IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 53 Original

STATE OF ALABAMA, One of the States of the United States, by and Through GEORGE C. WALLACE, as Its Governor,
Plaintiff,

v.

JOHN B. CONNALLY, as Secretary of the Treasury of the United States, and RANDOLPH W. THROWER, as Commissioner of Internal Revenue of the United States,
Defendants.

BRIEF

In Support of Motion for Leave to File Complaint

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JURISDICTION

The Jurisdiction is set forth in Article III, Section 2, Clause 2 of the Constitution of the United States.

"In all cases affecting Ambassadors, other public Ministers and Consuls, **and those in which a state shall be a party,** the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." (Emphasis added.)

STATEMENT OF THE CASE

The State of Alabama is seeking leave to file an original action in this Court to test the legality of income tax exemptions accorded private foundations and religious organizations under Section 501 of the Internal Revenue Code of 1954 (26 U.S.C. Sec. 501).

PROPOSITIONS OF LAW

Proposition I

Where the State is a party, plaintiff, or defendant, the Governor represents the State; and the suit may be, in form, a suit by him as Governor in behalf of the State.

Ex parte Kentucky v. Denniston, 24 How. 66, 16 L. Ed. 717;

State of Alabama, by and through George C. Wallace as its Governor v. United States of America et al., 373 U.S. 545, 10 L. Ed. 2d 540.

Proposition II

The provisions of Article III of the Federal Constitution, limiting jurisdiction of federal courts to cases or controversies, impose no absolute bar to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs.

Flast v. Cohen, 393 N.S. 83, 20 L. Ed. 2d 947.

Proposition III

No church may be financially supported or preferred by the federal government over any other, and no religious activities may be subsidized.

Protestants and other Americans United for Separation of Church and State v. O'Brien, 272 F. Supp. 712.

ARGUMENT

I

Where the State is a party, plaintiff or defendant, the Governor represents the State; and the suit may be, in form, a suit by him as Governor in behalf of the State, where the State is a plaintiff; and he must be summoned or notified as the officer representing the State, where the State is defendant. **Ex parte Kentucky v. Denniston,** 24 How. 66, 16 L. Ed. 717; **State of Alabama, by and through George C. Wallace as its Governor v. United States of America** et al., 373 U.S. 545, 10 L. Ed. 2d 540.

Under the above authorities, there can be no question but that this Court has jurisdiction to entertain this case and to grant the relief sought in the Complaint.

II

The provisions of Article III of the Federal Constitution, limiting jurisdiction of federal courts to cases or controversies, impose no absolute bar to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs. **Flast v. Cohen,** 393 N.S. 83, 20 L. Ed. 2d 947.

Since this Court has sanctioned actions by individual taxpayers to question the taxing and spending programs of Congress, certainly a sovereign state has standing to attack the granting of exemptions to private foundations and churches who have departed from the very basis on which the exemptions were granted in the first place and are so conducting themselves in such a manner that they are no longer entitled to the exemptions.

When private foundations use tax exempt income to espouse the cause of Communists in America; to promote revolution in the streets of our cities; to participate in

registration drives among blacks to elect radical mayors of certain cities; and bankroll the pro-Viet Cong American Friends Service Committee; grant funds to organizations which preach revolution and racial hatred; financing of Communists and radicals to run school "decentralization" in New York City, producing the bitterest sort of racial antagonisms; and making grants to the Leftist Urban League—are they not engaged in propaganda activities, attempting to influence legislation, and aiding and abetting political campaigns on behalf of candidates for public office?

These activities and these grants are not clothed with the protection accorded exempt organizations or foundation(s) "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes—no substantial part of the activities of which is carrying on propaganda . . ." They are not "charitable" foundations in the common law sense,[1] and to this extent, at least, they should no longer enjoy a tax exempt status.

There is a precedent for declaring unconstitutional Sections 170 and 501 of the Internal Revenue Code of 1954 in their application.

In the case of **William H. Green et al. v. David M. Kennedy (Connally), Secretary of the Treasury of the United States of America, and Randolph W. Thrower, Commissioner of Internal Revenue** the United States District Court for the District of Columbia filed on June 30, 1971, Civil Action No. 1355-69, held unconstitutional Sections 170 and 501 of the Internal Revenue Code of 1954 as applied to private schools in Mississippi which exclude Negro students on the basis of race or color.

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[1] The new interpretation of the IRS as expressed in **Green et al. v. Kennedy, etc. and Thrower, etc.**, District Court for District of Columbia, Civil Action No. 1355-69, filed June 30, 1971.

The plaintiffs, Negro Federal taxpayers and their minor children attending public schools in Mississippi, brought a class action seeking to enjoin the Secretary of the Treasury and Commissioner of Revenue from according tax exempt status to such schools. "They sought a declaration that granting tax exempt status to such schools is violative of the provisions of the Revenue Code governing charities and charitable contributions, and that if granting such status was authorized, then to that extent Sections 170 and 501 are unconstitutional."

In a 50 page opinion, a three-judge court ruled in favor of the plaintiffs holding that the IRS had changed its interpretation of the exemptions permitted by the Code and that now private schools which practice racial discrimination are not "charitable" in the common law sense.

It logically follows that private foundations and churches that engage in activities wholly at war with the purposes for which exemptions were granted them are no longer "charitable" in the common law sense, and to that extent Sections 170 and 501 of the Revenue Code of 1954 are unconstitutional.

III

No church may be subsidized and preferred by the federal government over any other, and no religious activities may be subsidized. **Protestants and other Americans United for Separation of Church and State v. O'Brien,** 272 F. Supp. 712.

The First Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Under the "establishment clause of this Amendment, it is well-settled that the federal government cannot pass laws which aid one religion, aid all religions, or prefer one religion over another. **Emerson v. Board of Education of the Township of Ewing, et al.**, 330 U.S. 1, 91 L. Ed. 711; **Illinois v. Board of Education of School District No. 71**, 333 U.S. 203, 92 L. Ed. 648.

When some church organizations use tax exempt income as a contribution to the defense fund (which is also tax exempt) of avowed Black Panther and Communist, Angela Davis, have they not forfeited their right to continue to be exempt as an organization operated exclusively for religious purposes?

It is earnestly insisted that such church organizations making contributions to such defense funds are no longer engaged in charitable activities and should no longer be accorded a tax exempt status. It certainly cannot be claimed that it is "organized and operated exclusively for religious purposes," and to that extent, Sections 170 and 501 of the Internal Revenue Code of 1954 is unconstitutional.

It is arguable that exemption of religious institutions from taxation constitutes an indirect subsidy which is as invalid under the First Amendment as would be a tax levied directly to support such institutions. See, *e.g.*, **Murray v. Comptroller of Treasury**, 216 A.2d 897 (Md. 1966). In his concurring opinion in **Engel v. Vitale**, 370 U.S. 421, 8 L. Ed. 2d 601 (1962), Mr. Justice Douglas stated:

> The point for discussion is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes.

CONCLUSION

The State of Alabama respectfully urges this Honorable Court to grant its Motion for Leave to File Complaint in the Court, and grant its prayer restraining and enjoining the defendants, John B. Connally, as Secretary of the Treasury of the United States, and Randolph W. Thrower, as Commissioner of Internal Revenue, from exempting the income of religious institutions, foundations, organizations, and similar associations, whether located within or without the State of Alabama, from the federal tax on income pursuant to the provisions of Section 501 of the Internal Revenue Code (26 U.S.C., Sec. 501).

Alabama earnestly insists that these financial giants should bear their proportionate share of the staggering income tax burden that now rests upon her citizens, and citizens throughout the Nation, who do not enjoy tax exempt status and are forced to pay a disproportionate share of federal income tax.

Respectfully submitted

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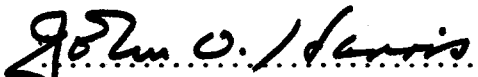
Certificate of Service

I hereby certify that on this 29 day of July, 1971, copies of this Brief in support of Motion for Leave to File

Complaint were mailed, postage prepaid, to Messrs. John B. Connally, as Secretary of the Treasury of the United States, and Randolph W. Thrower, as Commissioner of Internal Revenue, by addressing and mailing copies to the Solicitor General, Department of Justice, Washington, D. C., 20530. I further certify that all parties required to be served have been served.



Of Counsel for Plaintiff