IN THE SUPREME COURT OF THE UNITED STATES

EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, et al., Petitioners, v. WILLIAM E. SIMON, Secretary of the Treasury, et al., Respondents.	:	No. 74-1110
WILLIAM E. SIMON, Secretary of the Treasury, et al., Petitioners, v. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, Respondents.	:	No. 74-1124

Washington, D. C.

Wednesday, December 10, 1975

The above-entitled matter came on for argument at 1:00 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

MARILYN G. ROSE, ESQ., Center for Law and Social Policy, 1751 N Street, N.W., Washington, D. C. 20036, for the Petitioners in No. 74-1110

STUART A. SMITH, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for Secretary of the Treasury, et al.

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I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: At 1 o'clock we will hear arguments in No. 74-1110.

Miss Rose, you may proceed whenever you are ready.

ORAL ARGUMENT OF MISS MARILYN G. ROSE

ON BEHALF OF EASTERN KENTUCKY

WELFARE RIGHTS ORGANIZATION, ET AL.

MISS ROSE: Thank you, Mr. Chief Justice, and may it please the Court: I am Marily Rose. I represent the plaintiffs, petitioners in No. 74-1110 and respondents in No. 74-1124.

This case involves the legality of a revenue ruling issued by the Internal Revenue Service in 1969. This revenue ruling removed the longstanding decades-old free service requirement which had always been required of charitable hospitals. There was no notice given to anyone when this ruling issued, there was no opportunity given to anyone, the public at large, or affected persons, to comment upon it or to participate in its development. The ruling on its face relied solely upon statements in .. writers for the law of trusts that health, say, is charitable.

QUESTION: May I ask, Miss Rose, isn't what you told us about no hearing and no notice always true about rulings of this kind? Hasn't it historically always been true?

MISS ROSE: Well, when the Internal Revenue Service

issues revenue rulings, they give no notice and opportunity for comment. One of the issues is, should this have been a revenue ruling?

QUESTION: Yes, and whether or not the other rulings were rulings of this kind, I suppose is the question.

MISS ROSE: Yes.

There are three substantive violations which plaintiffs charge from defendants. First and foremost, plaintiffs charge that defendants exceeded their statutory authority and in effect amended the Internal Revenue Code when they permitted hospitals as charitable institutions to limit themselves to serving only the paying public.

If the Court decides this issue against plaintiffs, then our second issue is that this indeed, though it was called a revenue ruling, should not have been a revenue ruling, it was a substantive rule and defendants were required to proceed in accordance with section 553 of the Administrative Procedure Act.

QUESTION: Mrs. Rose, may I ask you kind of a preliminary question as to how you plan to structure your argument. Are you going to discuss standing and the Anti-Injunction Act and sovereign immunity at the latter part of your argument?

MISS ROSE: Yes, Mr. Justice Rehnquist.

QUESTION: Thank you.

MISS ROSE: The third violation, and this again is if the Court rejects both our Internal Revenue Code and our 553 argument, is that nevertheless there was a violation of section 706 of the APA,that this ruling was arbitrary and capricious because the defendants would have to have considered factors which they did not consider on the face of the ruling. And, as Mr. Justice Rehnquist indicated, there are jurisdictional issues which the defendants have raised. We believe these jurisdictional issues can be best considered and understood in context of the substantive issues, and for that reason we will address the substantive issues first.

Section 501(c)(3) and 170 of the Internal Revenue Code has never accorded hospitals tax exempt status or deductions to the donors to the hospitals. Unlike educational or religious institutions which have their own independent bases, hospitals have had to qualify as charitable institutions. For decades the IRS has required that the charitable hospitals provide either service exclusively to the poor or may provide service to all persons in the community, rich and poor alike, but they may not exclude the poor. This is the consistent position of every tax court and Federal court that has considered the issue in the past 33 years. There is no case the defendants have cited where a hospital has been accorded 501(c)(3) status without there being a finding that the hospital gave free service.

This, indeed, is the similar position that IRS takes for all other organizations which are eligible for the statutory benefits, solely by virtue of being charitable. Every ruling which is cited in the defendants' brief, every ruling which is cited in the amicus American Hospital Association's brief, and every ruling which we have found -- and this goes to date, to 1975 -- requires that institutions which are solely charitable as distinct from being charitable and educational or religious or societies for the prevention of cruelty to children, offer and must serve all persons in the community, rich and poor alike.

This is also the position of all State charitable cases, or virtually all State charitable cases. The defendants relied simply on a 30-year-old statement from Scott on Trusts. In 1939, as in 1967, the Scott treatise states that health is charitable per se. But all the cases that Professor Scott cites, the tax cases and charitable trust cases also have this rich and poor alike requirement, indeed, the general law of charitable trusts going back to England and more ancient times has always considered that there are four heads of charity. Charity is either for the relief of the poor, educational, religious, or there is a fourth head, and the fourth head are things beneficial to the community, but things beneficial to the community must provide service to all persons in the community, again, rich and poor alike. This

beneficial to the community does not permit the exclusion of the poor.

The defendants argue that the Treasury regulation which issued in 1959 permitted them to make this change. That is absolutely untrue. The Treasury regulation which issued in 1959 is an expansion statement on what is charitable. But it was broadened to include new purposes, such as combatting discrimination, juvenile delinquency. But there is nothing on the face of the ruling, of the 1959 regulation, nor is there anything in its published history to indicate that there was a change and charitable organizations may serve only the paying public.

In 1969 the American Hospital Association appealed to Congress to make a change and give hospitals independent status. This change was rejected. It was in the House bill. The Senate Finance Committee in October of 1969 considered the issue, and the Senate Finance Committee deleted the House amendment. The statement for deleting the House amendment took into account the fact three weeks earlier the Internal Revenue Service had issued the revenue ruling that's at issue in this case. But the Senate Finance Committee stated flatly that they were removing this provision, that the revenue ruling at issue in this case did not conform to the Internal Revenue Code, and they wanted to consider the proposal in context with the implications on health legislation.

I think it's clear that the Congress need not conform the statute to an administrative action, but administrators are bound to conform their actions to legislative enactment.

The court below recognized the judicial administrative and legislative history I have discussed. But they went further. They said that this need not always be the case, that defendants could take into account socio-economic changes. They also made a statement that a so-called requirement of emergency service in the revenue ruling may be of greater beneficial value to the poor than general hospital services, including inpatient care.

Those socio-economic findings are legally infirm. There is nothing on the face of the revenue ruling to indicate whatsoever that any of these matters were taken into account by defendants.

The appellate counsel in this case in the Court of Appeals below and in the Supreme Court is making this proffer, this argument, but that should be rejected as the Court of Appeals decision should be rejected. I think there are many cases of this Court that have stated flatly that the post hoc rationalization of appellate counsel cannot substitute for the reason that the administrative agency used. And the administrative agency used solely Scott on Trusts and Scott in Trusts has said the same thing, had this one

sentence upon which they rely, since 1939. And in 1939 and through the 1940's and through the 1950's and through the 1960's, yea, in the summer of 1969 the Internal Revenue Service was still going after hospitals that refused to serve the poor. The poor had to be served.

It is also factually infirm. Because of the limitation of time, I will not go into all the details. Our brief in chief and the brief of the American Public Health Association extensively discuss why it is factually infirm. In sum, HEW, which is the health expert agency in this country, finds there are over 23 million people in this country whose incomes are below the poverty guidelines, and at that time the poverty guidelines were something like $4,400 a year for a family of four, that these upwards of 23 million people have neither private nor public health insurance. And when we say that, we are including Medicaid. Medicaid is a very limited program in terms of eligibility of income and services. It doesn't take care of the poor.

The health policy of the United States has continued to require that free service be given. The Hill-Burton program of HEW requires that free service be given. Title 16 of the new Health Planning Act, December 1974, Congress specifically said that if there will be a national health insurance program, there is still a need to serve everyone in the community, to serve the poor.

The defendants have made a large argument that this ruling doesn't deprive service to the poor, that there is an emergency room requirement in the ruling. We disagree in several respects. First, they argue that the emergency room has now become like a private doctor's office. General physicians' services do not exist in the emergency room. The ruling, secondly, on its face talks not about general emergency room services, it talks about a dire emergency and that a hospital cannot turn away somebody in a dire emergency. And, thirdly, there is no requirement that people not be charged. The most they can say for this ruling is that people will not be required to put up money up front to pay a preservice admission if they come into an emergency room during a dire emergency, maybe bleeding to death. There is no free service requirement.

Turning now to section 553 of the APA argument, which this Court need not reach if they accept our primary argument, the Internal Revenue Service does not deny that it is an agency subject to 553 and it cannot make such a denial. It says this ruling was interpreted. We say that the Internal Revenue Service is mislabeling this ruling. This ruling on its face has to be substantive.

In our principal brief we have come up with what I would call a functional task, but the lower Federal courts have increasingly in recent years looked behind the label and said

is a rule,a policy of an agency,general longstanding, is it a revision of a longstanding rule? Is there a need for an agency to educate itself? What is the impact upon an industry? What is the impact upon the public? In every one of these cases, here is a major revision done without notice, without an opportunity for comment, by an agency that knows virtually nothing about health care. It's ... what the health care agency of the United States is doing, let alone what organizations like the American Public Health Association would do.

QUESTION: They know nothing about health care. Do we know more about it?

MISS ROSE: Well, Mr. Chief Justice, I don't know if this Court knows more about it, and I also don't know if the Court of Appeals might know more about it, but what the Court of Appeals did, they made findings. They made findings ...(Inaudible) They reached out and sustained this ruling in the same way as if there was an attack on a congressional statute for being unconstitutional. The fact is the Court of Appeals should have looked simply at the reason that was used by the agency, Scott on Trusts. They didn't look at that. They reached out and made socio-economic analyses. They were going beyond their power.

So I think all this Court with this argument has to determine is that this is the kind of thing there should

have been hearings on.

Alternatively, if the Court feels a definitional test is the proper one, an interpretive rule is one that is limited to a determination of Congressional purpose. A substantive rule is one which augments Congressional purpose and goes outside the statute. In this test, too, this is a substantive rule.

I will not go into our alternative section 706, the APA argument. I think it's clear that the only way the defendants feel that the ruling could be sustained is they had to make the socio-economic argument. It isn't on the face of the rule, the agency didn't consider it, and therefore all relevant factors weren't considered. And this is Citizens to Preserve Overton Park all over again.

I would like to turn to the jurisdictional argument that defendants have proffered. Defendants have come up with what is a variety of jurisdictional barriers to plaintiffs' maintaining this cause. Their first argument is an attack upon the rules laid down by this Court in Abbott Laboratories and all other cases like it. It's an attack upon the presumptive reviewability of agency action. I don't think that the IRS intended to attack that for any other agency of Government but itself. It says it is somehow different. But it has proffered no justification for making the Internal Revenue Service different from any other governmental agency.

QUESTION: How about -- you say very little in your reply brief about our decision last spring in Warth v. Seldin. Now, don't you think that has some bearing on the case?

MISS ROSE: Yes, and if you like, I will turn to Warth v. Seldin now, Mr. Justice Rehnquist.

Warth v. Seldin, of course, raises the question of standing to sue. Plaintiffs are poor people who are denied health care, denied admission to hospitals by hospitals which had been given 501(c)(3) status.

QUESTION: Yours is just kind of a House that Jack Built type of causation, the same as Warth, as I see it, where it's not just a direct causation, but if A hadn't done this, then B would have done this, then C would have done that, and then my people would have been OK. It's a fairly attenuated kind of standing, isn't it?

MISS ROSE: Mr. Justice Rehnquist, I disagree. In Warth v. Seldin this Court found that the defendants there weren't responsible for the inability of those people to find housing in Penfield. It was the marketplace that was at fault. In this case there is a Federal statute, the charitable provision of the Code, which is intended by Congress to ameliorate the conditions of the marketplace.

What plaintiffs have said is, "Government, you have abrogated our rights under that statute. It's very different.

QUESTION: Was that statute intended to confer any

discrete rights on your clients?

MISS ROSE: Oh, absolutely.

QUESTION: What is your authority for that?

MISS ROSE: I think the whole history of the reason for the charitable provision of the Code, just as the charity in charitable trusts --

QUESTION: Is this -- go ahead.

MISS ROSE: In fact, the defendants in the Treasury regulation when they start off defining what is charitable, they say "principally for the relief of the poor."

QUESTION: Has this Court ever entertained an action of this kind where the claimed beneficiaries of a tax deduction are in as tenuous a situation as yours? What's the closest case in point from this Court?

MISS ROSE: From this Court? I don't know of any case from this Court. There are lower cases.

QUESTION: I don't either.

MISS ROSE: In the 1930's there is a House report on the reason for the charitable provisions of the Code. It is to lessen the burdens of government. This is a classic statement. It goes back to the law of charitable trusts where the reason -- it goes back to 1601, that charitable trusts started -- was to take care of certain things that the Government otherwise would be obligated to do. And care of the poor was always a primary consideration. I think our

plaintiffs are clearly within the zone of interest.

QUESTION: Without the exemption, or without the letter from the Revenue Service, would these hospitals have served the poor?

MISS ROSE: Well --

QUESTION: You don't really know, do you?

MISS ROSE: Your Honor, if --

QUESTION: Suppose the hospitals' exemption had been revoked for failing to serve the poor.

MISS ROSE: Well, if a hospital --

QUESTION: How would that have helped you?

MISS ROSE: Well, we are not seeking -- this, of course, gets into the "Americans United" and Bob Jones issues. We are not seeking whatsoever to have anything revoked, except --

QUESTION: I understand that.

MISS ROSE: Yes. If the hospital --

QUESTION: You are saying that the modification of the rule from the exemption despite the failure to serve charities, and if these hospitals hadn't served charities, under the prior rule their letters would have been revoked.

MISS ROSE: I think we must presume that. All through the years the Internal Revenue Service required service to the poor and hospitals were deemed to be charitable, that they were obeying the law, the entire Internal Revenue Code --

QUESTION: They weren't required to do it. They weren't required under the law to do it. It's just if they wanted to be tax exempt they did it.

MISS ROSE: If they wanted to be tax --

QUESTION: They didn't break any law if they didn't serve the poor.

MISS ROSE: If hospitals wanted to lose their tax exemption. But that is a great degree of speculation. There are 3500 hospitals --

QUESTION: On whose side?

MISS ROSE: Mr. Justice White, hospitals are tax exempt --

QUESTION: These days when the profit and loss statements of hospitals look a lot different than they used to.

MISS ROSE: Well, your Honor, may I state several different responses to that.

First, they would not only lose the power to be tax exempt, but they would lose the contributions to them, and 60 percent of the construction money going into hospitals today is from charitable donations. The American Hospital Association goes up to the Hill, they make the statement. It is in the appendix, the testimony of the American Hospital Association, that charitable contributions to hospitals are what keep hospitals going. It makes the margin of difference.

Further, as amicus, Jackson County, Missouri, has

pointed out in its brief that States follow what the Federal Government does. And if the hospital decided it would rather not serve the poor and lose its tax exemption, it would be paying hundreds of thousands of dollars of taxes every year on the property on which it sits.

QUESTION: I just thought you ought to be making a standing argument.

MISS ROSE: OK. Well, the standing basically is, the proposition is that poor -- I think I have probably answered most of the standing argument. We think Warth v. Seldin is not pertinent, we think, because this particular provision was designed to ameliorate conditions of the poor. And it's the obligation of this statute that hospitals are not about to give up their tax exempt status. And, three, the last argument the Government raised, or I think they raised it first, is this is prosecutorial. And this is not prosecutorial. We are not seeking the prosecution of anybody. We are seeking a revocation of a ruling, and the order of the district court which we would like reinstated is that this ruling was invalid, hospitals have to give free service, and that the notification be made to the public, when the Internal Revenue Service publishes its Cumulative Bulletin, and if hospitals in the future didn't want to give free service, they could elect to be pulled off that list, until they are pulled off the list.

QUESTION: How about the sovereign immunity and the Anti-Injunction Act? Are you going to come to those?

MISS ROSE: The Anti-Injunction Act and the declaratory judgment provision are not pertinent. This is not a case involving the assessment or collection of taxes of either the people themselves or of anybody else. There is no other alternative for these people. There is not a refund suit. This isn't like "Americans United" trying to protect their contributors. This has nothing to do whatsoever with the assessment.

And sovereign immunity, we believe, has long since been overruled in most respects the Government is arguing it. Under Larson -- this case is exceeding statutory authority, and this is clearly the case --

QUESTION: You don't rely on Scanwell, and you simply rely on Larson?

MISS ROSE: We have the alternative, if you go beyond Larson, if you find for some reason Larson doesn't apply, then we are relying on Scanwell.

QUESTION: Which is not a case from this Court.

MISS ROSE: No. The court below. But basically we are saying that for cases that are clearly APA cases, sovereign immunity no longer exists. This doesn't mean there isn't a sovereign immunity argument on property cases, damage cases, property held in the name of the United States. There is still

a sovereign immunity argument. It just doesn't exist any more. Or Abbott Laboratories and Barlow v. Collins and Data Processing are all overruled.

I think I will sit.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Smith.

ORAL ARGUMENT OF STUART A. SMITH ON BEHALF OF SECRETARY OF THE TREASURY

MR. SMITH: Mr. Chief Justice, and may it please the Court: The Government's position in this case simply is that published revenue rulings, such as the revenue ruling at issue here, do not present any issue for a Federal court to review, and in that holding to the contrary, the decision of the Court of Appeals is erroneous.

Before discussing in detail the various jurisdictional barriers that we think exist to this suit, I think it would be important to the Court to have before it what the essential nature of a revenue ruling is, because in our view that essential nature demonstrates that the jurisdictional holding of the District of Columbia Circuit in this case would require the Federal courts to render judgments in the most abstract context.

Now, each year the Internal Revenue Service, pursuant to its statutory authority under section 7805 of the Code, issues some 40,000 advance letter rulings. These advance

letter rulings set forth its opinion of the Federal tax consequences of specific proposed transactions.

QUESTION: Those are private.

MR. SMITH: Those are private.

QUESTION: Sent to an individual in response to an individual inquiry.

MR. SMITH: Exactly.

QUESTION: And a few of those are later published.

MR. SMITH: A few of those are later published anonymously. And of those 40,000 the Service selects and edits several hundred for publication in its Internal Revenue Bulletin in a more abstract and anonymous form.

Now, the introduction to the Internal Revenue Bulletin on the first page has long stated that such rulings do not have the force and effect of law but are informational in character only and represent the conclusions of the Service as to the application of the tax law to what is often an abbreviated set of facts.

This Court in the Dixon case and many other cases has underscored and ratified that statement in the Cumulative Bulletin that these rulings are simply guidelines for IRS personnel and to educate the public generally.

QUESTION: How are these disseminated and published?

MR. SMITH: Mr. Justice Stewart, every two weeks the Internal Revenue Service, I think, publishes something

called the Internal Revenue Bulletin, and then every six months or so those are bound in what is known as Cumulative Bulletins. Those are distributed to people, officers of the Internal Revenue Service, and people generally who are interested in the development of the tax law.

QUESTION: And private tax lawyers can subscribe to it.

MR. SMITH: Private tax lawyers can subscribe, exactly. And indeed anyone can subscribe to it.

QUESTION: Anybody can. You pay a fee and you get it directly from the Internal Revenue Service.

MR. SMITH: Right.

Now, these rulings contribute -- they have a salutary aim, they contribute to uniformity of interpretation because, as I think the Court is well aware, it would be unfortunate if two different Revenue agents in different districts were to apply the tax law according to their best lights but coming out with different results on what is an identical set of facts.

QUESTION: They do that occasionally in spite of the Bulletin.

MR. SMITH: Mr. Chief Justice, we try our best, the Internal Revenue Service tries its best, but often mistakes are made.

QUESTION: They have a lot of them to deal with.

MR. SMITH: Yes. And these revenue rulings are an attempt to mitigate and minimize those unfortunate instances.

In any event, these revenue rulings contribute to uniformity of interpretation, and in our view contribute to the stability of the tax law by reducing controversies between the Internal Revenue Service and taxpayers because, as I think the Court is well aware, taxpayers, many taxpayers, do not like to litigate with the Internal Revenue Service. They would prefer to have an advance notice of what its position might be on a particular set of facts, and this educational program increases stability and reduces litigation and the attendant burdens on the Federal courts.

Now, the format of a revenue ruling is essentially a statement of facts, and it's often abbreviated, with a brief conclusion as to what the Federal tax consequences of those facts are. And the important thing is that the Internal Revenue Services does abbreviate the facts in publishing a revenue ruling, because when the taxpayer makes a submission to the Internal Revenue Service, he makes the submission with a voluminous statement of facts, but the Internal Revenue Service if it may select this particular letter ruling for publication, it will boil this down and essentially present the statement of facts which is designed to illustrate a particular legal principle that it feels is of

general interest.

QUESTION: Mr. Smith, is it still true today, as I think it was a hundred years ago when I was trying to practice, a Rev. Rul., maybe with an exception or two, was about the lowest form of animal life in the formal weight of --

MR. SMITH: I think that's so, Mr. Justice Blackmun. The courts -- of course, this gets into the argument about notice and hearing requirements, but they are not binding on the courts. In fact, there are scores of cases which hold that it simply is a statement of what the Internal Revenue Service thinks the law is.

QUESTION: I know we always hopefully looked for a TD or something of a little --

MR. SMITH: That is a higher form of tax life, there is no doubt about that.

QUESTION: The one we are talking about here begins on 6a of the appendix to your brief.

MR. SMITH: Exactly. That is Revenue Ruling 69-545.

Now, this ruling itself demonstrates the hypothetical quality of what the plaintiffs are seeking, the hypothetical quality of the relief they are seeking, because as the Court can readily see in pursuing this Revenue Ruling, it sets forth two polar situations, situation 1 and situation 2, dealing with two hospitals, Hospital A and Hospital B. In Hospital A, there are a variety of facts in connection

with Hospital A, it has an open board of trustees, it gives open staff privileges, it is involved in research and educational activities, it maintains a full-time emergency room, and no one requiring emergency care is denied treatment. To the contrary, hospital B is almost proprietary in nature, it's owned by a small group of doctors, they limit the staff privileges to people they know, and they comprise the medical committee generally to keep out qualified physicians, et cetera, et cetera, and it maintains an emergency room, but basically to treat the patients of its own doctors.

Now, these two polar examples were designed to educate the public generally and hospital administrators as to clear-cut situations. Hospital A is a situation, if you are like Hospital A, you will be fairly certain of exemption, but, of course, the ruling does conclude that you can't be certain of that itself. You have got to yourself submit an application for exemption to the Internal Revenue Service.

If you are like hospital B, which is a polar example of a hospital that doesn't seem to provide any community benefit, it seems to be run pretty much strictly for the private inurement of its owner-doctors. In that situation you are not going to get a tax-exempt status.

Now, the important thing which we emphasize is that the ruling doesn't even begin to attempt to deal with the hundreds of gradations in between Hospital A and Hospital B.

Hospital A, assuming for a moment that it doesn't give free care to indigents on a broad scale, let's say it dropped its emergency room completely for, let's say, the particular example that it might be engaged in treating cancer patients or a particular kind of disease. Under those circumstances an emergency room would be superfluous because such a hospital would rarely have need for an emergency room. Or, for example, a consortium of hospitals in a particular community could get together and one could say, "We will have the emergency room, you have the nursing school, and a third" --

QUESTION: You are not suggesting that the issuance of this revenue ruling wasn't a rather substantial event.

MR. SMITH: It was a substantial event, Mr. Justice White --

QUESTION: The day before the law wasn't that a hospital like the hospital in type A would --

MR. SMITH: I'm not sure that's right, because although the plaintiffs cite many cases for the proposition that the free care requirement was an absolute requirement. There is no reported decision, and I have found one, and there is no instance that I know that the Internal Revenue Service --

QUESTION: But I take it you are arguing in the case as though even assuming that that was the case.

MR. SMITH: Even assuming that was the case that it --

QUESTION: That the Revenue Service at the moment it issued that ruling was then applying the revenue laws completely different than it had before. You are arguing the case on that basis, aren't you?

MR. SMITH: That's right.

QUESTION: In fact, that was the understanding of the tax bar, pretty much, wasn't it?

MR. SMITH: It was the understanding of the --

QUESTION: Perhaps this isn't worth arguing any more.

MR. SMITH: Although quite frankly I think the decisions that plaintiffs cite of the Court of Appeals indicate that there was no instance in which the Internal Revenue Service revoked the tax exemption of a hospital solely because they denied free care to the indigent.

QUESTION: May I ask, now that I have interrupted you, this involves the tax benefit that a donor of a hospital as a donee or legatee, as well as the hospital's own income, doesn't it? Both kinds.

MR. SMITH: That's right. The deductibility of contributions or State tax deductions.

QUESTION: Well, then, they go together.

MR. SMITH: Yes. Yes, they do.

QUESTION: Thank you.

MR. SMITH: Now, given the fact that this ruling that

is under challenge here just presents these two hypothetical polar examples, I think it's important to point out that if a particular hospital decided that it didn't need an emergency room for a particular reason because of its own mode of operation, it would not necessarily have been denied a tax exemption by the Internal Revenue Service, and that to us demonstrates the hypothetical quality of this suit, because this ruling came up or was published on an abbreviated set of facts. Hospital A, indeed no other hospital is before this Court to present its own set of facts. And indeed each hospital continues to remain free to litigate its own right to exemption on its own facts.

QUESTION: No hospitals were parties to this action at all.

MR. SMITH: No hospitals were parties to this action at all, Mr. Justice Rehnquist. And to us this demonstrates an important point.

QUESTION: Did the Government ever move to dismiss the action on the basis of failure to join indispensable parties?

MR. SMITH: We don't regard the hospital as an indispensable party within the technical meaning of the Federal Rules of Civil Procedure.

QUESTION: Why don't you?

MR. SMITH: Well, simply because -- Well, I think

that if a hospital had been joined as a party, then I think we would essentially be faced here with whether that particular hospital exemption should continue to stand or not.

I think the important thing --

QUESTION: Isn't the only person that gets hurt is the hospital?

MR. SMITH: The only person that might get hurt -- the only entity that might get hurt is the hospital.

QUESTION: And that doesn't make them an indispensable party?

MR. SMITH: It makes them an indispensable party, but the joinder of one, two, three, or indeed a dozen hospitals would not create a broad rule which would be applicable to the hospitals generally, because each hospital continues to remain free to litigate its own right to an exemption on its own particular facts. And to us that demonstrates that this suit really is tantamount to asking the Federal court to render an advisory opinion, because if a Federal court says the emergency room requirement is no good, reinstate the old ruling, what essentially we are left with is a pronouncement which has no pertinence to any particular hospital.

QUESTION: You are saying it is not a case of controversy.

MR. SMITH: Essentially it is not a concrete case which warrants a decision by a Federal court.

QUESTION: What motions did you file?

MR. SMITH: What did you say?

QUESTION: What motions did you file?

MR. SMITH: We filed a motion -- essentially the position that we advance here was advanced in the lower courts. We moved to dismiss --

QUESTION: For what reason?

MR. SMITH: -- for a lack of standing, for failure to state a cause of action, that this suit comes within the tax exception of the Declaratory Judgment Act, it's not appropriate for judicial resolution.

QUESTION: So you filed motions to dismiss.

MR. SMITH: Yes, and the district court denied the motion to dismiss.

QUESTION: Then you filed a motion for judgment.

MR. SMITH: Yes. And the district court -- essentially the district court decided that it had jurisdiction, held the ruling invalid, and granted broad declaratory relief that the plaintiff seeks.

The Court of Appeals held that the Federal court had jurisdiction but held the ruling to be valid.

QUESTION: Supposing the district court had been affirmed by the Court of Appeals, would that have had financial consequences to hospitals?

MR. SMITH: It may have had financial consequences to

some hospitals, but it's entirely unclear as to how many, if any, hospitals would have suffered detriment.

The point is that each hospital continues to remain free to litigate its own right to a tax exemption. Indeed, Hospital A in this case, as the ruling demonstrates, was involved in education and research activities. It may well be that if it decided to drop its emergency room, as I have said, for one reason or another, because it was inappropriate to its activities, it still would have had a right to an exemption and it could have pressed its case before the Commissioner, before a Federal court, either the tax court or a district court.

QUESTION: So from the indispensable party's point of view, the only answer would have been to have joined every single hospital that pays taxes in the country.

MR. SMITH: Exactly. And that to us demonstrates, you know, the hypothetical abstract quality of this suit. It doesn't attempt to solve anything of general import. A revenue ruling doesn't attempt to solve anything of general import. It simply is a published statement on abbreviated facts of the Internal Revenue Service boiled down which attempts to educate the public about general Internal Revenue Service positions.

Now, I think the point about joining every hospital in the country is important, because essentially Congress has

determined that the tax jurisdiction of the Federal courts is limited to deficiency suits and refund suits. And the reason for that essentially is because the courts cannot decide cases, much less tax cases, on anything but a full presentation of all the facts. Here we have an abbreviated set of facts, and essentially for a court to render judgment about Hospital A and other similarly situated hospitals may not affect very many, if any, hospitals at all.

QUESTION: Mr. Smith, one thing that is not clear to me, if this letter is declared out, what does it change, if anything?

MR. SMITH: If this letter is declared out, it changes --

QUESTION: What would it change? It wouldn't change anything.

MR. SMITH: It wouldn't change anything.

QUESTION: Would it?

MR. SMITH: It wouldn't change the tax liability of any hospital.

QUESTION: I suppose that's why you are saying no judgment should have been entered in the first place.

MR. SMITH: Exactly. Exactly. This is really a request for an abstract decision on an abstract set of facts.

QUESTION: But if it turns on your answer to Mr. Justice Marshall's question, then if the ruling would have

changed the liability of some hospital, would your answer then be different?

MR. SMITH: No. My answer wouldn't be different simply because, as we point out at great length in our brief, we don't think that the Internal Revenue Code confers a private right of action on nontaxpayers to contest the tax liability of any particular person. And I think that's important here because I think essentially that's what's lurking behind this suit. The plaintiffs have said that this suit essentially simply involves the editing and rewriting of a revenue ruling of general application, and they trust the system to alter hospital conduct.

Now, taking that at face value, I think that the simple answer to that is that really makes this an abstract case simply because of the Internal -- if they are not interested in Internal Revenue enforcement with respect to any particular hospital or group of hospitals, then essentially they are asking the Federal courts to rewrite revenue rulings, which is the province of the Commissioner, where there may be no effect at all, or they proffer no interest in it in effect.

QUESTION: You wouldn't let them into any suit at any stage with respect to whether a hospital was exempt or not.

MR. SMITH: That's right. We don't think --

QUESTION: So that this particular group or poor people generally who would like free service cannot litigate

as far as you are concerned the exemption or nonexemption of hospitals.

MR. SMITH: Exactly, any more than A cannot litigate the propriety of a ruling given to B, if he doesn't like B, if he thinks B is a competitor of his, if he thinks that for one abstract reason or another the ruling was incorrect. The Internal Revenue Code simply doesn't confer private rights of action on citizens generally to challenge the tax consequences that the Internal Revenue Service has conferred on a private party. I think that's absolutely well settled. I think if there is a decision which is in point on this of this Court, it seems to us it's Louisiana v. McAdoo, which the plaintiffs here have dismissed as overruled. That decision hasn't been overruled. There the State of Louisiana, which was itself engaged in the production of sugar, filed a motion for leave to file a bill of complaint in this Court in an original action to force the Secretary of the Treasury to increase the quotas, the duties on imported sugar. It, as a producer of domestic sugar, felt hampered and those rulings operated to its financial detriment. And the Court simply said that that kind of action -- it dismissed it without considering the merits -- would operate to disturb the whole revenue system of the Government, and that court's role in such a case would be to interfere with the very function of Government.

Another decision which we think is virtually on point

is the Dorsheimer case which was rendered by this Court over ---

QUESTION: Can any person that you know of challenge an exemption letter? I am sure if you cancel one the fellow whose letter is cancelled can litigate with you, but how about the other way?

MR. SMITH: No.

QUESTION: So that if you were granted an exemption letter, whether it conforms to the statute or not, you are home free.

MR. SMITH: Well, Mr. Justice White --

QUESTION: Yes or no. Has he got it?

MR. SMITH: The answer is yes, but that has been a decision of Congress to confer the power to administer the tax laws in the Commissioner of Internal Revenue.

QUESTION: Some Congressman becomes aware of this and gets excited enough, he could embark on some kind of an investigation and inquiry, couldn't he?

MR. SMITH: Indeed, Mr. Chief Justice, a simple letter to the Internal Revenue Service, I have found, by a Member of Congress, elicits a very prompt response.

QUESTION: And if it doesn't, they can go on with congressional inquiry.

MR. SMITH: Absolutely. And they can enact legislation, and if particular public officials have acted in a way that the Congress thinks is improper, Congress can seek to call

him before investigating committees. Indeed, recent --

QUESTION: They do that sometimes, don't they?

MR. SMITH: They do that. In fact, the present incumbent Commissioner of Internal Revenue has been before Congress some 29 times in the last year. Congress has exhibited a very detailed interest in both substantive tax law and in the administration of the revenue laws.

It seems to us there are just some things that the courts don't get into, and one of them is the administration of the tax laws as the Commissioner sees fit. This to us dates back to the Second Congress when in 1792 Congress enacted a provision saying that the Secretary of the Treasury shall direct the collection of taxes, which were then internal taxes, as he shall judge best. And the present Code follows through on that, grants a number of wide discretionary powers to the Secretary of the Treasury and his delegate, the Commissioner of Internal Revenue, to publish rules, make assessments, bring civil actions. And that authority is explicitly and solely conferred in these public officials. The Internal Revenue Code doesn't confer any private rights of action in those cases. And, indeed, as I was saying, the Dorsheimer case it seems to us is another case which a hundred years ago this Court was faced with a situation where a collector of Internal Revenue and two informants brought a suit abainst the United States urging that the Secretary of

the Treasury improperly waived the penalty in a particular liquor tax violation case. And they were indeed hurt because at that time they had an existing right to part of the proceeds of the penalty. They felt the penalty should have been enforced and they would have gotten more money.

QUESTION: The Dorsheimer case would go off on standing or on lack of case or controversy?

MR. SMITH: Mr. Chief Justice, it is very hard to know how that case went off. The court simply said with respect to the discretion of the Secretary of the Treasury, it was the exercise of his discretion in a matter entrusted to him alone and from which there could be no appeal. I suppose the court said that there really wasn't the case for the court to consider. This was something that Congress had given this public official sole discretion to do, and you can't appeal from that sort of thing. And today, the Internal Revenue Code provides for discretion of the Commissioner of Internal Revenue to settle cases. If a case is settled and some other party doesn't like the way it was settled, there is no cause of action to come into the Federal courts.

QUESTION: Like he could audit somebody and allow a depreciation deduction and nobody can really challenge it.

MR. SMITH: Exactly. Exactly. And it seems to us that Congress has made a decision that these particular public officials -- they may make mistakes from time to time, but

the presumption is that they are operating clearly in accordance to their best lights. The tax law is hard, but the Internal Revenue Service is staffed by people who have a good deal of expertise in this matter, and the courts are not going to second guess them in this context.

QUESTION: These rulings are subject, are they not, at any time to revocation?

MR. SMITH: Of course.

QUESTION: Even when revocation may affect a given taxpayer?

MR. SMITH: Indeed. The Internal Revenue Service reserves the right to revoke something retroactively, and he generally only does it when there is an omission of material facts, but he can do it, and this Court in Dixon and American Automobile Association has said that he can do it. And, Mr. Justice Brennan, that brings up another point about --

QUESTION: That can be tested in the charitable case by the contributor, can't it?

MR. SMITH: That can be tested, yes, as the Court has indicated in Bob Jones.

QUESTION: But in the other case where a guy is, or some corporation or foundation is violating its exemption, nobody can do anything about that but the Commissioner.

MR. SMITH: Exactly. Of course, the public has the right to bring the matter to the attention of the Commissioner.

QUESTION: But no legal action can reach it.

MR. SMITH: Absolutely. In the same way, that as we point out in our brief, if somebody feels somebody is involved in an unfair labor practice and contacts the general counsel of the Labor Board and he disagrees, that's the end of the matter. He can't sue to compel the general counsel of the Labor Board or the Federal Trade Commission or many other agencies and ask them to commence proceedings against private parties. Congress has vested discretion in the officials alone to enforce those statutes.

I want to mention one other thing sort of as a concomitant to my discussion with Mr. Justice Brennan, and that is the difficulties engendered by these kind of injunctive actions in this case are illustrated by what happened after the district court's judgment came down. The district court voided the revenue ruling and enjoined the Commissioner from taking any action consistent with it. Then, of course, the Government appealed. Of course, during that time there were many hospitals who were anxious to have their tax status clarified, contributors who were anxious to have their deductions clarified, municipal bond issues were pending as to whether hospitals were tax exempt. The Government applied for a stay to the district court of its decision in order to allow at least until the matter was resolved throughout the courts to have its policy continued to be extant.

The district court denied the stay, the Court of Appeals denied the stay. Essentially for six or eight months the matter was in complete limbo. The Commissioner had no idea how to enforce the law at all. And it seems to us that really demonstrates how these injunctive actions undermine the whole very salutary nature of the published revenue ruling program which is to educate the public. If the public is in disarray, it doesn't know what the answer is going to be, and the Commissioner is stymied by court orders, in a normal case where a ruling -- let's say a ruling is approved by a district court, as it was ultimately by the Court of Appeals here. And let's say for one reason or another the Commissioner wants to modify it --

QUESTION: Mr. Smith, can the Commissioner or the Secretary be sued in any one of the 93 judicial districts?

MR. SMITH: I think so, simply because there are Internal Revenue district offices there, so I would think that he could --

QUESTION: So you know it's not just a question of litigation in the District of Columbia.

MR. SMITH: I think that's probably right.

QUESTION: Bob Jones came up out of the Fourth Circuit.

MR. SMITH: Right. Yes, Bob Jones came up through the district courts.

QUESTION: Through the Fourth Circuit.

MR. SMITH: Right.

The final point I was going to make was essentially if a ruling were approved and the Commissioner wanted to modify it in some way, presumably he would have to go back to the district court that approved it by an injunctive order to get permission to modify it. Otherwise, he would be in contempt of that court order. The tax law simply can't be administered that way, we submit.

(Laughter.)

MR. SMITH: For reasons we set forth probably at too great a length in our brief, we submit that the judgment of the Court of Appeals be reversed and remanded to the district court for an entry of judgment dismissing the complaint for lack of jurisdiction.

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

Thank you, Miss Rose. Your time is up, Miss Rose.

MISS ROSE: My time is up?

MR. CHIEF JUSTICE BURGER: Yes. Do you have something factually to raise other than argument? We will give you a moment.

REBUTTAL ARGUMENT OF MISS MARILYN G. ROSE
ON BEHALF OF EASTERN KENTUCKY WELFARE
RIGHTS ORGANIZATION, ET AL.

MISS ROSE: May I make one statement of fact.

There are over 12,000 lawsuits that are brought every year involving revenue rulings on refund and deficiency situations, and that is where uncertainty may lie if there is uncertainty. Half a dozen suits in five years do not raise uncertainty.

MR. CHIEF JUSTICE BURGER: Thank you, Miss Rose.

The case is submitted.

[Whereupon, at 1:56 p.m., argument in the above-entitled matter was concluded.]