In the

Supreme Court of the United States

FLORENCE DIFFENDERFER
and NISHAN PAUL,

Appellants,

vs.) 70-47

CENTRAL BAPTIST CHURCH OF
MIAMI, FLORIDA, INCORPORATED,
et al.,

Appellees.

Washington, D. C.
December 6, 1971

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Appellees.

Washington, D. C.,

Monday, December 6, 1971.

The above-entitled matter came on for argument at 11:43 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

LEO PFEFFER, ESQ., c/o American Civil Liberties Union Foundation, 156 Fifth Avenue, New York, New York 10010, for Appellant Diffenderfer.

HOWARD J. HOLLANDER, ESQ., 708 City National Bank Building, Miami, Florida 33130, for Appellant Paul.

CHARLES M. WHELAN, ESQ., 106 West 56th Street, New York, New York 10019, for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 47, Diffenderfer against Central Baptist Church.

Mr. Pfeffer.

ORAL ARGUMENT OF LEO PFEFFER, ESQ.,

ON BEHALF OF APPELLANT DIFFENDERFER

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

This case presents the question, whether the First and Fourteenth Amendments of the Constitution forbid government tax exemption to extend to church-owned commercial property?

The specifics of the case involve a Florida statute --

Q Excuse me, Mr. Pfeffer. I wonder, before you begin, the Attorney General of Florida has filed a suggestion which, as I read it, says that this exemption is no longer available under Florida law and the issue to which I wish you would particularly address yourself, says that under Florida law this particular property is a reversal and cannot be subjected to tax; is that right?

MR. PFEFFER: Yes. Not quite. The -- I have addressed myself to the question of mootness in my reply brief which I have filed with this Court, specifically to that exclusive issue. But I will briefly state why I believe the case is not moot.

In the first case, the new amendatory law is not yet in effect. It takes effect next year, December 31st of this year, which means the next fiscal year. So that the taxes this year, at the very least, is before the Court, so that it's not moot.

Q Let me see now. You mean even if the tax -- if we were to reverse and the tax for the past year is not collectable, you say it is collectable for --

MR. PFEFFER: For this year, because the statute itself, at the very last, says it shall not take effect until next year. You'll find that and the suggestion -- you'll find that on the very last page, 15, of the suggestion of the Attorney General of the State of Florida, which has a text of the amendatory statute.

Actually it will take effect December 31st, 1971, which means the next year, not for the current one.

So that, at the very minimum, it's applicable.

There is also a Florida statute which says that if any tax which is not collected for any reason, is thereafter determined to be payable, the taxpayer is liable for the years past.

So that on the very technical --

Q Well, that's the one that concerned me. I thought the State was suggesting that there was no such --

MR. PFEFFER: Yes, there is. It is contained in my

reply brief.

Q Well, perhaps I should ask your adversary, then. I won't take any more of your time.

MR. PFEFFER: And the statute does so provide.

Q I take it, you would concede if there were no tax collectable, in the event you prevail, then this case would be moot, wouldn't it?

MR. PFEFFER: Well, I don't think so, for a different reason. I think that under the decision of this Court, in Flast v. Cohen, a determination that the plaintiffs here, as the taxpayer, has standing to sue, means that they have been individually harmed by the exemption; and while the State of Florida can, if it wishes to, provide that in the future there shall be exemption, at least as far as the tax which has accrued, while this suit is pending, at the very least -- the very least -- the plaintiff, by his factor, he has standing, has been personally aggrieved.

Q Even though the tax is never collectable?

MR. PFEFFER: Oh, well, the tax may be collectable, presumably, within the power of this Court as a court of equity.

Q No, no --

MR. PFEFFER: What do you mean?

Q -- my hypothesis only was: would this case be moot if in fact you prevail, and the property were taxable, nevertheless, the tax is not collectable under Florida law?

MR. PFEFFER: Well, I would say that under the First Amendment the plaintiffs here would have a suit in the court to compel this payment of taxes as a redress for a wrong already committed.

Q I see.

MR. PFEFFER: An equitable part of the cause.

In any event, the issue -- it is collectable, as I indicated, and the issue is one of national importance; else the Court would not have noted it.

Q Well, as you know, Mr. Pfeffer, I'm sure, Florida has a rule that sometimes I wish many other States had --

MR. PFEFFER: Yes.

Q -- which permits us to submit the State law questions to the Florida Supreme Court before we decide a constitutional question. We've done that once or twice, --

MR. PFEFFER: Yes. Yes.

Q --in the Aldrich case among others.

MR. PFEFFER: Yes.

Q You don't think this might be an appropriate case for that --

MR. PFEFFER: I don't think it's necessary, because the amendatory statute is unambiguous; it says it will not take effect until next year. So, to that extent, I don't think you should.

Q You said you don't think it's necessary. Do you

think it would be an appropriate case?

MR. PFEFFER: No, Mr. Chief Justice, I don't think so. Because I think if the Florida Court, as I indicated in my brief, if the Florida Court would say that the tax is not collectable retroactively, I would say that still raises a federal issue, a federal question, whether the State of Florida can deprive a taxpayer of that equitable remedy any more than it could deprive him of the right just to originate. It's a federal question, not a State question.

Now, the question, to the specifics of this case, is a Florida statute which, as I pointed out, has been amended. Now, there is a difference between myself and the attorney for the other plaintiff. We do not challenge the constitutionality of the amendatory statute.

The amendatory statute says: when a piece of property owned by a church is used partly for church purposes and partly for non-commercial purposes, that part which is used, there shall be a pro rata tax on that part which is used for non -- or the extent it's used for commercial purposes.

Mr. Hollander, representing the plaintiff Paul, is of the opinion that any use of it destroys the entire exemption. We do not go that far. We concede, at least for the purpose of this case, that to the extent that the statute prorates the taxability, to that extent it is constitutional.

Now, the question presented to this Court is whether

this Court's decision in Walz, which upheld the exemptability of property owned by a church and used exclusively for religious purposes, extends to property which is used for -- at least in part, purely in the secular field of commercial competition and enterprise, the sole relationship to the church being that all the profits of it go to the church.

It is our contention that nothing in the Walz case requires its extension to this particular case, and the issue is specifically not before the Court.

In Walz, the Court recognized and rejected the argument there presented that tax exemptions represented the first step in an inevitable progression. The Court said: the history of tax exemption for 200 years shows there has not been an inevitable progression in breaking down the wall of separation between church and State.

If Your Honor please, this case shows that perhaps the Court was a little too optimistic in Walz, because this is a further step. Unlike the Walz situation, this does not have the support of 200 years of uniform, universal practice upon which the Court, both the Court's opinion and concurring opinion, relies in large measure on Walz. It shows that ever since our Constitution was written, in every State of the Union, including the Federal Government, land used exclusively for religious purposes was exempt.

And the Court pointed out, the concurring opinion

pointed out, that this history is worth volumes of logic and should be of great weight.

The history here is just the reverse. The history here shows, as I've pointed out in my brief, that even as far back as 1217 there was this device of turning over property to -- religiously owned property for non-religious use as a means of avoiding the obligations of feudalism and what today would be the functional equivalent of taxation.

Now, it is our contention that a statute which exempts a church from those burdens which every sector of commercial institutions bears in its operation in the commercial area, is inevitably a statute whose purpose, or certainly its effect, whatever its purpose, its primary effect is the advancement of religion. To that extent it is subject to the restrictions of the First Amendment.

Now, in Walz, the Court noted, aside from the historical background of tax exemption, that the State was faced with an alternative here: tax the church, in which case there will have to be some entanglement of the State in church affairs; or do not tax it, in which case the entanglement, if any, will be considerably less.

And the rationale of the Court, as I see it, the rationale of the opinion as I see it, is this: that prima facie, at the very least, a statute by the State which advances religion or aids religion is prima facie subject to constitu-

tional, at least, scrutiny, strong scrutiny. And it's only if you can show, as was asserted in Walz, that there is a countervailing factor: that to tax would impose another evil, which the First Amendment sought to avoid, the evil of entanglement, then we will allow the exemption rather than invoke the entanglement.

Now, in the cases decided since we wrote the brief in this case, the Lemon, and DiCenso, and the Tilton cases, the Court found that the Walz case did not intend, and it did not expand the scope of governmental, of permissible governmental aid to religion, but restricted; and the Court noted, particularly in Tilton, which involved the college aid, and the Court held that that part of the federal law which said that after 20 years a college which receives part funds to build a facility may use it for any purpose. That part of it the Court unanimously -- there was no Court's opinion in Tilton, there was a plurality.

But there the Justices agreed that to that extent, at least, that statute was unconstitutional. There was some value which existed after 20 years, and the State could not, or the Federal Government could not aid or advance religion to that extent.

Even though -- even though it would mean continuing surveillance and entanglement after the 20 years. Because the statute, Higher Education Facilities statute, forbade the use

of those facilities financed with federal funds to be for sectarian teaching or religious worship. So that the government agency, after 20 years, would still have to keep an eye on that facility, to make sure it was not used for religion.

Thus quite clearly indicating, although there seems to be an impression, which I do not believe is valid, that the Everson rule had been buried, dead and buried, and that the government may aid religion; I don't know of any case that so holds. But it's quite clear that Tilton and Lemon-DiCenso do not allow a government aid to religion absent some counter-vailing factor, such as in Walz, entanglement in Everson, the welfare of children who were protected from the accidents of the hazards of the road, and that type of case.

Now, our contention here is that the amount of entanglement involved in financing the commercial activities of a religious group is minimum, and that it is far outweighed by the other factors which call for constitutional restriction upon that aid or benefit to religion.

One of the things which we believe should be considered by the Court, and which the Court noted, both in Walz and in Lemon and DiCenso, that one of the things, one of the major evils the First Amendment was aimed at avoiding was what the Court called the potential for political divisive-ness along religious lines; divisive political potential.

That the fathers of our -- the First Amendment were

afraid, and they had a whole history of 2,000 years of political control and divisiveness because of religion, churches seeking certain benefits, and the church in return seeking to control the -- the State in turn seeking to control the church.

We contend that this type of legislation, which puts a competitive advantage in the business world in favor of churches, necessarily brings that type of divisive political potential which this Court warned against, both in Walz and repeated it in Lemon and DiCenso. The acrimony, the bitterness, the feelings of a garage plot owner across the street in downtown Minneapolis, from that owned by the church, that the church doesn't have to pay a tax and therefore can undercut him, whereas he has to pay taxes.

That kind of political divisiveness, that kind of reaction towards favoritism to the church is one of the dangers which I believe the First Amendment was intended to avoid.

Now --

Q Well, a municipality could easily control that competitive aspect, could it not, by prescribing rates? Is the competitive factor really very important?

MR. PFEFFER: Oh, yes, it is, Mr. Chief Justice, because the municipality -- the State -- the municipality belongs to the State -- the State could avoid it by simply taxing it. The point is that it doesn't. It's not that it

has the power to, the point is that if it has the power to it would simply -- nobody contends, Mr. Chief Justice, that the State could not impose such a tax.

Q I just thought you were resting too much on the competitive factor, when the municipality could govern that by fixing all the rates for all the parking lots, so that one could not undercut the other.

MR. PFEFFER: But, as I have indicated, Mr. Chief Justice, if the State does not want to give an unfair advantage to the church, they could do it, or rescind it by simply not making it tax-exempt, by simply not -- by not making it tax-exempt. Which I do not believe that the appellees here contend that there is a constitutional right to tax exemption.

MR. CHIEF JUSTICE BURGER: We'll suspend for lunch.

(Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Pfeffer, you may proceed.

MR. PFEFFER: I believe I've used up my time. The balance of my time will be used by Mr. Hollander, the attorney for the other appellant.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Hollander.

ORAL ARGUMENT OF HOWARD J. HOLLANDER, ESQ.,

ON BEHALF OF APPELLANT PAUL

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

The case is, of course, one involving separation of church and State, and is in fact a progression of the Walz decision decided last year by this Court.

I do not premise my thinking on this case on the Everson decision. I believe that my position can be squarely met in the dictates of not only Walz, but the three cases decided this year, DiCenso, Tilton, and Lemon.

This Court has said, in those three cases, as well as Walz, that there are three main evils against which the establishment clause attempted to prevent, and that was: financial aid, sponsorship and active involvement.

And we measured those three evils by three tests,

we are told. The tests are: whether or not there's a valid secular legislative purpose; the second was a test decided in Schempp, which is whether or not the primary effect either inhibits or advances religion; and the third test is whether or not there is excessive entanglement or active involvement.

I think that the case before Your Honors is clearly one not involving a valid secular legislative purpose as seen in the Walz decision, where there was discussion in the Court opinion concerning the pluralism of religions and the good works of religions. Certainly that's not involved, where we have a commercial parking lot. And that, incidentally, is exactly what it is.

We're involved with a square block in the City of Miami, which occupies 127,500 square feet, of which 75,000 square feet is this commercial parking lot. Monday through Saturday -- this is all stipulation of facts, because it's not contested; we're up here on stipulation of facts -- Monday through Saturday, each and every day other than Sunday, this religious institution rents out this lot other than those particular lots within the 290 which are used for persons who might want to attend church that day for a choir meeting or a directors meeting of some kind. Other than the portion which might be used for someone who might have some business Monday through Saturday in the church, the entire rest of this lot, 75,000 square feet, 290 parking spaces, is rented out

commercially, six days out of seven days a week. This is stipulation of facts.

Q What do you mean rent it out commercially; is there an operator on it?

MR. HOLLANDER: Oh, yes. Drive your car in, you pay your toll and go out.

Q You mean this is operated as a regular parking lot?

MR. HOLLANDER: Right. You don't know that it's necessarily owned even by a church, it just sits -- it's just a regular parking lot for anyone who doesn't have business in the church.

Q Are these church employees who are the attendant?

MR. HOLLANDER: Are they church employees? I really don't know that, sir. I don't know.

Q The church hasn't leased the lot to a parking lot operator who runs it as a parking lot? It's directly by the church, is that it?

MR. HOLLANDER: I really can't tell you that, sir. I don't know whether or not they lease it. I know that the lots are used commercially six days out of seven days a week; I don't know if there's anyone else that intervenes between the church and perhaps the --

Q The stipulation of facts doesn't cover that at all?

MR. HOLLANDER: I don't think it covers that, Your Honor. But I don't really think that gets at the issue. The issue is whether or not, in my judgment, the primary fact of renting out Monday through Saturday 290 spaces, or almost all of that, or the active involvement of the government is such as to transgress the restrictions of the establishment clause.

I think that is really the issue involved, and I don't think whether or not the institution itself, or a corporation which the institution has contracted with, actually runs the lot.

Q What would you say if the church just made the lot available to the general public during the week, at no cost?

MR. HOLLANDER: I think it's constitutional. I think it's constitutional.

Q That would be a non-religious purpose.

MR. HOLLANDER: I think so, but this lot is -- that's not the case. The stipulation of facts, of course, is --

Q Well, where are the stipulations with respect to this aspect of the rental? Are there here in the Appendix somewhere?

MR. HOLLANDER: The Appendix was dispensed with. They are --

Q Yes.

MR. HOLLANDER: -- as part of the record, and they are quoted, incidentally, at length in the appellees' brief.

Q Yes.

(Mr. Hollander leafing through pages.)

Q Well, I don't want to take any more of your time. I can find it if they're in the appellees' brief.

MR. HOLLANDER: They are -- well, it's certainly a stipulation of facts which all parties entered into.

Q I understand that.

MR. HOLLANDER: And I don't -- I don't think that those facts are at all in issue.

I do think that we have some very important things to decide, and that is, certainly the valid secular legislative purpose is not there. Then we come to the primary effect.

And I noted the language in Tilton. I think that's extremely important, because Tilton was decided on the basis that the buildings were strictly secular. There were no religious symbols; there was no permeation of religion in higher institutions. It was strictly secular use.

So the Court was concerned with the use of these facilities. Well, what's the use of this facility? Six days out of seven days each week they rent out this parking lot, and they take in a profit; they're at a competitive advantage because they don't pay taxes.

So if the use of the property is to be any kind of

criteria, as apparently it was in the Tilton decision where the buildings were strictly secular, and the Court dwelled on that fact, then certainly the use of this property commercially would cast it within the terms of the establishment clause. And certainly also within the terms of what this Court discussed in the Tilton decision.

I also think that the entanglement that we get involved in, which this Court discussed in the three decisions this year, and the Walz decision last year, is present in this case.

The kind of political divisiveness, which this Court says is not inherent in our people, is certainly involved in this case.

After all, we have a Circuit Court that attempted to tax, we have a Supreme Court of Florida that got outraged at the Circuit Court and reversed; we have a Legislature that says, We don't like the Supreme Court's decision at all; threw out the statutes, and said that next year we'll go into new statutes. We have a raging controversy in Florida over this lot, and a very political divisiveness which this Court seeks to prevent is exactly what we have with the commercial parking lot in Miami.

Now, is it a commercial parking lot, or is it something else? The District Court down there said it was a commercial parking lot. They held as follows:

"Does the holding in Walz vs. Tax Commissioner, supra, that there is no establishment of religion and no inhibition of the free exercise of religion in a state taxation scheme which exempts from taxation property used 'exclusively for religious purposes', i.e., 'religious properties used solely for religious worship' -- encompass the tax exemption in the instant case as it applies to church property, used as a commercial parking lot? We answer affirmatively."

So they concluded it's a commercial parking lot. But why have they decided it's okay, a novel constitutional principle? They said, because the proceeds go to a worthwhile charitable recipient, based on Walz, and the court based their decision on Walz; and the recipient, we're going to hold that it's perfectly all right because there's a worthwhile recipient, even though we hold it a commercial parking lot.

I think that's a novel ruling, because I've never seen any establishment case, really, that looked at whether or not the worthwhile recipient was such as to permit it within the establishment clause. And, incidentally, the very kind of entanglement is inherent in that kind of decision.

After all, the sight of government auditors, government inspectors, in daily surveillance, running through church records each day to determine where the funds were traced to, was it or not a worthwhile recipient? That is the very kind, as I understand it, of surveillance which this Court says is

not proper under the establishment clause.

So the very decision of the U. S. District Court calls for the kind of surveillance which is "trace the funds, and if it's worthwhile, fine; if it's not worthwhile, then we do something about it."

Now, I think, along these very same lines, and counsel and I may have a difference here -- I think we do -- the new statute which is going to go into effect next year is even worse than this one, because the new statute says -- well, we're going to break it off at 50 percent, and if it's less than 50 percent we will prorate it, you see.

So the government auditors or inspectors, in their daily policing, will go through the records of the church of these 290 spaces, and will say: You used this space Monday, Wednesday, and Friday for commercial purposes; you used this space Tuesday and Thursday for religious purposes. And they will have to go through how many spaces were used for religious purposes, how many for commercial purposes, and the very surveillance, the very abhorrent kind of degrading situation, not only for the government but for the religious institution, is inherent in the new formula. It doesn't cure it, it makes it worse; the new statute.

Q Well, on this issue, I gather, you and your fellow counsel, your fellow appellant, are are odds; am I right?

MR. HOLLANDER: We are at odds. I think that the new

statute is even worse than the old statute, because I think it calls for greater entanglement even than the old one does.

Q As I understand his position, he told us that he doesn't think the new statute produces an unconstitutional situation.

MR. HOLLANDER: Yes, sir. Yes, sir. We are at odds on that point.

Q Right.

MR. HOLLANDER: Now, I want to preface my remarks in that regard.

Q I understand. Right.

MR. HOLLANDER: I wanted to direct the remainder of my remarks to the mootness issue, because I think it's specious in all respect. It's specious for several reasons.

First of all, let's get to the back-taxing. Back-taxing is specifically permitted in Florida. It is specifically permitted by Florida Statute 193.092, and the two cases cited by appellees, which is the City of Naples case and the Blount case, stand for the proposition that back-taxing is permitted. In fact, the two cases say so.

Q Mr. Hollander, do you think this Court has the authority to tell the State of Florida that they must collect the back taxes?

MR. HOLLANDER: Yes, sir; I think it does, because I think it's a matter of --

Q Under what authority?

MR. HOLLANDER: Under the First and Fourteenth Amendments, which tells us that the establishment of religion is prohibited and that --

Q Well, for how many years back?

MR. HOLLANDER: It's permitted for three years under the statute.

Q Well, why couldn't we -- we're not bound by that according to your opinion; we could go back 20, couldn't we?

MR. HOLLANDER: Well, perhaps so.

Q Just how far do you go?

MR. HOLLANDER: Well, at least the statute permits three years. In fact, Your Honor, the case says -- and these are the very cases cited by the appellees in this point -- the case says: Although back assessments are specifically authorized by Florida statute --

Q Well, specifically, what vehicle would that be? Mandamus? An order? Or what?

MR. HOLLANDER: Well, I don't -- I can't tell the Court what procedure to use. I simply think that --

Q Well, tell me, who has authority to levy the taxes in Florida?

MR. HOLLANDER: The county authority, the taxing authority in Dade County.

Q Are they a party here?

MR. HOLLANDER: Dade County is a defendant, party defendant, Your Honor.

Q And who collects there? Is he a party? Is the tax collector a party?

MR. HOLLANDER: I'm sorry, sir; I can't hear.

Q Is the tax collector a party?

MR. HOLLANDER: Well, Dade County, Florida, is a party to this suit, Your Honor.

Q I know Dade County is --

MR. HOLLANDER: And Mr. R. K. Overstreet, the Tax Collector of Metropolitan Dade County, is a --

Q And did you ask for the relief that they assess the taxes?

MR. HOLLANDER: Oh, oh, this has been implicit. They attempted to assess the taxes. The Florida Supreme Court said they can't do it.

Q No. No. Where do you specifically say that you want them to levy for back taxes?

MR. HOLLANDER: The -- well, my complaint calls for the taxation of it. Perhaps I didn't spell out that I not only want taxation, I want back-taxation as well. But I think my complaint covers exactly what we're looking for.

Q You think under the case as it now stands we can order them to levy the taxes?

MR. HOLLANDER: Yes, sir. I have no question about

it because I think the cases in Florida specifically permit it.

I call Your Honor's --

Q I can understand that you have no question about it.

MR. HOLLANDER: Yes, sir.

The cases, although back assessments are specifically authorized by Florida Statute 193.23 FSA, equitable estoppel will prevent the city in this case, where good faith is not disputed; that case happened to involve, where the city -- certain reliance was placed upon what the city or county had done, so they said, Well, in this case you can't do it. But the general principle in the statute was upheld. They did the same thing in Coppack vs. Blount. In Coppack vs. Blount, they specifically said: However, from defendant appellant's brief we determined the trial judge concluded that the back assessments involved herein were specifically authorized by statute 193.23, Florida Statutes.

We agree with this conclusion.

They then said, Well, because of certain reasons in this case, we feel that we have to estop the taxing authorities, because --

Q Well, I don't read the State as saying anything differently. What they say at page 3 is: "back-assessments, construed by the Florida Supreme Court to be inapplicable

because of estoppel in such circumstances."

MR. HOLLANDER: But not estoppel against the plaintiffs in this case. It was estoppel against the taxing authorities.

Q Well, I don't know about that.

MR. HOLLANDER: Why would the plaintiff, who never misled or never intended to rely on any -- never gave reliance upon these people, possibly be estopped?

Q Yes, but who collects -- it's the public authorities that collect the taxes, isn't it?

MR. HOLLANDER: I think so, and I think --

Q Also the back-taxes would have to be collected, not by you but by the public authorities,isn't it?

MR. HOLLANDER: That's right, Your Honor.

Q You mean to say that this doctrine of estoppel may not be applied -- that they made that up?

MR. HOLLANDER: Well, the county never gave these people reliance that they would not tax --

Q No, no, no. Who makes that decision, whether the estoppel doctrine applies or not?

MR.HOLLANDER: Well, I think that this Court can take notice of the Florida cases on point.

Q All the Florida cases say, according to the State, in any event, is that you can't collect them if the taxing authorities are estopped from collecting them.

MR. HOLLANDER: That is a -- I think that if Your

Honor really looks at this case, especially the points that that case makes at the end, both cases, which say we approve the general principles; but in specific cases we have to invoke estoppel. I think the Courts clearly say that we approve of the general principle of back-taxes, because we approve of the statute.

In those cases, the city and the county, respectively, gave --

Q Well, tell me, if the facts here were that the taxing authorities are estopped, on that premise that they are estopped from collecting the back-taxes, on that premise would this case be moot?

MR. HOLLANDER: Well, if they're estopped, there would be no other authority to collect the taxes.

Q Therefore the case is moot.

MR. HOLLANDER: Well, I -- I -- it would certainly have to go back, but I think, in my judgment at any rate, that whatever -- estoppel would not be present against these taxing authorities because they took it to the Supreme Court of Florida. They never gave these people reliance that they wouldn't assess. And, in addition, it's the plaintiffs who ask for the relief, and I don't think estoppel would be proper.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Whelan.

ORAL ARGUMENT OF CHARLES M. WHELAN, ESQ.,

ON BEHALF OF THE APPELLEES

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

The tax exemption that is involved in this case is possibly singular in the history of American tax law. But it's certainly extinct. The statute has been changed. This particular tax exemption will not be available after the end of this year, and this year's tax year is already closed.

Q What are your tax years?

MR. WHELAN: Well, it begins in January and by the --

Q Calendar year.

MR. WHELAN: -- first Monday in October, the rolls are finished and nothing more can be done, except --

Q That is for the year 1971?

MR. WHELAN: That's correct.

Q I see.

Q Is that in the record, that October date?

MR. WHELAN: No, but it's in the statute that governs the assessments.

Q Well, is it clear that property inadvertently omitted, or omitted for any reason at all, could not be placed on after the October date?

MR. WHELAN: No, under Florida law, where there has been simple inadvertence, or even positive neglect, back-taxes

can be assessed for a period of three years. That's clear from the terms of the statute, and from the construction of that statute, in City of Naples v. Conboy.

However, where the taxing authority has positively and affirmatively treated the property as exempt, as it has in this case, since the decision of the Supreme Court of Florida, then the taxing authority cannot change its position after the rolls have been endorsed on the first Monday of October.

Q Is that principle applicable at any time to exemption? That is, you have many grounds, I take it, for exempting property --

MR. WHELAN: Yes, this is a general rule --

Q A general rule applicable to all exemptions?

MR. WHELAN: General rule for closing the assessment rolls. For all the taxpayers.

Q If it's listed by the assessing authorities as exempt, you're telling us that under Florida law that does establish an estoppel against the taxing authorities subsequently from collecting?

MR. WHELAN: That is correct, Your Honor.

Q I see.

MR. WHELAN: Now, it is true that in the City of Naples case that the Florida Supreme Court allowed the taxpayers, who were the plaintiffs in that suit and were trying to compel the City of Naples to disregard the contract that it entered into

for an exemption for real estate development, it is true that the Supreme Court of Florida said that while the city could not be compelled to collect taxes for the three years prior to the commencement of a litigation, that they could collect taxes for the years during which the litigation proceeded.

So, insofar as the plaintiffs make the contention that at least the current year's tax is still at issue, at least that much, because a court order could change the rolls; my answer to that is that the doctrine of equitable estoppel, as it has been applied in the Coppack case and the City of Naples case, would clearly result in a decision by the Supreme Court of Florida that the tax commissioners here cannot change their minds.

We are the ones who relied on the Supreme Court of Florida's decision in the suit brought some years ago by Dade County. So we have had the assurance of the Supreme Court of Florida that we meet the --

Q Well, doesn't this mean, if that's so, that the relevancy -- that the new statute is really irrelevant to the issue of mootness?

MR. WHELAN: Yes, it is.

Q Because what you're telling us is that we could never reach this question, since, in no circumstances could these taxes ever be collected?

MR. WHELAN: That is my contention, Your Honor. And

it seems clear to me that the law of Florida is quite clear on this point.

Q Even if the new statute had not been adopted, as Justice Brennan suggested?

MR. WHELAN: Yes, Your Honor.

Q So we can write that out of the case, in your view?

MR. WHELAN: Yes. However, if the statute, the old statute were still on the books, then it would seem to me that the -- at least the question of the old statute would still be around; but it's not around. And if the plaintiff -- if the appellants are correct,which I do not concede, if they are correct in saying that Florida is really out on the line of American tax tradition, you know, with this type of statute, and that it goes in the teeth of the whole history of Anglo-American tax law, then clearly this case becomes totally insignificant. The statute no longer exists. And if they're correct, Florida is the only, or almost the only jurisdiction that has ever permitted this sort of thing, so there is no significance to this case whatsoever.

However, the real issue in this case is not the issue that the appellants have presented. And the reason it isn't the issue that they have presented is that they have attempted to put a label of commercial business on an activity of the church which, while it has certain commercial dimensions, is

of a much more limited character and one recognized by all American jurisdictions as being something that is different from pure commercial activity.

Now, in the stipulation of facts, which is contained -- which is reprinted as an appendix to the motion to dismiss or affirm, we have the following stipulated facts between the parties. On page 3 of the Appendix, stipulation that --

Q Where's the Appendix?

MR. WHELAN: It's in the Motion to Dismiss or Affirm.

Q Yes, I've got it; thank you. Page 3?

MR. WHELAN: On page 3, we have a stipulation that all of this church property is being used for church purposes.

On page 4, a stipulation of the use of part of the parking area during the week by church members.

On page 5, particularly, we have a key stipulation. In the paragraph at the top of that page: that the church is located in the heart of a great metropolitan area, and is required to maintain the parking area for the use of the congregation, and so forth.

Then, part of this parking space -- this is in the middle -- is used every day of the week by people attending church and church functions. But rather than to permit that portion not to used to lie vacant, the church rents the parking area. The church does directly operate this parking area. There is no intervening lessor.

Q Well, tell me, under the new statute -- you know, that statute is not before us -- notwithstanding all this, the church is going to have to pay some part of the taxes, some taxes?

MR. WHELAN: That may be so, Your Honor. It depends on the regulations that will be promulgated in interpreting that 50 percent --

Q Well, of course, it has to be 50 percent or something like that?

MR. WHELAN: Yes.

Depending on what the church itself does, depending on what the regulations say the church does --

Q Well, I was just wondering if -- it says so flatly that this is an absolute essential to the church services, whether the new statute as applied to this may not render it total.

MR. WHELAN: Well, yes, there are questions that still have to be answered about the new statute; that is clear.

Q I take it you concede that Florida could eliminate exemptions altogether?

MR. WHELAN: Yes, it could, Your Honor.

Q And now you suggest that this new statute just gives a partial exemption to --

MR. WHELAN: That is certainly its intention. Its intention is to say that from now on we're not going to follow

the 75 percent rule. Florida had the statute, as is set out in the brief, where any charitable, non-profit organization could rent out up to 75 percent of its home facility, the basic facilities necessary for the operations, the exempt operations of that organization, and it could take the rental and use the rental income for exempt purposes.

Florida has now said, "We're not going to do that any more." If you don't use at least 50 percent of the facility for exempt purposes, then you have to pay 100 percent of the tax. If you use more than 50 percent, then we will apportion the tax according to the amount of the property that is used for non-exempt purposes.

So in this particular case the application that will actually be made of a new statute to the parking lot will depend on how that 50 percent is figured, and on what use the church makes next year. January 1st is the status date in Florida, so the use that's made of that church parking area on January 1st will determine the -- be one of the principal determinants of the application of the new statute.

Q Well, under that statute, would it be possible for the church to just lay out the square footage and carve off, to be safe, 49 percent of it and rent the 49 percent out?

MR. WHELAN: Then it would have to pay tax on 49 percent.

Q And it would reserve the others for church

purposes during the week as well as on Sunday?

MR. WHELAN: But the State may take the position that the area to be measured is strictly the parking area, and not all of the property owned, and that if more than 51 percent of the parking area is rented, then the taxes have to be paid on the entire parking area.

And we just don't know what position the county commissioners and the State will take on that question.

Q But if they took the parking area and the church reserved 51 percent for all times during the week for its church, under the new statute what happens?

MR. WHELAN: They would have to pay tax on the 49 percent that they rent out.

Q Is it licensed, the parking lot?

MR. WHELAN: It doesn't require a license, according to my information, Your Honor.

Now, finally, there's a stipulation on page 12 of the Appendix, that this parking lot is as necessary to the church as the roof. So there can be no question but that in this case we are talking about an income,incidental income-producing use of a facility that is absolutely indispensable to the conduct of the exempt operations, and functions of this church.

And that's why the issue in this case simply cannot be the issue that the appellants have attempted to raise, the broad issue of how far the First and Fourteenth Amendments

would prevent mistakes of the Federal Government, from granting an exemption, wipe the exemption that used to exist in the Internal Revenue Code before the Tax Reform Act of 1969. That exemption, the exemption of churches and certain other types of exempt organizations, from the tax on unrelated business income is the exemption that appellants seem to be attacking, but that exemption doesn't exist, either, except to the extent that there is a type of five-year clause in which the organizations that used to enjoy that exemption before 1969 are given a grace period in which to dispose of the property or start paying the full tax.

Q Mr. Whelan, how long has the parking lot been there?

MR. WHELAN: Well, the parking lot was originally not a part of the church, it was purchased mostly after the Second World War, to make it possible for the people to get to church. As that area developed commercially and, you know, became quite congested with automobiles, when they became available again, after the War and gasoline was then available, then it was necessary to secure this property; otherwise --

Q I was just thinking, you said it was as indispensable as the roof. I know some churches without parking lots; but I don't know of one without a roof.

MR. WHELAN: Well, in this particular case --

Q I wondered if you were pushing it a little far.

MR. WHELAN: Well, I have not pushed it beyond what appellants have stipulated --

Q Yes.

MR. WHELAN: -- and what the Supreme Court of Florida found.

Q That's right.

MR. WHELAN: And what the District Court in this case also assumed.

So, as I say, the question here is simply not the question of the constitutionality of an exemption that would be granted to some totally commercial operation of a church. The real issues in this case, as we see them, are, rather, the permissibility of parity of treatment by the States and the Federal Government of churches with charitable, non-profit organizations.

That's the only question that's before this Court, because Florida did not give any special treatment to churches in this case. Florida treated churches the same way that it treated charitable non-profit organizations in general. There is nothing specific, there's no preference here in favor of a church, Florida treated the church in the same method just as New York, in the Walz case, treated churches, the same way it treated other types of exempt organizations.

What appellants are really asking this Court to say is that churches have to be singled out, they have to be

singled out and taxed; they cannot be included in this general class of charitable non-profit organizations.

Q Tell me, suppose the church were ten miles from this parking lot. And the parking lot was because the church need to supplement its income, at the least, as a commercial parking lot seven days a week, and the evidence was that that income was absolutely essential to the church or it would have to close down. Under Florida law, would this parking lot be exempt?

MR. WHELAN: No, it would not.

Q Suppose it were owned by a charitable corporation, would it then --

MR. WHELAN: No, it would not be exempt. It's got to be used at least 25 percent, or had to be used at least 25 percent of the time as part of the home facility. So if it's completely separate, and it's not used for the exempt purposes, it simply is not exempt.

Now, I would draw the attention of the Court to the typical structure of an American charitable, non-profit organization. Think of any college or university, or any hospital, any orphanage, of good size, most of these organizations have, in addition to the basic facilities that they are using, other facilities which are also important and necessary, but which are open to the public, in many cases, and for which a charge is made.

The hospital cafeteria, the hospital parking lot, the auditorium in a college; it's never been a rule of American tax law that the only way a charitable, non-profit organization or a church can support itself is by free-rule offerings that are sufficient every year for its budget.

Every church in every State in the Union, and here in the District of Columbia, churches and non-profit, charitable organizations have been allowed to engage in fund-raising activities of various types of a more or less commercial character, without losing the property tax exemption.

Now, Florida, it is true, has adopted a rule that is somewhat different. In most States, so far as I have been able to discover, if the property is rented, that is the end of the matter. But Florida permitted, for a time, 75 percent rental without loss of the property tax exemption.

But there isn't any constitutional difference between this kind of permission for use, income-producing use of the basic home facility and the permission that has been granted for such matters as dances and dinners and picnics and bazaars of all kinds.

The rule has been, in every American jurisdiction, that the exempt organization has to be non-profit, it has never been that they have to be non-productive. That they have to be completely dependent upon the free-rule offerings of the public as a method of financing themselves.

Now, there have been, in our history, certain efforts now and then to change this rule, and to require, particularly the churches, to be dependent on free-rule offerings made each year and only on those offerings. But no jurisdiction has ever adopted the particular rule of law.

In this morning's paper we read of the Johnson Foundation, where a billion dollars has been donated for the charitable purposes of that foundation. And this initial gift will be administered by the foundation, in conformity with the law, and the income from that capital gift will finance many of the activities of the foundation.

Our law permits the creation of such activities and entities, and has always done so.

I think that there is still another matter which is of extreme importance in this case, and that is the attack by the appellants on the doctrine of legislative discretion in the tax area. This doctrine has been expressed by this Court on many occasions, notably in the Bell's Gap Railroad v. Pennsylvania case, and it was also in Gibbons v. District of Columbia case. It was also mentioned in the Walz case. That the Legislature isn't frozen into every particle of the tax laws. There is ample opportunity for the exercise of choice.

The Constitution set some limits. There are specific limitations in the Constitution of the United States in the

taxing power, both of Congress and of the States. But in the absence of a specific prohibition, clear prohibition, this Court has been,correctly, totally reluctant to imply limitations on the exercise of the taxing powers.

Q Florida doesn't impose ad valorem taxes on stocks and bonds, does it?

MR. WHELAN: On ad valorem personal property?

Q Yes.

MR. WHELAN: I do not know, Your Honor.

I just simply don't know the answer to that.

Q Mr. Whelan, --

Q If it did, and you have the problem here where the churches with endowments, in stocks and bonds --

MR. WHELAN: Oh, there would be problem in that area. My only information is that, generally speaking, in American tax law, such have not been subject to personal property tax.

Q It happens to be in New Jersey.

MR. WHELAN: Yes, and in the Pennsylvania case, the Bell's Gap case, in which this Court asserted the authority of the States to exercise discretion, that was a securities tax case, too.

Q Mr. Whelan, I'm just curious, I think I know the answer: Does the church have any federal income tax complications with respect to this parking lot? Is the income taxable,

Federal income tax --

MR. WHELAN: No, it is not, Your Honor, because the definition of an unrelated business excludes rentals.

Q Churches.

MR. WHELAN: Not churches any more.

Q Excludes rentals?

MR. WHELAN: Rentals; correct.

Q At any time has it ever paid Federal income tax?

MR. WHELAN: No, Your Honor.

Q And there is no State, no Florida State income tax, or at least hasn't been for a while?

MR. WHELAN: Not that I know of.

So the rental problem, and, say, the unrelated business income problem here is that the -- or the answer to it is simply that the Federal statute excludes from the definition of an unrelated business income derived from interest, from dividends, from rentals, and from royalties.

But let's consider for a moment the choice that the State faces in this area of taxation and exemption. It has only two choices: one, to tax; and the other, not to tax.

Appellants assert that not taxing helps. If they're correct in that contention, despite the language of the Walz case, which rejects that concept, that an exemption involves sponsorship or active assistance, that if they are correct in saying that an exemption helps, then it stands to reason that

taxation hurts.

In the doctrine of the Everson case, and of the subsequent explanations and elaborations of that case, is not that the government cannot aid the churches; it is that the government can neither help nor hurt. Certainly not on purpose. Can neither help nor hurt.

And in the face of this mandate of the First Amendment, what is the government to do when it can't avoid one or the other?

Now, I think this is a false dilemma. I think that the Walz opinion quite correctly rejected the concept that the exemption amounted to positive sponsorship of a church, or direct active assistance to the church.

What the government is faced with, the Legislature is faced with here is four types of organizations: governmental organizations, private for-profit organizations, charitable non-profit organizations, and churches and religious organizations.

Now, in the choice between taxing and not taxing, when it comes to the governmental organizations, the government is certainly not going to tax unless it engages in some budget bookkeeping, a shifting of the burden among different elements of the government.

In a private for-profit organization, the Federal Government and the States have elected to tax.

And in the charitable non-profit organizations, the Federal Government and the State Governments have elected not to tax.

Now, when they found to the churches and the religious organizations, which of these three categories are churches most like? Well, they're certainly not governmental organisations, and they're certainly not private for-profit organizations, because if they were they wouldn't qualify under the legal concept of a church. So they're much more similar to charitable non-profit organizations than to anything else.

And in view of the fact that many churches do engage in charitable activities in addition to the basic worship and preaching that they do, it is eminently sensible for a Legislature to treat churches and religious organizations in the same way that it treats charitable non-profit organizations.

But there's more to this than just reasonableness, because our historical tradition shows that this is the choice that all of the States and the Federal Government have in fact made. And if we have any reverence for the choices of our ancestors, it seems to me we ought particularly to reverence those that they not only practiced but they professed as being the right solution.

As far as the entanglement question is concerned, it seems to me that that is entirely spurious in this particular case. There has been no evidence whatsoever of that

entanglement, and there is no need for it under this kind, which is the only statute involved in this case, which permits the organization to do, to engage in this type of renting.

As far as policing the income is concerned, again that is a spurious claim, because in order for you to qualify initially as a church, the State has to be entitled to review that, has to be entitled to make at least simple external tests of the uses to which the property and income of that organization is put; so we can't have tax exemptions of any kind, and we couldn't have taxation of any kind, either, if the entanglement doctrine were pushed to the point where the State could not engage in simple external auditing at definite periods of time.

The last reason that would really justify and increase the justification for this choice of all the States is that if they were to single out churches as a special class, the churches would, as a practical matter, simply restructure their legal entities for holding their charitable non-profit activities.

In other words, if the doctrine were that the church could be exempted with respect to these traditional income-producing activities of the home facility, then the churches would spin off all their other activities into other types of corporations, and this seems to be an absolutely useless kind of gesture to force the churches to make.

Now, if the church whittles itself down to where it is simply conducting a house of worship, then Walz is absolute authority for the exemptability from the property tax of the house of worship.

Q And you are assuming, for example, that in this case the church could sell its parking lot to a corporation and then retain the shares in the corporation?

MR. WHELAN: Well, it certainly could do that; of course the corporation that it sold it to would have to pay the property tax and the income tax.

Q Yes, but the church would receive, as the sole shareholder, the net income?

MR. WHELAN: After taxes.

Q That's your hypothesis is what it had to --

MR. WHELAN: Yes, but take --

Q -- that the State could constitutionally do?

MR. WHELAN: Sure. It has every right to do that.

Well, I think in conclusion I can sum it up this way: The appellants are asking this Court to decide a question that's not presented by this case. They're asking the Court to decide a question -- to the extent that they're asking this Court to decide the question that is presented, the case is moot. And if, for any reason, the Court should decide the question presented by this case is not moot, then the only answer that the Court can give to the question which is simply

the constitutional permissibility of parity of treatment with respect to the home facility, is that that parity of treatment is permissible. Because that's the only answer that is consistent with the State and Federal tax history, with religious neutrality, and with the preservation of legislative discretion.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Whelan. Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:45 p.m., the case was submitted.)