their monies that go in for another purpose are being used  
4 to elect some other candidate.

5 QUESTION: Does this law apply only to Michigan  
6 corporations? It applies to all corporations, doesn't it? It  
7 applies to all corporations, in and out of state.

8 MR. CARUSO: Any corporation within the State of  
9 Michigan.

10 QUESTION: Well, that policy you are just defending  
11 there, I mean, that is a sensible policy for the Michigan  
12 legislature to require for Michigan corporations, I suppose,  
13 if it doesn't want the shareholders of Michigan corporations  
14 to accept unanimously -- use any -- use any money for  
15 political purposes. I can understand that. But they are  
16 imposing this upon other states who think that shareholders  
17 generally don't mind their money being used by the corporation  
18 for a purpose that it considers valid to its business.

19 MR. CARUSO: I think it is any corporation doing  
20 business in the State of Michigan, and that may include  
21 corporations incorporated elsewhere, that is true. I can't  
22 answer that.

23 But in any event, as I say, the -- this legislature --  
24 this Court has historically deferred to legislative judgment  
25 in the regulation of the political process where corporations

1 are concerned. They have perceived that there is a potential  
2 danger and a potential threat to the -- to the electoral  
3 marketplace, and that they, that deference should be given to  
4 the regulation.

5 QUESTION: Thank you, Mr. Caruso.

6 Mr. McLellan.

7 ORAL ARGUMENT OF RICHARD D. MCLELLAN

8 ON BEHALF OF THE RESPONDENT

9 MR. MCLELLAN: Mr. Chief Justice, and may it please the  
10 Court:

11 Michigan State Chamber of Commerce is a nonprofit  
12 Michigan membership corporation. It was organized in 1959 for  
13 the specific purpose of promoting economic development and the  
14 preservation and enhancement of the American enterprise  
15 system. Both the purpose and the activities of the state  
16 Chamber of Commerce are ideological. The state Chamber  
17 lobbies in the state capital on legislation, it is actively  
18 involved in ballot question campaigns and referenda in the  
19 state, it educates its members and the public with respect to  
20 public policy issues. It maintains a separate segregated fund  
21 for the purpose of making political contributions to  
22 candidates, and it rates candidates on a job provider index.

23 But the state Chamber of Commerce does not communicate  
24 its views to the general public with respect to candidates  
25 because Section 54 of the Michigan Campaign Finance Act makes



1 it a felony for such commun -- for the Chamber to engage in  
2 such communications.

3 QUESTION: Can it communicate the ratings?

4 MR. McLELLAN: It cannot. Not if those are in any way  
5 in support of or opposition to the election of a candidate.

6 QUESTION: So if one candidate was rated on a scale of  
7 one to -- or zero to ten, and he was rated at ten and the --  
8 his opponent was regulated at one, then that would obviously  
9 be interpreted as support if you communicated the rating?

10 MR. McLELLAN: If the purpose was -- and I am assuming  
11 that the purpose would be to influence the general public.  
12 They do not publish ratings as a general educational matter.  
13 Their purpose in speaking is ideological and it is designed to  
14 influence the election or defeat of candidates.

15 Importantly though, the Michigan Campaign Finance Act  
16 is different from the Federal Election Campaign Act. The  
17 Michigan Act, which was adopted in 1976, prohibits only  
18 corporate speech. Unincorporated labor organization speech is  
19 unregulated. In fact --

20 QUESTION: Was this point argued in the court of  
21 appeals?

22 MR. McLELLAN: Yes, it was, Your Honor.

23 QUESTION: The equal protection point?

24 MR. McLELLAN: The -- yes. We have briefed, and we  
25 brought the case originally on both First Amendment and equal

1 protection, it was briefed and argued in the court of appeals,  
2 and we have briefed it here.

3 QUESTION: And did the court of appeals pass on equal  
4 protection?

5 MR. McLELLAN: They did not.

6 QUESTION: Any explanation of why not?

7 MR. McLELLAN: Because the court of appeals found for  
8 us on the First Amendment --

9 • QUESTION: They did not need to reach the equal --

10 MR. McLELLAN: They did not need to go to the equal  
11 protection.

12 We point this out, the disparate treatment between  
13 corporations and unincorporated unions, for two reasons. The  
14 primary reason that, in Michigan the political marketplace is  
15 largely characterized by the contest between the forces of  
16 organized labor and business. And the Michigan law, because  
17 it treats the Michigan Chamber of Commerce differently than  
18 its primary adversaries, which were identified in the trial as  
19 the United Auto Workers and the AFL-CIO, this disparate  
20 treatment creates an -- a disadvantage to the Michigan State  
21 Chamber of Commerce in carrying out its purposes, which is to  
22 be a political and ideological organization within the State  
23 of Michigan.

24 QUESTION: But all we ordinarily require to reject an  
25 equal protection claim is some sort of rational basis, and

1 isn't it enough that the unions are unincorporated, they don't  
2 have the freedom from liability that the corporation has?

3 MR. McLELLAN: It may be important in your analysis,  
4 Mr. Chief Justice, in this case, because Mr. Caruso and the  
5 state have argued that the amassing of wealth is the important  
6 state interest. And unions, particularly the major labor  
7 organizations in the State of Michigan, are able, because of  
8 their size and their broad membership base and the special  
9 advantages that they have under the law, to amass substantial  
10 wealth.

11 QUESTION: Do they do that through their own funds, or  
12 do they set up separate funds for doing that?

13 MR. McLELLAN: In Michigan, unlike the federal law,  
14 they use their general union treasury funds for --

15 QUESTION: They do.

16 MR. McLELLAN: -- political purposes.

17 QUESTION: They don't have --

18 MR. McLELLAN: Both direct contributions and  
19 independent expenditures.

20 QUESTION: They don't have political action committees?

21 MR. McLELLAN: They do for federal law purposes.

22 QUESTION: I see, just for federal elections.

23 MR. McLELLAN: Yes.

24 QUESTION: Is there a summary in the record or in the  
25 trial courts finding as to the number of unincorporated union

1 associations?

2 MR. McLELLAN: There is not any finding there, Your  
3 Honor. The only evidence in the record that I recall was that  
4 there are 22 Michigan unions that are incorporated, including  
5 the Michigan Education Association, which --

6 QUESTION: That are incorporated.

7 MR. McLELLAN: Are incorporated. Most other large  
8 unions are unincorporated.

9 QUESTION: But is there anything in the record that you  
10 can point to to establish that, or do we just take judicial  
11 notice of that?

12 MR. McLELLAN: I think you take judicial notice of  
13 that.

14 QUESTION: You suggest that there are no limitations,  
15 legal limitations on how much -- how unions can use their  
16 funds for political purposes?

17 MR. McLELLAN: There is not in the Michigan Campaign  
18 Finance Act, Your Honor.

19 QUESTION: But members certainly have remedies, don't  
20 they --

21 MR. McLELLAN: They, members do have the rights --

22 QUESTION: -- under the federal labor laws.

23 MR. McLELLAN: This Court has recognized that, in, that  
24 there are other laws that protect union members.

25 QUESTION: So unions really aren't all that free to

1 just use their amassed wealth to, for political purposes, are  
2 they?

3 MR. MCLELLAN: No, they are not. There are federal  
4 restrictions on them.

5 QUESTION: Well, there are also constitutional  
6 restrictions, aren't there?

7 MR. MCLELLAN: Yes.

8 QUESTION: Which would apply to the use of funds in  
9 state elections.

10 MR. MCLELLAN: It would. A member of a union would be  
11 able to assert his or her constitutional interests.

12 QUESTION: And unions nowadays usually have a mechanism  
13 for that, don't they?

14 MR. MCLELLAN: Yes. My understanding is that unions  
15 that are contesting it have that opportunity.

16 QUESTION: And your organization, so long as it doesn't  
17 endorse a particular candidate, wouldn't violate the law, or  
18 seek to favor a particular candidate. You could still  
19 campaign with respect to issues as much as you like, is that  
20 correct?

21 MR. MCLELLAN: Under the present system we are able to  
22 lobby on legislative issues, participate in ballot question  
23 campaigns. We are not able to articulate the connection  
24 between a particular issue and a particular candidate.

25 QUESTION: Right. But you could -- you could publicize

1 the issue statewide to the electorate, not just lobby in the  
2 legislature, right?

3 MR. McLELLAN: Yes.

4 QUESTION: So long as you don't identify it with a  
5 candidate.

6 MR. McLELLAN: That is correct.

7 QUESTION: And you can make all the arguments you want  
8 to your own membership in connection with soliciting funds for  
9 your political action fund?

10 MR. McLELLAN: Correct.

11 QUESTION: Which then is free to spend the money --

12 MR. McLELLAN: Correct.

13 QUESTION: Why is that? I am a little interested in  
14 the difference between -- why is it so important that you're  
15 not, that you be free to operate without going through the  
16 fund that the statute provides for, the separate fund?

17 MR. McLELLAN: The primary operational reason is that  
18 PACs have a significant, negative image in the public. And  
19 the state Chamber of Commerce, as was submitted in court, has  
20 a very strong reputation, the state Chamber of Commerce. And  
21 to be able to speak with your own voice, with your own name on  
22 the bottom of the advertisement, that this is the view of the  
23 state Chamber of Commerce --

24 QUESTION: But the problem is that when you speak with  
25 your own voice you purport to represent 8,000 members who all

1 agree on your, what you are saying. Whereas when you go  
2 through the fund you are sure that everybody who contributed  
3 to the fund authorizes you to speak in that way. Isn't there  
4 that potential misunderstanding of -- I mean, that is why it  
5 is stronger speech when it purports to represent all 8,000  
6 members, even though they haven't all contributed to the fund.

7 MR. McLELLAN: The Michigan State Chamber of Commerce,  
8 every member, corporate or individual, must subscribe to the  
9 objectives of the state Chamber.

10 QUESTION: Well, I understand, but they don't all have  
11 to vote for the same candidates for office.

12 MR. McLELLAN: No, and they may not. In fact they, it  
13 is a diverse membership. There is a, it is a widely diverse  
14 membership, in size and function of business --

15 QUESTION: And of course you want to be able to use  
16 your accumulated funds from dues, you don't want to have to go  
17 back to anybody.

18 MR. McLELLAN: That is right. We don't want to have to  
19 --

20 QUESTION: And if you are going to set up a fund, you  
21 are going to have to go raise some money.

22 MR. McLELLAN: We don't want to go through the same --

23 QUESTION: And you may not be able to raise it from  
24 everybody, because they don't agree with you.

25 MR. McLELLAN: That is correct.

1 QUESTION: Which means that your speech is restricted.

2 MR. McLELLAN: Our speech is restricted. If we have to  
3 use that mechanism, there are substantial burdens that we  
4 would be faced --

5 QUESTION: It is not only restricted, but if it weren't  
6 restricted it might be misleading, too.

7 QUESTION: What difference does it make in your  
8 argument that you speak for a nonprofit corporation? Can't  
9 the same arguments you are making be made for corporations  
10 that are in business for profit?

11 MR. McLELLAN: Yes, the same argument can be made, and  
12 we would make it. We would make it particularly in this  
13 sense. In this case, in Michigan under the Michigan law,  
14 there has been no showing of any state interest that would  
15 restrict independent expenditures generally. There was no  
16 legislative findings dealing with independent expenditures.  
17 There was no evidence submitted at the trial that would  
18 suggest that there is something inherently corrupting or  
19 potentially corrupting by corporate independent expenditures  
20 generally. So, in answer to your question, yes. We do not  
21 think that that is a significant distinction. However, this  
22 has been addressed by the court and we are, and I am  
23 responding to that analysis.

24 This is the first time this Court has considered the  
25 constitutionality of a state law that bans independent



1 expenditures in the -- with regard to a candidate, by an  
2 ideological corporation that has business corporation members.  
3 And we suggest that the analysis that this Court has made with  
4 respect to independent expenditures generally is equally  
5 applicable in this case.

6 QUESTION: Mr. McLellan, do you think the case would be  
7 any different if this were a law that were a corporation law,  
8 that is Michigan made the judgment, we think that someone who  
9 takes part in the kind of an economic unit that we want to  
10 allow to be created under Michigan corporation law, should  
11 never be bound through his participation in that unit to  
12 support with his funds a particular candidate.

13 Are you incorporated in Michigan, by the way?

14 MR. McLELLAN: We are incorporated in the Michigan  
15 nonprofit corporation act, that permits a corporation be  
16 organized for any lawful purpose.

17 QUESTION: Suppose Michigan made that judgment. You  
18 know, we set up this economic kind of a unit called a  
19 corporation. We don't think that anybody who joins it ought  
20 to have political views attributed to him, and therefore  
21 corporations incorporated in Michigan can't endorse a  
22 particular candidate. Would that be any different as far as  
23 the argument you are making before us is concerned?

24 MR. McLELLAN: I think not, Your Honor. I think that -  
25 - that we would argue that the First Amendment would permit

1 that person -- again, you would still have to do the analysis  
2 as to whether or not there is a sufficient reason for the  
3 state to restrict them. Even in the case where they create --

4 QUESTION: Well, the reason is we don't want people to  
5 -- people's money to be used to endorse a candidate that they  
6 don't like. What if the state corporation law said that  
7 certain types of, as they do, certain types of votes have to  
8 be passed by more than just 50 percent of the shareholders.  
9 Suppose that it said to endorse a particular candidate you  
10 need unanimous shareholder consent. Would that be all right?

11 MR. MCLELLAN: Yes, I think so. I think that clearly  
12 the state laws provide a structure for the operation of that  
13 corporation and might well require that. This is a  
14 prohibition on the speech, and I think that there may well be  
15 other steps that would be appropriate by the state.

16 Let me just, a final point here. I repeat again that  
17 from our view, in this case the state utterly failed to prove  
18 a state interest that would permit the imposition of the  
19 substantial ban on corporate speakers; that independent  
20 expenditures in Michigan on the record in this case are not  
21 corrupt; that, in addition, this speech is valuable by the  
22 Michigan State Chamber of Commerce, its political adversaries,  
23 by other ideological groups, corporate and unincorporated;  
24 that there is a value here that should be recognized by this  
25 Court and by the Michigan legislature and that is to inform

1 the public, to have a diversity of views and to reflect a true  
2 competition of ideas and the free market basically in ideas.

3 We think that the court of appeals properly interpreted  
4 the decisions of this Court. We think that its decision was  
5 consistent with prior decisions. It was fair, and will assure  
6 ideological groups the opportunity to --

7 QUESTION: May I just enquire, what do you mean by an  
8 ideological group? I can understand it in a sort of a single  
9 issue group where there is just one issue, such as right to  
10 life or something like it, very clear what, that they all have  
11 the same approach to the problem. But one of the points you  
12 made earlier was the Chamber of Commerce, by its very nature,  
13 is very diverse in the various interests it represents. And,  
14 sure, everybody is in favor of democracy and against crime or  
15 something like that, but do you call that -- is that enough to  
16 make it an ideological group? .

17 MR. McLELLAN: I believe an ideological group -- it  
18 does -- it is an ideological group.

19 QUESTION: Well, would General Motors be an ideological  
20 group, because all the shareholders want to make money and  
21 believe in free enterprise.

22 MR. McLELLAN: No, I do not think it, General Motors is  
23 an ideological group.

24 QUESTION: Simply because they are a profit-making  
25 corporation?

1 MR. McLELLAN: No, simply because they are organized  
2 for a different purpose. I think that you can identify those  
3 groups that have organized themselves to primarily advocate  
4 ideas, not all necessarily political ideas, but they are  
5 ideological in that sense.

6 QUESTION: Would there be any nonprofit or membership  
7 corporation, I guess you call it in Michigan, that would not  
8 be an ideological group within your concept?

9 MR. McLELLAN: Yes. Some health care groups, other  
10 groups may not be ideological. Certainly, I think that they  
11 would be supporting it, their purpose would not be  
12 ideological.

13 QUESTION: What about a trade association, the  
14 Automobile Manufacturers Association, or something like that,  
15 who seek to promote the welfare of the automobile industry?

16 MR. McLELLAN: In general, trade associations, I think,  
17 are organized for largely public policy and ideological  
18 purposes.

19 QUESTION: Trade associations would be included in --

20 MR. McLELLAN: Would be. Civic action organizations,  
21 like the ACLU, NAACP, are the more common examples of  
22 ideological groups. But the State Chamber of Commerce, trade  
23 associations, environmental groups, are equally ideological in  
24 that sense. The fact, from our perspective, that they, that  
25 the Chamber represents business interests does not make it any

1 less ideological. The issues in which they are involved are  
2 ideological.

3 If there are no further questions, that concludes my  
4 argument. Thank you.

5 QUESTION: Thank you, Mr. McLellan.

6 Mr. Caruso, do you have rebuttal?

7 REBUTTAL ARGUMENT OF LOUIS J. CARUSO  
8 ON BEHALF OF THE APPELLANTS

9 MR. CARUSO: I have two points to make, and the first -  
10 -

11 QUESTION: You have three minutes.

12 MR. CARUSO: The first point I would like to make, and  
13 that has to do with contributions and independent  
14 expenditures, and the difference between the two. This Court  
15 has said that contributions -- the restriction against  
16 contributions is valid. They haven't dealt with the  
17 independent expenditure prohibition in term of corporations.  
18 But I want to point out something here.

19 There is a difference between the federal statute this  
20 Court has dealt with on independent expenditure and that with  
21 the -- and that set forth in the Michigan Campaign Finance  
22 Act. The federal statute is much more restrictive than the  
23 state statute is. In the federal statute, it says without  
24 cooperation or consultation with any candidate. That is the  
25 federal statute. But the state statute simply says is not

1 made at the direction or under the control of, which simply  
2 means in the State of Michigan, on independent expenditures, a  
3 corporation could have dialogue with a candidate and say,  
4 look, I am going to take out these ads in this newspaper. If  
5 you are going to spend money there, spend it some place else,  
6 we will help you there. In the federal statute you cannot do  
7 that.

8 QUESTION: You ought to fix that.

9 MR. CARUSO: In the state statute you can. Pardon?

10 QUESTION: You ought to fix that.

11 MR. CARUSO: Pardon?

12 QUESTION: I mean you ought to fix that. That doesn't  
13 seem to me a justification, saying therefore we have to  
14 prevent corporations from making any contributions at all.  
15 You should fix it the way the feds fixed it.

16 MR. CARUSO: Well, even the feds, even the Federal  
17 Election Commission takes the position that independent  
18 expenditures are -- should be -- is prohibited, and it is a  
19 valid prohibition.

20 One other thing I wanted to mention, and that is what  
21 this Court stated in National Right to Work at 210. And that  
22 says while Section 41b restricts the solicitation of  
23 corporations and labor unions without great financial  
24 resources, as well as those fortunately situated, we accept  
25 Congress' judgment that is it the potential for such influence

1 that demands regulation. Nor will we second-guess a  
2 legislative determination as to need for a prophylactic  
3 measure where corruption is the evil field -- feared.  
4 Differing structures and purposes of different entities may  
5 require different forms of regulation in order to protect the  
6 integrity of the electoral process. And I mention that in  
7 response to the arguments that have been made here with  
8 respect to labor unions.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Caruso. The  
10 case is submitted.

11 (Whereupon, at 1:45 p.m., the case in the above-  
12 entitled matter was submitted.)  
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CERTIFICATION

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

No. 88-1569 - RICHARD H. AUSTIN, MICHIGAN SECRETARY OF STATE AND FRANK J. KELLEY,

---

MICHIGAN ATTORNEY GENERAL, Appellants V. MICHIGAN CHAMBER OF COMMERCE

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BY Leona M. May  
(REPORTER)



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