In the

Supreme Court of the United States

DONALD C. ALEXANDER,
Commissioner of Internal Revenue,

Petitioner,

v.

AMERICANS UNITED, INC., etc.,
et al.

Respondents.

No. 72-1371

Washington, D. C.

January 7, 1974

Pages 1 thru 61

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

DONALD C. ALEXANDER, Commissioner of Internal Revenue, Petitioner,	:	
v.	:	No. 72-1371
AMERICANS UNITED, INC., etc., et al., Respondents.	:	

Washington, D. C.,

Monday, January 7, 1974.

The above-entitled matter came on for argument at 10:54 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SCOTT P. CRAMPTON, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C. 20543; for the Petitioner.

ALAN B. MORRISON, ESQ., Room 515, 2000 P Street, N. W., Washington, D. C. 20036; for the Respondents.

FRANKLIN C. SALISBURY, ESQ., Room 545, 1701 Pennsylvania Avenue, N. W., Washington, D. C. 20006; for the Respondents.

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 will hear arguments next in 72-1371, Alexander against Americans United.

Mr. Crampton, you may proceed whenever you're ready.

ORAL ARGUMENT OF SCOTT P. CRAMPTON, ESQ.,

ON BEHALF OF THE PETITIONER

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

The proceedings before Your Honor is on a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

While taxes are involved, the basic issue is a procedural one, namely, do the Anti-Injunction Act and the Declaratory Judgment Act prevent the maintenance of this action for injunctive relief?

This, in turn, requires consideration of the structure which Congress has provided for the litigation of tax controversies, namely, proceedings through the Tax Court and then on appeal, or, first, payment of the tax and then a refund sued either in the District Court or in the Court of Claims.

This tax procedure is expressly protected, as we view it, by the Anti-Injunction Act and the Declaratory Judgment Act.

I realize that when you're in a position of deferring

judicial consideration of certain questions, that is not a popular position to take; but it seems to us it's required by the laws and by the need of the United States to protect its revenue.

The case is before the Court on a complaint and a motion to dismiss. The motion to dismiss was sustained by the District Court and then reversed in part by the Circuit Court.

The respondents, Americans United, is a non-profit, educational corporation organized in 1948 under the laws of the District of Columbia. Its purpose, as stated in its charter, is to defend and maintain religious liberty in the United States by the dissemination of knowledge concerning the constitutional principle of the separation of church and state.

In 1950, Americans United asked the Internal Revenue Service for a determination that it was exempt from tax under comparable provisions to what is now effective in the Internal Revenue Code as Section 501(c)(3).

The Revenue Act of 1954, in three sections, provides for charitable deductible gifts. One is 501(c)(3), and then the actual deductions allowed in 170(c)(2), and in 2055(a)(2), the latter being the estate tax cases.

Each of these provisions limits a charitable deductible gift to an organization, and I'm quoting, no

substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation.

With minor exceptions, no deduction is allowed to taxpayers for political contributions, and it seems to us that this quoted provision on the exempt organization simply carries out this general policy.

It may help the Court to know the procedure that is followed in these cases.

An organization claiming to be exempt files with the Internal Revenue Service a Treasury Department Form 1023, which discloses considerable information about its organization, that is its form and the pertinent documents, whether it's a successor to another corporation, a description of its activities, any financial information that it may have, or financial information of its predecessor; and it must show that there will be no return of assets to the organizers. A sort of built-in cy-pres principle.

If there are any problems arising after this is filed, as far as the Internal Revenue is concerned, there is an opportunity for conference, and the Internal Revenue Service is quite willing to discuss the situation with the organization, tell them in what particulars they do not believe it complies, and ultimately they frequently have generally worked the situation out.

If the Internal Revenue Service is satisfied, it

issues a ruling letter to the exempt organization, saying that it finds that it has qualified under the statute.

The Internal Revenue Service, of course, reserves the right to look at the operation and the function of the organization in later years, to see that it is operating as it represented it would and, furthermore, that there's been no change in the situation that might require a further review of the matter.

This Court some years ago had a situation in the American Automobile Association cases, where there was a revocation of a ruling that had been outstanding.

As far as exempt organizations are concerned, there were 13,000 of these ruling letters issued in the last fiscal year.

QUESTION: If there is that number of exempt organizations, how is it possible for the Service to keep track of what each one does from year to year and, as you point out, sometimes withdraw the exemption? Is that -- do informers bring this to your attention, or what?

MR. CRAMPTON: I don't -- I imagine some of it may be brought to our attention by other people bringing actions to withdraw the tax-exempt status. We have a number of those cases. And, of course, I suppose informers do question.

This is one of our complaints with procedure is

that I think outsiders use the Internal Revenue provisions as sort of a club to accomplish a purpose, if they disagree with them.

And, to a certain extent, the Service does, from time to time, examine these. I suppose they have the same problem in determining --

QUESTION: Annual reports are not required, are they? As to the effect that the organization is continuing to be just what it was when it got its exemption, or anything like that?

MR. CRAMPTON: I don't believe so.

QUESTION: I don't think so. Are there?

MR. CRAMPTON: I don't think they require any reaffirmation of that.

QUESTION: Is it still true that many listed aren't even in existence any more?

MR. CRAMPTON: That could very well be. There are -- that's my next point -- there are 120,000 of these organizations listed, and when you do put an organization on the list of, cumulative list of organizations exempt from tax; donors may rely on that list and make a contribution to that organization, with the complete knowledge that the Internal Revenue Service will not challenge the deduction. And that's why it's so important.

QUESTION: I suppose, even though these numbers are

rather formidable, that the fact is that only a small, relatively small, percentage of this 120,000 are organizations having significant amounts of money, and spending significant amounts of money?

MR. CRAMPTON: Oh, I'm not so sure, Your Honor. Some of these are churches, and you take some of the main churches, they have tremendous budgets.

QUESTION: Well, excluding churches, for the moment.

MR. CRAMPTON: Well, Red Cross might be one.

QUESTION: The Red Cross has a great deal of money.

MR. CRAMPTON: Yes.

QUESTION: I am just wondering, groping for whether this is a problem, obviously you couldn't conduct visitation of 120,000 or even 20,000, but you can keep a pretty close idea of what -- you can have a pretty close idea of what the large organizations are doing. Because if they're doing a lot of the forbidden activity, that becomes quite visible.

MR. CRAMPTON: I think that's true. And I think on the larger organizations, they would, just like in auditing the income tax returns, they are people that --

QUESTION: But Red Cross is under Congress, isn't it, under a congressional Act? Is it different from the others?

MR. CRAMPTON: I'm not certain -- I'm not certain about that, Your Honor. I just mentioned it as an organiza-

tion that came to mind, having a substantial budget.

QUESTION: But you don't have a great deal of concern about whether local parish churches are conducting lobbying activities, do you?

MR. CRAMPTON: No.

QUESTION: Individually.

MR. CRAMPTON: No.

QUESTION: The problem is, in other words, concentrated in a relatively few of the total of 120,000. By that I mean maybe 10 or 15 or 20 thousand, if that's relatively few of the total.

MR. CRAMPTON: Well, I think our problem with the lobbying is relatively small in the exempt organization sphere. I would agree with Your Honor on that.

I might point out that this advance-ruling procedure that I've just been discussing, in our view, I think is unique in the United States. It originally developed without any statutory sanction. It was an aid to the Service, it was an aid to the taxpayers, and a convenience for all.

But because the Service has been doing that, it doesn't seem to us that it alters the litigation process.

Now, in 1968, the Internal Revenue Service did take a look at American United. It reconsidered the situation, and revoked its prior letter.

In doing so, it set forth a number of respondents' substantial political activities and advised Americans United in part that by engaging in general legislative activities to implement your views, and by urging the enactment or defeat of proposed legislation which you believe inimicable to your principles, you have ceased to function exclusively in the educator's role of informant, and thereby encroaching upon the proscribed legislative area.

The Internal Revenue Service concluded that the respondent was an action organization and not entitled to an exempt status under 501(c)(3) and the regulations thereunder, and that therefore contribution to it would no longer be recognized as deductible.

Shortly thereafter, the Internal Revenue Service did rule that the respondent was an exempt under 501(c)(4) as a social welfare organization. So it, as an organization, owes no taxes.

But this did not affect the contributions to it. It did not entitle its donors to the charitable deduction.

And the exemption under 501(c)(4) also required Americans United to pay employment taxes.

In July of 1970, the respondents brought this class action on behalf of Americans United, two individuals, and all other federal taxpayers similarly situated. It was brought against the Commissioner of Internal Revenue. It

asked for a three-judge statutory court, a declaratory judgment and an injunction, and alleging that the exemption clauses of section 501(c)(3) are unconstitutional under the First and Fifth Amendments.

The heart of the complaint, as we view it, was the prayer to enjoin the Commissioner of Internal Revenue from enforcing the provisions of section 170(c) and 501(c)(3).

Respondent asserts in its brief that the main thrust of the revocation here is undeniably the imposition of a significant burden on respondent's fund-raising capabilities. We think that depends on how you look at it. There's no doubt that it did increase the burden, but it seems to us that the main thrust of this lawsuit is to prevent -- of the Commissioner's action is to prevent the use of tax-deductible dollars for lobbying, which Congress has proscribed.

The complaint speaks of depriving Americans United of contributions. The actual effect, however, would be to prevent the Commissioner of Internal Revenue from assessing taxes against individuals, corporations, and the state who would be making contributions to Americans United after the Commissioner of Internal Revenue had determined that it no longer qualified.

It is primarily this obstruction of the authority of the Commissioner of Internal Revenue the government believes

is barred by the Acts of Congress.

The government filed a motion to dismiss in the District Court. This was granted. The lower court relying on the Anti-Injunction Act and the Declaratory Judgment Act.

The Circuit Court of Appeals reversed as to Americans United, but significantly it affirmed as to the two individuals.

The result, it seems to us, is to permit the litigants to have accomplished, indirectly, what the lower court said they could not do directly.

Stated another way, the donors as individuals could not enjoin the Commissioner of Internal Revenue, but the donors, by using the so-called tax-exempt organization as a party, have, under the holding of the lower court, accomplished the same result.

I think it might help --

QUESTION: And the result is that the Commissioner could not question the deductibility of contributions made by donors to this institution; is that it?

MR. CRAMPTON: Well, the result under the holding of the lower court would be that the injunction should -- the case was referred for a consideration of whether or not the injunction should be granted.

QUESTION: Right.

MR. CRAMPTON: Now, this would open it up for a

hearing on the merits, I think, and the court said it was not expressing an opinion on it.

But we think that procedurally there was no ground for an injunction here, because of the provisions of the statute.

QUESTION: But you said a little earlier what the practical effect would be upon the Commissioner, and I wanted to be sure. But the --

MR. CRAMPTON: Well, the practical effect --

QUESTION: -- practical effect would be that he could not question the deductibility of contributions made to this organization, so long -- during the pendency of this injunction; is that it?

MR. CRAMPTON: That's right. That would be the effect of it.

QUESTION: Has the Service, Mr. Crampton, in effect, conceded irreparable injury to Americans United?

MR. CRAMPTON: No. We don't --

QUESTION: You think -- you have not?

MR. CRAMPTON: No, we're not conceding that.

QUESTION: And yet they're deprived, or they would be under your theory, for a substantial period of time, of donations?

MR. CRAMPTON: No, they're not deprived. They're deprived of tax-deductible donations.

QUESTION: That's precisely -- and the donations are going to dry up, are they not?

MR. CRAMPTON: Well, that depends on -- I think on the attitude of the donors. As far as the small donations are concerned, I think many people that give ten dollars to the college don't care whether or not it's deductible or not, because they're using the standard deduction.

The large donors, if they really are back of an organization like this, would probably defer making the gift until such time as this was decided, if the tax deduction was an important factor to them.

But we think there's an additional burden here, but we don't think that's any more of an irreparable injury than are many other situations where parties are forced to pay taxes and then litigate, or await a decision of a question of law or fact or something.

QUESTION: They did allege that. They did allege that it would be --

MR. CRAMPTON: Yes.

QUESTION: -- difficult and would practically put them out of business.

MR. CRAMPTON: They did.

QUESTION: And that's -- aren't we obliged, at this stage of the proceeding, to recognize that?

All they want is a hearing and an attempt to prove

it.

MR. CRAMPTON: That's right. But what they want is an injunction in the interim. And we think that they're not entitled to that under the Anti-Injunction Act.

QUESTION: Well, what do you have to offer that they will not be irreparably harmed, except your imagination?

MR. CRAMPTON: Well, I think that -- I'm not saying that there won't be harm, but I don't think it's irreparable. I think that --

QUESTION: Suppose they were?

MR. CRAMPTON: Well, that comes right back to the Williams Packing case. The Williams Packing case enforced the injunction, even though there they said it would put them in bankruptcy.

QUESTION: Well, what's the purpose of the statute, then, I mean --

MR. CRAMPTON: I think the purpose of the statute is just that, and --

QUESTION: Because, I mean, otherwise there's no need to bar an injunction unless there's irreparable injury.

MR. CRAMPTON: That's right.

But --

QUESTION: But the real problem is that you say it's an injunction against taxes, and they say it's an injunction against their organization, being able to operate.

And I recognize, I don't know which way I come out, but I think there is a little difference there.

MR. CRAMPTON: Well, there is a difference if you -- you can look at the organization, but I think when you look, take it one step further, you are --

QUESTION: When were you given these tax deductions? It was long after the Anti-Injunction statute, wasn't it?

MR. CRAMPTON: I'm not sure I understand Your Honor's question.

QUESTION: Well, does the Anti-Injunction statute apply to tax-exempt corporations is the question, I think.

You say it does; they say it does not.

MR. CRAMPTON: We say it does, yes.

QUESTION: They say it does not.

MR. CRAMPTON: I think that's right, yes.

QUESTION: Well, No. 1, the charitable organization exemption came later, so clearly it wasn't covered, wasn't intended to at that time.

MR. CRAMPTON: That's right.

But the --

QUESTION: And the relief here is no relief which says that you can't collect taxes, is it?

MR. CRAMPTON: Oh, yes. The action right here says that he can't collect from the donors. And it could

very --

QUESTION: I thought the donors were left out of there.

MR. CRAMPTON: No, the two donors are --

QUESTION: I thought the Court of Appeals left the donors out.

MR. CRAMPTON: That's right. It did.

QUESTION: Well, that's what I'm talking about. What we have now is the organization and not the donors.

MR. CRAMPTON: Well, yes and no, Your Honor. If the donors -- if the Commissioner is enjoined from enforcing the provisions of the statute, he can't go after the donors.

QUESTION: That's right.

QUESTION: Furthermore, he couldn't collect certain kinds of taxes from the organization itself.

MR. CRAMPTON: That's right. Federal employment taxes --

QUESTION: Federal employment taxes --

MR. CRAMPTON: -- we say that they --

QUESTION: If the Commissioner's action stands, you can collect federal employment taxes.

MR. CRAMPTON: That's right. And we are.

QUESTION: If the injunction stands, you cannot.

MR. CRAMPTON: That's right.

That's the way I see it.

QUESTION: From the organization itself.

MR. CRAMPTON: From the organization itself.

QUESTION: Unh-hunh.

MR. CRAMPTON: Now, the Anti-Injunction Act, as Your Honor suggested, came in a long time ago, 1867, but the significant thing, as we see it, is that this was reaffirmed by Congress when it reenacted the Revenue Code, or when it enacted the Revenue Code of 1954.

And the only exception to the Anti-Injunction Act, that we believe is pertinent, is the one this Court announced in the Enochs vs. Williams Packing Company case, where the taxpayer alleged it would go into bankruptcy, and the Court said, well, still the statute had to be enforced, unless the taxpayer could show that under no circumstances could the government prevail; and, second, that equity jurisdiction exists because of irreparable injury, for which there was no adequate legal remedy.

The second statute -- I've been talking so far primarily about the Anti-Injunction Act, but we also rely equally on the Declaratory Judgment Act. And this Court may recall that that was originally passed in the early 1930's and was silent as to taxes.

There were several attempts made shortly thereafter to apply that statute to taxes, and Congress, in 1935,

promptly amended the Act to provide that it should not apply to any suit with respect to federal taxes. And it seems to us that this is again a congressional affirmance of the Anti-Injunction Act. At least the philosophy that you can't enjoin taxes.

The legislative history of this amendment shows clearly that Congress thought the existing remedies provided -- existing procedures provided ample remedies for the correction of tax errors.

The basic complaint of the respondent is that the action of the Internal Revenue Service has materially deterred its contributors, and I think this is true, as I've mentioned, but I think the same could be said for the failure of the Internal Revenue to issue the ruling in the first place.

But where there is a factual or a legal controversy, the statutes just do not give a tax-exempt status pendente lite, and we believe it should not be the role of the courts to provide one.

The administration of the tax laws has been delegated to the Treasury and to the Internal Revenue Service, and if the Internal Revenue Code is to be administered by injunction, it seems to us that nothing but chaos is going to be the end result.

QUESTION: Yes, but chaos hasn't resulted, has it,

from the Williams Packing Company case?

MR. CRAMPTON: No. And we think we can move with the Williams Packing Company case. You see, those two tests are not the ones they're meeting here.

And my thought, continuing my thought of chaos is we have 400-some district judges and a number of suits now pending where the -- which request the Commissioner of Internal Revenue to reserve, to remove the tax exemption of such organizations as labor unions, fraternal clubs, and hospitals.

It's quite conceivable that some organization, which is opposing the views of the Americans United, would bring a similar suit. This might result in conflicting injunctions in different jurisdictions, and complete confusion, as we see it.

In our reply brief we've cited two of these cases, one is the Cattle Feeders case out in Oklahoma, in which the -- enjoins the Commissioner of Internal Revenue from applying a ruling that the Internal Revenue Service was to promulgate regarding year-end purchases of feed, where, in the view of the Internal Revenue Service, it distorted income.

The Internal Revenue Service has also been ordered to revoke the exemption of a hospital, where it did not admit indigent patients.

It seems to us that the latter case is another

example of the use of the tax laws and the injunction procedure as a club in what is primarily a fight between private parties.

It's our view that the administration of the tax laws should not be by injunction, and that if the Internal Revenue Service is wrong in its determination regarding Americans United, there are two adequate remedies at law.

The first, as Mr. Justice White suggested, is a suit against -- by the organization itself to recover the employment taxes that it's been forced to pay. In such a proceeding it can come in, claim it's exempt under section 501(c)(3), and argue the merits of that position.

A second proceeding would be the suit by what the briefs refer to as a friendly donor. Usually that's a secretary or somebody with a relatively simple return, perhaps on the W-2 form. They make a contribution to an organization such as this, file a claim for refund, and then litigate it.

And that is a decision on the merits. It's a device that's frequently used by corporations to test taxability of dividends.

QUESTION: Of course your opponents contend that if it's a very small donor, the Service has, on occasion, simply made the refund and mooted the issue on the merits.

MR. CRAMPTON: That allegation is made, and I think

they do refer to a Church of Scientology case, and that case, in our view, was not in point. That was a question whether in that year money inured to organizers. And there was discovery proceeding, as I understand it. They were convinced that it did not inure in that year, and they made them a refund and mooted it out.

But I believe the Service would welcome a chance to test this on the merits, and certainly, in so far as those of us who are presently in the Department of Justice are concerned, we think this is the way to meet the situation, and I have told a number of tax-exempt organizations that as far as I personally was concerned, we'll meet them in court any time on this fact question and get it decided.

And I think the Internal Revenue Service shares that view, and they would honor a finding like that. Assuming, of course, that the operation is conducted the same way in successive years.

The respondent speaks of itself as being the principal party, but it seems to us here, in legal effect, it is acting as agent for its contributors. They are also real parties in interest, and, as has been pointed out, the injunction would prevent the Internal Revenue Service from asserting taxes against the donors; in the meantime, the statute of limitations may run. It seems to us that the declaratory judgment is an independent reaffirmation of the

Anti-Injunction case, and that both of these simply bar the present type of enaction.

QUESTION: Does the government take the position that the Anti-Injunction Act has the same impact as 28 USC 2201?

MR. CRAMPTON: Yes.

QUESTION: On declaratory judgment?

MR. CRAMPTON: Yes. We say we --

QUESTION: You don't think the prohibition against declaratory judgments is any broader or any narrower than the prohibition against injunctions?

MR. CRAMPTON: Well, no, I think that the Declaratory Judgment Act would probably be a little bit broader, because when you use the phrase with respect to that --

QUESTION: I want to know what the government's position is with respect to that.

MR. CRAMPTON: I think it's broader. And it's a more recent enactment. It mentions the --

QUESTION: Well, don't you have to have, in effect, a declaratory judgment before you can have an injunction?

MR. CRAMPTON: Well, I hadn't thought about that, Your Honor.

QUESTION: Of course, there are quite a number of injunctions entered, with no declaratory judgment in the

traditional sense, aren't there?

QUESTION: But there has to be some legal basis, some legal basis for the injunction. I mean, some right to the injunction.

MR. CRAMPTON: I would think you could have an injunction and then your declaratory judgment might not be --

QUESTION: Well, you may not have something --

MR. CRAMPTON: -- and that puts the same --

QUESTION: Well, you may not have something called a declaratory judgment, let's say.

MR. CRAMPTON: Yes.

QUESTION: Well, suppose when a permanent injunction is entered, the court has declared something, but it isn't what we think of as a declaratory judgment case.

MR. CRAMPTON: No. I think that the concepts, at least in my thinking, are somewhat different, and I come back with Mr. Justice White's point, I think the Declaratory Judgment statute is even broader than the Anti-Injunction Act.

I'd like --

QUESTION: I gather the basis of the Court of Appeals, the decision below, I gather also in the next case, the court in that case, was that really neither a declaratory judgment nor any restraint against the collection of taxes is being sought, but that we have to read these proceedings

as an attack upon the constitutionality of the substantiality exception, and an injunction against its enforcement. But that such an injunction involves neither a declaratory judgment, under the Declaratory Judgment Act, nor an injunction within 74, whatever that -- isn't that what they -- that's in effect what they held, isn't it?

Do I read the opinion --

MR. CRAMPTON: Well, I'm not quite sure --

QUESTION: Oh, I see.

MR. CRAMPTON: I had trouble just reading how they were getting around those, myself; but that --

QUESTION: But surely I'm right, that they tried to get around both?

MR. CRAMPTON: Yes. Yes.

QUESTION: And you say that this was neither.

MR. CRAMPTON: That's right.

QUESTION: Didn't they?

MR. CRAMPTON: Yes.

QUESTION: And I gather that's -- isn't that the rather narrow question that we have to decide?

MR. CRAMPTON: Well, I think the -- yes, whether the --

QUESTION: Yes.

MR. CRAMPTON: -- whether they can get around them.

QUESTION: That's right.

MR. CRAMPTON: Because I think what the court has tried to construct is sort of a detour around these two statutes.

QUESTION: Right.

MR. CRAMPTON: I would like to touch briefly on this question that he raises of substantial. The theory or the claim is that a large organization spending X percent of its budget can do more permissible lobbying than a smaller organization spending the same percent of its budget.

I think it's significant on our procedural problem here that the lower court didn't hold that under no circumstances could the government prevail.

It simply said he thought this might -- ought to go to hearing on the merits.

It's our view that the word "substantial" must be related to the person involved. The tax laws are full of such arbitrary lines. One man may get a larger charitable or medical deduction than another. One man may get a deferral of a larger amount on his installment sale than another, because it's a bigger transaction.

QUESTION: Mr. Crampton, what's your interpretation of how the Court of Appeals, finding that the government at least had an arguable case on the merits, how did they get around the Williams Packing statement that only if the

government clearly can't prevail ought an injunction be allowed?

I don't mean what's the government's position, but what's your interpretation of what the Court of Appeals did?

MR. CRAMPTON: That, in my judgment, is a rough question, because I read that thing and I've tried to see where he came out on it, and I've had difficulty.

He simply seemed to think that this was a question that ought to be -- raised a constitutional point and perhaps because there was an allegation of constitutional issues this shouldn't be --

QUESTION: But many of our cases have held the fact that constitutional question is raised doesn't affect the applicability of the Anti-Injunction Act.

MR. CRAMPTON: That's right, and we've cited them in our brief. And, I say, I've had trouble reading the Court of Appeals opinion, to see where he just avoids these statutes.

QUESTION: I notice that the concurrence [respondents] said that this opinion was a model of lucidity.

[Laughter.]

MR. CRAMPTON: Well, they'll have an opportunity in just a minute to explain that, and maybe they can answer the question of Mr. Justice Rehnquist better than I can.

I might --

QUESTION: It's really their burden.

MR. CRAMPTON: I think so.

QUESTION: But I gather on the substantiality point, in a practical world it is true, isn't it, that organizations opposed to the point of view of this one, not by reason of their greater means and so forth, are not devoting a substantial part of their time and effort to lobbying, but it may be it's not a substantial part, but, in the aggregate, it's a much greater part --

MR. CRAMPTON: That's true.

QUESTION: -- than what this organization does.

MR. CRAMPTON: And you wonder what the test might be. If you put a dollar amount in, then an organization under the dollar amount might devote a hundred percent to it, whereas a bigger organization would be only devoting a fraction. And it seems to us that this is about the best test Congress could devise.

I might close -- I'm concerned about my time, I haven't seen the light -- but we'd like to say that while we're not unsympathetic with the problem Americans United has, we believe the solution is in legislation. We believe that solution is coming.

Their judicial review of this type of a problem is presently being considered in the field of pension plans. In H. R. 4200, 93rd Congress, First Session, in section 601

they are providing for -- it is proposed to provide for an appeal to the Tax Court from rulings in the pension field.

I understand this Act has passed both houses and is in conference, but not on this point.

The section -- a committee of the section on taxation is considering a similar --

QUESTION: Would that affect this?

MR. CRAMPTON: It wouldn't affect this case, no, but it will affect future -- if this is enacted it would, in effect, exempt organizations.

But a committee of the section on taxation of the American Bar Association is presently considering whether a similar recommendation should be made in the field of exempt organizations. That isn't cited in our brief, but you can find a reference to that in 26 of The Tax Lawyer, at page 628.

It seems to us that it's clearly the scope -- that the scope of this legislation is to be determined by Congress, and we submit that that's where the relief, if any, should be, and not by seeking a judicial remedy here, which, in our view, the statutes just do not provide.

We believe the judgment should be reversed.

MR. CHIEF JUSTICE BURGER: You've been puzzled about your time problem. I've just been informed that the electronics system has failed; due process requires that we

allow you some additional time, anyway. We'll give you three more minutes, and enlarge your friend's time.

MR. CRAMPTON: Thank you.

MR. CHIEF JUSTICE BURGER: The time is actually consumed.

MR. CRAMPTON: I thought it must be.

MR. CHIEF JUSTICE BURGER: Mr. Morrison, we'll enlarge the time on your side of the table by three minutes.

ORAL ARGUMENT OF ALAN B. MORRISON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MORRISON: Thank Your Honor.

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

Americans United is before this Court today largely because of decisions made by the Internal Revenue Service relating to the administration of the Internal Revenue Code's provision regarding charities.

The Service has decided to administer these provisions by a system of advance rulings. Now, this system is unique to the Internal Revenue Service under the charitable area and does not apply with near the force in this area as it does in other areas where rulings are issued.

The result of this decision by the Service is that a ruling that an organization is tax-exempt is not merely useful, but it's essential. The ruling has become the sine qua non of effective fund raising for a charitable

organization. And the denial of a ruling, or the revocation of a ruling requires immediate action on behalf of the charity if it is to continue without serious financial difficulties.

As Mr. Crampton explained, there are two aspects of a charitable ruling. First, that the charity is exempt from income taxation. This is relatively unimportant for the small organization; but to a large university, with a significant endowment, the exemption from income taxation can be important.

But the second feature and by far the more important, because it is essential to all kinds of charities, is that donations are deductible from the income of the donor; and particularly from the income tax of the donor with a large income.

The question of whether or not an organization qualifies under section 501(c)(3) is ultimately one for the courts to decide, under the test laid down by the Congress.

Now, the Service could have decided to administer these provisions without a system of advance rulings. Income tax matters would be handled like other income tax matters. Deductions could have depended upon opinions of counsel for either the charity or for the donor.

But the Service decided long ago that a system of issuing advance rulings would be useful, both to the Service

and to the taxpayers, to let everyone know where they stand. And they have been issuing these rulings for years.

In fact, in 1969, in the Tax Reform Act, the Congress enacted a new section, section 508, which requires any organization seeking 501(c)(3) status to notify the Service in advance that they are going to claim that they are exempt, so the Service can begin considering the question.

In addition to the issuance of rulings, the Service has also prepared a document known as the cumulative list of exempt organizations. Once an organization has a ruling that it is exempt under 501(c)(3), its name is added to the list, and the Service no longer can challenge the deductibility of gifts added to that for an organization on that list.

If the organization is not on that list, it creates enormous fund-raising problems, particularly with regard to the large donors, for there are, after all, a limited number of funds available, and the absence of the name of an organization from that list puts that organization at a serious competitive disadvantage in seeking to attract funds.

In effect, the ruling is a license to operate seriously in the fund-raising area.

As the courts below -- the court below here, the court in Bob Jones, and as former Commissioner Thrower indicated, these are very serious matters. And thus, when Americans United had its 501(c)(3) status revoked in 1969,

it caused serious financial problems.

Now, it was still, and is today still exempt from income taxation under section 501(c)(4); therefore, it pays no income taxes, it can't go to the Tax Court or seek a claim for refund on the income taxes.

The only other tax consequence to Americans United itself, as a result of the ruling revocation, was a requirement that it begin to pay unemployment taxes, commonly referred to as FUTA, which, in the four years between the revocation and today, has never amounted to more than $1200. A really trifling amount, when considered in the light of the real consequences which is the lost contribution.

In fact, these FUTA taxes are so small that Americans United has paid those taxes and will continue to pay those taxes through the end of this case, however long it takes, because that's not really what we're concerned about here.

The prayer for relief specifically says -- the complaint specifically says we are not seeking to enjoin any taxes payable by --

QUESTION: What if you sued for a refund of the ones you've paid?

MR. MORRISON: I'm sorry, Your Honor?

QUESTION: What if you sued for a refund of your FUTA taxes?

MR. MORRISON: We could do that, Your Honor. I may --

QUESTION: When you could raise this fair issue.

MR. MORRISON: Your Honor, it could have been done. First, let me say, the notion that we could raise this was not suggested by anyone until the reply brief stated --

QUESTION: Well, whether that's so or not, is it so?

MR. MORRISON: The refund suit could have been brought, Your Honor. But it is fraught with difficulties.

QUESTION: Then you could have raised this fair issue as to whether or not your FUTA taxes were validly collected or --

MR. MORRISON: That is correct, Your Honor.

The legal issue is, in most cases, the same as the deductibility issue. In most cases I said. But it is a remedy which is uncertain, albeit not for Americans United, perhaps, but for a number of other organizations which are in the very similar position.

First, because, Your Honor, there are exemptions from FUTA tax. It does not apply to any organization which does not have $1500 a year in wages paid. There are other exemptions for small organizations.

QUESTION: But if those, Mr. Morrison, apply to other organizations but not to Americans United, how does that bear on the adequacy of Americans United's remedy at law?

MR. MORRISON: Well, we first say, Your Honor, that we're asking this Court to establish an exception to the Anti-

Injunction Act, to construe it as nonapplicable in a series of cases.

We believe it would be counterproductive for the Court to establish rules depending upon the peculiarities of otherwise very similar organizations. But, moreover, beyond that, Your Honor, our real problem is not whether the remedy is available, but whether the remedy is truly adequate.

For the refund suit's biggest problem, as is the suit by a donor, is that it does nothing to stop the Service from continuing the position --

QUESTION: But the trouble is that that's the very purpose of the Anti-Injunction statute, is to put off, to refund suits, the decisions of questions like these.

MR. MORRISON: Your Honor, in 1876, this Court, in the State Railroad Tax Cases, referred to the Anti-Injunction Act in connection with the refund provision as a complete system of corrective justice. And in those days, where the only questions involved were the questions of "would the taxpayer get back the taxes plus interest that he paid", it was a complete system.

And as in Williams Packing, it was a complete system of corrective justice, for the only thing anybody was seeking a refund on is the taxes that were paid. Those taxes in this case are irrelevant.

QUESTION: Well, what if -- don't you think that the

absence of any alternative remedy was an important part of the Court of Appeals decision?

MR. MORRISON: Your Honor, the Court of Appeals did place great emphasis upon that.

QUESTION: I don't know what it would have done if the issue had been before it about the FUTA taxes.

MR. MORRISON: It was before it, Your Honor, --

QUESTION: Was it?

MR. MORRISON: -- it was dismissed in a footnote as being so --

QUESTION: I see.

MR. MORRISON: -- as being so far from the mainstream of the litigation as not to be --

QUESTION: Well, that's rather odd, isn't it? I mean, isn't it, because you could have had that decision -- you could have had this very issue decided in the refund action.

MR. MORRISON: Your Honor, I believe Americans United probably could have. On the assumption that, first, it was not mooted out -- and we take a different view of the Scientology case, we don't think there's any --

QUESTION: I thought you said a while ago that the issue hadn't been -- wasn't raised until --.

MR. MORRISON: It was put in, very briefly, by the government in its, in the second reply brief in the Court of

Appeals.

QUESTION: In the Court of Appeals.

MR. MORRISON: In the Court of Appeals, yes, Your Honor.

QUESTION: Right.

MR. MORRISON: But not in the District Court. And that was some three and a half years after the ruling was revoked.

QUESTION: Is this question involved in this case, did Bob Jones University also have available a refund?

MR. MORRISON: I believe it did, yes, Your Honor. And I believe there's also a possibility -- I'm not thoroughly familiar with the record, but as I read the government's brief, it's alleged that Bob Jones may have some income tax liability, since it was held not to be a (c)(4) organization, as was our organization.

QUESTION: Mr. Morrison, you said your exception, you came under -- you wanted us to establish an exception to the Anti-Injunction statute.

MR. MORRISON: Yes, Your Honor. If that's what I said, it wasn't precisely what I meant.

Although the Anti-Injunction statute is absolute on its face, with certain specific exceptions, largely relating to the Tax Court proceedings, --

QUESTION: Well, maybe I ought to warn you; the

answer I'd like to get is how we do it without rewriting the statute?

MR. MORRISON: The same way that this Court has been doing it for fifty years without rewriting the statute, Your Honor, --

QUESTION: In which case did we rewrite the Anti-Injunction statute?

MR. MORRISON: Well, begin --

QUESTION: Which one?

MR. MORRISON: The Standard --

QUESTION: Let's start over again.

MR. MORRISON: The Standard Nut Margarine case, Lipke vs. Lederer, Hill vs. Wallace, and the case we rely upon most, Allen v. Regents of Georgia case.

QUESTION: Now, how do you want us to do this one?

MR. MORRISON: We want you to say, Your Honor, that it is outside the purposes of the Anti-Injunction Act, since, as Your Honor quite correctly pointed out earlier, Congress obviously did not have charitable organizations in mind in 1867 when it wrote this provision.

QUESTION: They didn't have automobiles in mind, either.

MR. MORRISON: No, sir, Your Honor. It didn't have a great many things in mind.

QUESTION: But it did have taxes in mind, didn't it?

MR. MORRISON: It did, Your Honor.

QUESTION: And this has quite an impact on taxes.

MR. MORRISON: Your Honor, I don't believe it does have quite an impact. For, in our view, most donors, and particularly large donors who are considering making a sizable gift to a charitable organization, if the organization is not on the list, as Americans United has not been, most of these, or many of these persons will simply deflect the contribution to another organization which is on the list.

QUESTION: Well, I think all of us, every one on this bench, has had that experience as a lawyer. But that's not the heart of the case, is it?

Or do you think it is?

MR. MORRISON: Well, it is important because we think it's indicative of the fact that this case is not dealing primarily with the orderly process of the collection of revenue, as has been true in other cases. And as the government's brief says, and as the Supreme Court has said in Enochs, the manifest purpose is to insure the orderly process of the collection of revenue.

And we suggest that this is far from the mainstream of that kind of problem. And it's particularly important because of the great need that this taxpayer has to have his ruling.

And of equal importance is the fact that not only

does it not have its ruling during this period of time, but that throughout the entire period of the refund litigation there will be no revenue coming in, because of the loss of -- the ruling.

And this is important, because even if we win the refund suit at the District Court level, after having waited until the end of the year so that an annual tax could be paid, waited till we file a claim for refund, waiting six months after that, thereafter filing a complaint, the government answering sixty days later, discovery beginning, and perhaps the government discovering an issue in the case that will enable it to prevail for reasons other than the reason that was given for the denial of deduction.

That after that happens, and even if we win the case in the District Court, the ruling does not come back yet. For, according to the government's theory, that even where the refund suit is won there is still no right to have the ruling restored.

QUESTION: How do you view the section in the exclusion rather than the Declaratory Judgment Act?

MR. MORRISON: I view that as coterminous, Your Honor.

QUESTION: Coterminous?

MR. MORRISON: Yes, Your Honor. It was enacted --

QUESTION: In language it certainly seems broader,

doesn't it?

MR. MORRISON: It does seem broader, Your Honor, but it was enacted specifically to fill a loophole that had been created when some of the courts had started to permit declaratory judgments to do that which the Anti-Injunction Act could not do. And it was intended specifically for that purpose, and with no other purpose in mind.

QUESTION: I guess you have to take that position, don't you, because, with respect to taxes, that's the word, isn't it?

MR. MORRISON: It would be very much broader.

I would point out, Your Honor, that section 1340, the jurisdictional section, uses the phrase, giving the district courts jurisdiction, "to matters arising under the Tax law", which might even seem broader.

But I think that all the courts have considered them to be in the same general area. It was enacted, that is the exception to the Declaratory Judgment Act was enacted, to fill a specific need, to prevent the end run, if you will, around the Anti-Injunction action; and therefore we consider it to be the same.

QUESTION: Have there been any judicial constructions of it to that effect?

MR. MORRISON: Yes, Your Honor.

QUESTION: In this Court?

MR. MORRISON: Not in this Court, no, Your Honor.

There are certain cases referred to --

QUESTION: The government apparently thinks that it's broader, it doesn't concede that it's coterminous with the --.

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

We have -- the legislative history we quote, I believe it's in footnote -- it's in a footnote in our brief --

QUESTION: Well, that's all right; I'll get it.

MR. MORRISON: Footnote 5 on page 6, Your Honor. And it makes references to Judge Tamm's discussion of the legislative history in the Court of Appeals, and I think that it does indicate that that is the case.

As I said, the real loss to Americans United in this case is the lost contributions; and the refunding of $1200 plus interest is not going to do anything about getting that back.

We think that this case comes within this Court's exception in Allen v. the Regents, where, in that case, the plaintiff was, like this case, not the taxpayer; that is, not the person against whom the taxes were sought to be collected. And that in that case this Court held that where the plaintiff had no plain, speedy and adequate remedy at law -- and I emphasize the word "adequate" because that is, in our view,

the touchstone here; that the remedy suggested by the government is not adequate.

That the court had jurisdiction, notwithstanding the literal language of the Anti-Injunction Act.

We believe that that case applies here.

The government contends that Allen was overruled, in effect, by Williams Packing Company; that Williams Packing is a substitute for a whole long line of cases, which are not discussed at all, and which, the Allen decision, is indicated only as a "see also" footnote.

The decisions in Allen and Williams Packing are irreconcilable, for one very important reason:

The Williams Packing decision predicates jurisdiction upon a finding that under no view of the facts or law could the government prevail. But in Allen, not only could the government not prevail, but in the very same opinion this Court upheld the determination that the statute challenged by the University of Georgia Regents was constitutional.

Therefore, the decisions are irreconcilable, and the government must contend that Allen was overruled.

We see no reason to believe that this Court overruled Allen. The cases are different, the facts are different, and we suggest that the decision in Allen v. the Regents is still good law and supports this case, as do other cases, such as Lipke v. Lederer, which dealt primarily with

the problem of a penalty being imposed in the form of a tax, or cases involving essentially regulatory matters: Hill v. Wallace.

QUESTION: Are you really saying that they're irreconcilable or that they deal with two different things?

MR. MORRISON: Well, I say that they're irreconcilable if the government statement that there is a substitute, that Enochs was a substitute for all of the prior decisions, it becomes irreconcilable.

But I believe that they are -- that they really deal with two different kinds of exceptions. There are, if you will, parallel different classes of exceptions; and that the Allen case supports the decision we're asking this Court to affirm here.

QUESTION: If they are irreconcilable, I suppose the latest in time would prevail.

MR. MORRISON: That is correct, Your Honor. But we believe -- I misspoke, perhaps. But they're irreconcilable only if you accept the government's proposition that one is a substitute for the other.

We believe they're not irreconcilable, and that they simply dealt with different situations.

The Williams Packing case being the classic case of a taxpayer seeking to enjoin the collection of its own taxes, claiming, verifiably or not, that there was irreparable

harm.

This Court said no. In that situation, irreparable harm and the adequacy of remedy is not enough; you must show more. And that's what 7421 says, and we agree one hundred percent; but we don't think that deals with this case, where there are different problems involved than in that situation.

All that we are seeking here is an opportunity to litigate the question of whether or not our ruling was properly revoked during the course of the litigation.

All we want is a chance to obtain an injunction, so that we will not have to wait years until the refund suit is concluded. We are not, as the government suggests in its reply brief, on page 38, asking for an automatic right to retain the ruling regardless of the merits.

We are fully aware of the standards, both at the preliminary injunction stage, and what we must do with the merits in order to retain the ruling, which we have been without for almost four years now.

But at least it's a chance, and it's a chance for organizations such as this, and, equally important, for fledgling organizations which have no financial backing to rely on.

Just recently a decision of the United States District Court for the District of Columbia, in the case of Center on Corporate Responsibility v. Shultz, a decision which

the government referred to in its initial brief in this case, but did not refer to in its most recent brief. An unreported decision, but now appears in the 1974 CCH Reporter, at paragraph 9118, where that court upheld the plaintiff and held that the Service had illegally ruled that it was not entitled to a deduction.

MR. CHIEF JUSTICE BURGER: Mr. Morrison, it may help you if I alert you, in the absence of our lights, that you've got about two minutes left.

MR. MORRISON: Thank Your Honor.

MR. CHIEF JUSTICE BURGER: Before you impinge on Mr. Salisbury's time.

MR. MORRISON: Thank you, Your Honor.

In that very case, the Service contended that in spite of the allegations of political influence and no basis at all for denying deduction, the court had no jurisdiction whatsoever. And we submit that 7421 was not intended to apply in those situations, that it was not intended to act where there was no complete system of corrective justice.

We see no reason to apply the statute which was obviously not intended to reach charitable organizations, and there's every reason not to apply it.

Accordingly, we ask this Court to affirm the decision below.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Morrison, Mr. Salisbury.

ORAL ARGUMENT OF FRANKLIN C. SALISBURY, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. SALISBURY: May it please the Court, and Mr. Chief Justice Burger:

As the former house counsel and litigation attorney for Americans United for Separation of Church and State, I appear before you to argue that the decision of the United States Court of Appeals for the District of Columbia, upholding the right of Americans United to its day in court, was correct and should be upheld.

My share in the oral argument is to emphasize just a few points which makes clear that the opinion of the Court of Appeals below, which holds that this case does raise a substantial constitutional question, should be upheld.

I fear that the Commissioner's counsel have misstated, inadvertently, the legal question presented. Reading their brief, they say: the question presented is, quote, "whether the respondent is barred by the Anti-Injunction Act and the Declaratory Judgment Act, or otherwise, from obtaining injunctive or declaratory relief requiring the Commissioner to issue a ruling that respondent is exempt under section 501(c)(3), and therefore that contributions to it are deductible under Code Section 170(c)(2)."

Americans United has never argued that the Commissioner should rule that it is exempt under 501(c)(3). Americans United has sought to have the substantiality clause of 501(c)(3) ruled unconstitutional, expunged, as it were, from 501(c).

Thus directed, the Commissioner could and should exercise his discretion and determine the eligibility of Americans United for continuing treatment under 501(c)(3).

QUESTION: Without the substantiality section, when then would the Commissioner determine?

MR. SALISBURY: The clause has many other qualifications for -- 501(c)(3) says. It is very complicated, and we feel that we could qualify on all of them.

We can't qualify, and don't want to qualify, if it means we can't either come to this Court and present cases or we can't go to Congress and say that, well, the Constitution is great and we want it kept that way.

The existence --

QUESTION: Mr. Salisbury, while you're stopped for a moment, let me -- it seems to me that at least at one focal point in the Court of Appeals opinion is the statement at the end, it's on page 40 of the Petition for the Writ, "that the possibility of success is not so certain as to merit the Enochs exception with respect to 7421(a), yet not so frivolous or foreclosed as to merit denial of the 2282

motion."

I'm not exactly sure what that means, but do you think it's a correct statement of the -- of how the issue should be resolved?

MR. SALISBURY: Well, in so far as it states that we have -- that, I think, means that we have a substantial constitutional question involved. And -- because --

QUESTION: It also suggests that the court considered the matter in some state of judicial equipoise, that it might go either way; isn't that about it?

MR. SALISBURY: Yes, I think it might go either way.

QUESTION: Well, but if it goes either way, doesn't the Anti-Injunction statute control?

MR. SALISBURY: I think the case that held that under no circumstances could the government prevail in a lawsuit is not good law and not applicable to us. Because anybody can prevail. It is not a good standard.

The Enochs case, the organization --

QUESTION: Well, it was a standard that some judges thought at the time was the way to implement the Anti-Injunction statute, wasn't it?

MR. SALISBURY: Yes. I'm hoping the judges at this time will not so feel.

QUESTION: Well, what are you asking, that Enochs be overruled?

MR. SALISBURY: No. In Enochs the organization owed a tax.

Now, we agree that if Americans United owed a tax, that we should have paid the tax and then gone into the Tax Court and sued to have it refunded. But we don't have any such tax owed.

Now, way at the end of the whole proceedings it was suggested we could, in effect, deprive our employees of their rights under the FUTA, the Unemployment Compensation Act, sued to get the money back, and then go in and, not argue about that, argue about our First Amendment rights.

QUESTION: Well, had you paid that tax before this episode?

MR. SALISBURY: No, no. We weren't --

QUESTION: Then you wouldn't be depriving them of something you hadn't done before --

MR. SALISBURY: From that day on, we've paid their unemployment tax. And we would continue paying that tax, even if we win this case, because that's a benefit to our employees if -- and they're likely to lose their jobs, because of the impact of this ruling, and they need that unemployment --

QUESTION: But you can't say there's no other remedy available to you?

MR. SALISBURY: Well, it is -- I think, if Your

Honors will consider the remedy, that we should not pay a tax which we want to pay --

QUESTION: Well, you didn't used to.

MR. SALISBURY: No, but I don't think we were --

QUESTION: Until the Commissioner forced you to confer this benefit on your employees, you weren't.

MR. SALISBURY: -- eligible for it.

I'm not quite certain, but I don't think we were eligible to pay it before. Once we changed our status, then our employees could obtain unemployment compensation under this Act.

QUESTION: And if you win, if you win, therefore, you won't be eligible to pay it?

MR. SALISBURY: This could very well be true.

QUESTION: Unh-hunh.

MR.SALISBURY: Now, the Commissioner of Internal Revenue revoked the privilege of Americans United to continue soliciting donors, who in turn could make their donations out of pretax income; and the reason given is that Americans United total activity is one of legislative effort.

If we file a brief amicus before this Court, which we do quite -- which we used to do, anyway, quite frequently, they say it's an attempt to influence legislation because we take a stand.

If we praise a great opinion, like Everson vs. the

Board of Education, it is, according to IRS, an attempt to influence legislation because we favor the opinion.

If we republish James Madison's Memorial and Remonstrance, it is an attempt to influence legislation. Everything we do, according to the letters we have from IRS, is an attempt to influence legislation.

The result is a penalty for the exercise of our First Amendment rights. We remain tax-exempt -- that's not a right, that's a privilege -- but we are denied the support of our donors, which is not a privilege but a right.

These donors are still free to make tax-exempt donations to other charities and other causes, but not to one of the greatest causes of all, the preservation of the principle of separation of church and state. The cause dear to our donors and a cause dear to the members of this Court.

It must be remembered also that in our argument Americans United actually is arguing that no organization, not even the Roman Catholic Church, with its unlimited resources constantly used for lobbying, should be put to the test of the substantiality clause 501(c)(3).

QUESTION: Mr. Salisbury, did I understand you to say that the Internal Revenue Service takes the position that an organization that files an amicus brief in this Court is attempting to influence legislation?

MR. SALISBURY: As I read their revocation letters,

one of -- we've had a whole series, of course, --

QUESTION: Well, the Court, of course, has been accused of being a -- .

[Laughter.]

But that's a very interesting submission.

MR. SALISBURY: I was shocked when we got the letter. I was the attorney that had to try to keep compliance; but I gave up on trying to see that absolutely no legislative efforts were made, when they came back to me and said that everything you do influences legislation. I presume that this case will be reported, and that will influence legislation.

That is a deprivation of our First Amendment rights.

QUESTION: But that letter is not in the record, is it?

MR. SALISBURY: We haven't had a big enough record because we haven't had a chance to get into the court. But that is what we will prove in the -- before the --

QUESTION: You will prove that IRS sent you a letter that said if you file a brief amicus in this Court you are influencing legislation?

MR. SALISBURY: I will --

QUESTION: You going to show us that letter?

MR. SALISBURY: I will prove that the effect of their letters --

QUESTION: Oh. Oh. The effect of the letters.

MR. SALISBURY: -- to counsel would be, because they say that's an action organization.

Now, they are changing their position on that particular point, I think. Due to various pressures.

But they still indicate that if we were to, as we're constantly doing, going before the Congress, at the request of Congress, to say what we think about the First Amendment.

They say that influences legislation. And it probably does.

But we say we have a First Amendment right to influence legislation.

Now, I notice that the time, the Court is ready to close, so I will --

MR. CHIEF JUSTICE BURGER: We will resume the case after 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. Salisbury, you have about two minutes left. The electronics are still not functioning and so we'll let you know when your two minutes is up.

MR. SALISBURY: Thank you.

MR. CHIEF JUSTICE BURGER: Perhaps you can keep an eye on the clock, too, while you're arguing.

MR. SALISBURY: I will just take two minutes to sort of finish what I would have finished before lunch. It's more of a preoration, but when we have our day in court on the merits of this case, we will show that 501(c)(3), as presently written, with its substantiality test and its propaganda bar, permit the Commissioner of Internal Revenue, in fact invite him, to tear out the heart of unpopular causes, unpopular to him or unpopular to the particular personnel in the IRS handling the case.

And it does tear out the heart of our organization, Americans United for Separation of Church and State.

We have suffered irreparable damage already. A $90,000 loss in 1972; over $200,000 loss in 1973. The backlog of gifts which we had, which permitted our appearance before this Court so many times, it will soon be dissipated.

Already the staff has been cut from 43 to 28. Our

mailing list, when we send out the educational materials explaining to people what this Court holds on Separation of Church and State, has been cut from 200,000 to 132,000.

No longer has Americans United a full-time counsel for litigation. This litigation is handled on an uncompensated basis by Mr. Morrison and myself.

Surely, a substantial constitutional question is raised when a statute is interpreted to permit, indeed to invite, the Commissioner to stifle free speech, to stop the seeking of redress of grievances before Congress and before the Court; no briefs amicus have been filed with this Court by Americans United since the revocation; no new litigation has taken place bearing our name as plaintiffs before the Federal Court.

Our abilities to preserve the principle of separation of church and state, through education and litigation and perhaps bringing our points to Congress, has been cut out.

We ask that the opinion of the Court of Appeals below be upheld; and on behalf of those who dedicate their lives to religious liberty, both Catholics and Protestants alike, we thank you for this opportunity to present our views to you, in whose hands religious liberty has fared so well in this country.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Salisbury.

Do you have anything further, Mr. Crampton? You have about three minutes left.

REBUTTAL ARGUMENT OF SCOTT P. CRAMPTON, ESQ.,

ON BEHALF OF THE PETITIONER

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

I would like to answer in a little more detail the question which Mr. Justice Marshall asked me about whether or not returns were required. I knew that annual returns were required, but I wasn't concerned -- I didn't -- my recollection wasn't too clear on just what was required in those returns as to the continuing of material relating to continued tax exemption.

I am now advised that you are required to state whether or not you have made any change in your activities; but, other than that, the return is one of financial information, and of course it would not catch a situation, or trigger a situation, where perhaps the Commissioner had changed his view as to a situation such as they might have here.

I'd like to reply very briefly to counsel's suggestion that the size of the employment taxes has some factor. I don't think it has anything to do with it at all. He can sue for ten dollars, and in that proceeding argue that he is an exempt, he represents an organization exempt under 501(c)(3), and I think had he done so this question would have

been decided by now and been decided on its merits.

QUESTION: But it is true that he wants something more than to get a refund of the employment taxes.

MR. CRAMPTON: Well, he wants a determination that he's an exempt organization, and I think he would have gotten it in that proceeding.

QUESTION: Which has much broader tax implications than just the refund of the employment taxes.

MR. CRAMPTON: No, because I think to get the refund of employment taxes, the court would there determine if he was --

QUESTION: Well, I understand that.

MR. CRAMPTON: -- an organization exempt under 501(c)(3).

Now, to the extent that he may be saying "I want to do something for other organizations", our position is that that's not the case here. We're talking about Americans United.

QUESTION: Would IRS be required to follow that as to their contributors?

MR. CRAMPTON: Well, as to future --

QUESTION: I thought IRS could go along with what the Court said or not, whichever way it goes.

MR. CRAMPTON: I think they would, and I think that's their policy; and we certainly would, assuming the

organization continued to operate the same way in later years that it was in the time of the test case, I think that would be a complete answer.

And they put their name back -- they do require them to file an application --

QUESTION: That's not what -- do you mean that IRS is required to follow that as to the contributors? The IRS says you don't have to pay these taxes. Can IRS also say, but we will still deny tax exemption to the contributors?

MR. CRAMPTON: Well, the way, the procedure that they have is that the IRS, after a case like that, asks you to submit an application referring to the case as the reason for -- that you're now qualified as a tax-exempt organization.

QUESTION: Well, let me put it --

MR. CRAMPTON: And they would then put your name back on the list.

QUESTION: But it's no requirement, though. That would be up to IRS, wouldn't it?

MR. CRAMPTON: Well, I think that's right, Your Honor. But I think you could assume the good faith of the government in a situation like that.

QUESTION: Mr. Crampton, the unemployment taxes, if they were exempt, would they be able to pay those voluntarily and cover their employees? If they were an exempt, section (3), organization?

MR. CRAMPTON: I'm not sure of that question, Your Honor. I know they can under Social Security taxes; whether they can under the Employment taxes, I don't know.

QUESTION: Unh-hunh.

MR. CRAMPTON: I would like to comment just briefly on the Allen case. In that situation the University of Georgia was a collector of taxes, it was not a taxpayer; and so it had no means of independent judicial review. And I think that completely distinguishes that case.

If all that the respondent wants is a determination that the word "substantial" should be read out of section 501(c)(3), we think they could have had that holding, if they're right, made in a refund suit; and that's the place to do it.

QUESTION: Mr. Crampton, maybe you've answered this, and I haven't followed you. A refund suit on the FUTA taxes would not answer the 501(c)(3) issue, would it?

MR. CRAMPTON: It's our view that it would. Because that suit would be based on the theory that "we are an exempt organization under section 501(c)(3), and therefore we don't have to pay the FUTA taxes."

And if the Court agreed with them, you'd have a determination that it was an exempt organization.

QUESTION: Until this revocation, Americans United did not pay FUTA taxes.

MR. CRAMPTON: That's right.

QUESTION: And that's what triggered the payment of the FUTA taxes.

MR. CRAMPTON: That's correct. Yes.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Crampton.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:07 p.m., the case in the above-entitled matter was submitted.]

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