

IN THE SUPREME COURT OF THE UNITED STATES

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SENATOR MITCH McCONNELL ET AL.,:

Appellants/Cross-Appellees :

V.:No.02-1674

FEDERAL ELECTION COMMISSION ET AL.,:

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Washington,D.C.

Monday,September 8,2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at

APPEARANCES:

KENNETH W.STARR,ESQ.,Washington,D.C.;on behalf of the McConnell Plaintiffs.

BOBBY R.BURCHFIELD,ESQ.,Washington,D.C.;on behalf of the Political Party Plaintiffs.

THEODORE B.OLSON,ESQ.,Solicitor General, Department of Justice,Washington,D.C.;on behalf of Federal Defendants.

SETH P.WAXMAN,ESQ.,Washington,D.C.;on behalf of Intervenor-Defendants.

FLOYD ABRAMS,ESQ.,New York,New York;on behalf of the McConnell Plaintiffs.

LAURENCE GOLD,ESQ.,Washington,D.C.;on behalf of AFL-CIO.

JAY ALAN SEKULOW,ESQ.,Washington,D.C.;on behalf of Minor Plaintiffs.

PAUL D.CLEMENT,ESQ.,Deputy Solicitor General, Department of Justice,Washington,D.C.;on behalf of Federal Defendants.

KENNETH W.STARR,ESQ. On behalf of McConnell Plaintiffs

BOBBY R.BURCHFIELD,ESQ. On behalf of Political Party Plaintiffs

THEODORE B.OLSON,ESQ. On behalf of Federal Defendants

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LAURENCE GOLD,ESQ. On behalf of AFL-CIO

JAY ALAN SEKULOW,ESQ. On behalf of Minor Plaintiffs

PAUL D.CLEMENT,ESQ. On behalf of Federal Defendants

REBUTTAL ARGUMENT OF KENNETH W.STARR,ESQ.On behalf of McConnell Plaintiffs

BOBBY R.BURCHFIELD,ESQ. On behalf of Political Party Plaintiffs

SETH P.WAXMAN,ESQ. On behalf of Intervenor-Defendants

CHIEF JUSTICE REHNQUIST: Today we'll break for lunch and reconvene at 1:30 and the court will be in recess from today until the first Monday in October 2003,at which time the October 2002 term of the court will be adjourned and the October 2003 term of the court will begin as provided by statute. We'll hear argument now in the Bipartisan Campaign Reform Act cases. Mr. Sekulow?

ORAL ARGUMENT OF JAY ALAN SEKULOW

Mr. Sekulow, we'll hear from you.

ORAL ARGUMENT OF JAY ALAN SEKULOW ON BEHALF OF MINOR PLAINTIFFS

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

The court below unanimously concluded that section 318, the prohibition of contributions by minors is unconstitutional. The statute suffers from three constitutional defects. First, section 318 is a ban, not simply a limitation. No symbolic or associational speech rights are recognized under 318.

Second, the government failed to produce sufficient evidence to show that there was corruption or the appearance of corruption with regard to conduit giving by minors. The fact of the matter is Judge Henderson called the evidence remarkably thin. Judge Kollar-Kotelly called the evidence so minimal as to, in her words, doom the statute. Section 318 is not closely drawn in support of the interests being asserted. In fact, the government concedes that this statute is an absolute ban and they also concede that, in fact, the ban burdens more speech than a limitation.

QUESTION: Mr. Sekulow, could you have a ban at any age? Is it 17 year olds that ban is questionable. But say the Congress drew the line at 8 or 10.

MR. SEKULOW: Certainly that would be more closely drawn, Justice –

QUESTION: Would that be constitutional?

MR.SEKULOW: I think so. The issue would be could an 8 year-old make the voluntary decision to make a contribution. I think it would be a closer case. This is an absolute ban, though. This is the exact opposite of that situation. Rather than looking at a concern over –

QUESTION: I'm posing an absolute ban on contributions by 10 and under.

MR.SEKULOW:I think it would be the same argument. At a minimum, there would have to be -- they would have to establish that the ban was justified by at least a --closely drawn to the concern. I think when you get --the younger it gets obviously it is more of a problem. But here you have a ban actually --

QUESTION:I just want to be clear on what your answer is. I thought you said that there would be a line, a bright, clear line that could be drawn at some age, only not 17.

MR.SEKULOW: All legislation is line drawing. Here –

QUESTION: What's the answer? An 8 year-old? Nobody under the age of 8 can give a contribution, period, end of the matter, that's it, that's the law, constitutional or not.

QUESTION: In a sense, the problem diminishes with the age. There aren't a great number of 8 year olds making contributions.

MR.SEKULOW: That's exactly correct, Mr. Chief Justice. And the fact is, as Judge Leon recognized, the younger the child gets, the less likely are they to have resources. But here again, as the government concedes, this is an absolute ban for 17 and under. It is not worrying about just two year olds or four year olds.

QUESTION: I'd still appreciate an answer. Six month old, right?

MR. SEKULOW: I'll give you the six month old.

QUESTION: Wonderful. Now, once you give me the six month old --once you give me the six month old, you've agreed that at some age, it's reasonable to draw a line. And once you're down that road, you have to deal with the obvious question that the Constitution draws a line at 18 years old to vote. And after all, it was thought you needed a constitutional amendment to get that result. And so what's wrong with Congress saying, well, we think the problem's about the same when you give money to a candidate as when you vote for a candidate. And so we're going to pick the same line. There are many 17 year olds who would be excellent voters and there are many older people who are terrible, okay? So they pick this line for that, we would like this line for this. And what's wrong with that?

MR.SEKULOW: Justice Breyer, two things are wrong with that proposition. First, the First Amendment rights of speech and association are not somehow contingent upon, dependent upon exercise of the right to vote under the 26th. Secondly --and a perfect example of that would be prior to the passage of the 19th Amendment, women were denied the right to vote in the United States but they certainly could still exercise the rights of speech and association to obtain the right of suffrage. And I think it would be exactly the same argument. Also, in fact, in 11 states, 17 year olds actually can vote in primaries so long as they reach the age of 18 by the next general election. So there are states in which in fact it can be that the 17 year old can vote. But that I think also proves up the problem here. And that is, if the government's justification for the prohibition --and here this absolute prohibition --is in fact that there is a concern over conduit giving, the existing regulations and existing law, 441(a) and (f), prohibit excess or contributions given in the name of another, a conduit gift. That is absolutely prohibited. Contributions given in the name of another within the same provision, prohibited. And of course, 441(a) prohibits gifts in excess of the contribution limits. This statute doesn't say that a 17 year old who is -- actually under this statute, a 17 year old who has her own means of support, who might even be emancipated, whose parents may have never given \$1 to a campaign are put in the situation where their gift is banned. It's unauthorized and inappropriate, illegal under the statute.

QUESTION: Mr. Sekulow, you said in your brief that you would accept even a severe limitation, but not an absolute ban, so among severe limitations, would it be constitutional to say, yes, 16, 17 year olds can give, but what they give is going to count against how much the parent or parents who claim the child as a dependent can give.

MR.SEKULOW: Actually, our --our discussion about that restrictions relates to what some of the other states have done by allowing if no states bans gifts by minors, some states do impose what's called family contribution caps or limitations. Again, certainly that would be more closely drawn than an absolute prohibition.

QUESTION: I just wanted to know what you meant in your brief by you would accept a limitation, even a severe one. Is this one that you would accept?

MR. SEKULOW: Well, we would accept this fact. If the Government could establish through evidence that in fact somehow a restriction on the incremental amount allowed to be given would meet the criteria of avoiding corruption or the appearance of corruption, if the Government established that, sure, but they haven't. I was using that as an --

QUESTION: I'm not asking you about establishing proof in one by one in an individual case, because that wouldn't be worth anybody's time. Could the law say it will count against the parent or parents who take the child as a deduction?

MR. SEKULOW: That would, I think it would certainly make it more difficult, Justice Ginsburg, to make a facial challenge if the gift, the symbolic gift and the associational rights were recognized by a cap. But again, this is a ban. It doesn't allow that individual 17-year-old, 16-year-old, 15-year-old to make that gift. We were trying to show through that, those examples of what some of the states have done to allow gifts to be made by minors but at the same time putting what's called family caps in place. It would certainly make it more difficult as a facial challenge, but again, this is a prohibition event.

QUESTION: Mr. Sekulow, is it necessary to rely on the First Amendment to reach your conclusion, or could you argue this an unreasonable restraint on liberty?

MR. SEKULOW: Well, I would argue both.

QUESTION: You do argue both?

MR. SEKULOW: I would. And I certainly would assert again that what the individuals planned on giving here is a liberty interest, but it's a -- it's also speech, it's also association. The underpinning of this Court's justifications for limitations is the fact that an act of some type can be given, a gift could be given. Here, it's a complete, again, a complete prohibition.

QUESTION: Let's go to our jurisprudence where, where the restriction in question is invalid or arguably invalid under a specific constitutional guarantee, such as the First Amendment.

MR. SEKULOW: Yes.

QUESTION: You don't resort to substantive due process to create some general liberty interest?

MR. SEKULOW: Absolutely correct, Justice Scalia.

QUESTION: So your answer should have been no.

MR. SEKULOW: Well, okay. Then the answer will be no. But it certainly is a First Amendment interest, and that's what we've asserted throughout this, that there is both the speech and the association --

QUESTION: Giving money is the First Amendment, yeah.

MR. SEKULOW: Yes, but that was -- the hypothetical was assuming that that wasn't available. However, the First Amendment -- 2

QUESTION: You'd rather have his vote than mine?

MR. SEKULOW: Well, I would certainly like to have yours, Justice Stevens. The -- I think the bottom line of this ban is what came up in, was one of the opinions, is no one knows exactly where this came from. There is no evidence that was submitted of any significance justifying this prohibition. Administrative convenience in enforcement is certainly not a basis for curtailing speech or associational rights.

QUESTION: Didn't the FEC have, didn't they continuously write about this and say there seemed to be an awful lot of tiny children who are sending in money for your trust funds or something.

MR. SEKULOW: Actually, Justice Breyer, they wrote in a –

QUESTION: What did they say?

MR. SEKULOW:--in the reports that there was, they thought there was a concern, or evidence that they said, there was concerns over conduit giving. However, actually the FEC could never make the conclusion, though, nor could Congress because neither Congress or the FEC ever asked for the age of the donor, so they could not determine whether in 2 fact there was a violation of conduit giving in and of itself, that's already prohibited under 441a and f. They don't even ask for the age of the contributor, so to go from a situation, and by the way, they never asked for a complete ban. The FEC in all of its recommendations never asked for an absolute ban on considerations by minors to be put in place. They had a presumption issue for those that were 15, 14, and 13, under 15 and under, but that was a request for a presumption which was rebuttable, rebuttable under voluntariness, rebuttable if in fact it was from funds controlled by the minor and it wasn't a gift directed by the parent. For these reasons, the fact that this is a ban, this is not a limitation, we would request the Court affirm. Thank you.

QUESTION: Thank you, Mr. Sekulow.