No.____

In The

Supreme Court of the United States

CATHOLIC ANSWERS, INC. AND KARL KEATING,
Petitioners,
v.
UNITED STATES OF AMERICA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

James Bopp, Jr.
Counsel of Record
Anita Y. Woudenberg
THE BOPP LAW FIRM
The National Building
1 South 6th Street
Terre Haute, IN 47807
812/232-2434 (voice)
812/235-3685 (facsimile)
jboppjr@aol.com (email)
Counsel for Petitioner

Questions Presented

In *Bob Jones University v. Simon*, 416 U.S. 725 (1974), this Court questioned "the reasonableness of a system that forced a [non-profit organization] to bring a series of backward-looking refund suits in order to establish repeatedly the legality of its claim to tax-exempt status and that precluded such an organization from obtaining prospective relief even though it utilized an avenue of review mandated by Congress." *Id.* at 747. This Court now faces precisely this issue. Under the position advocated by the Internal Revenue Service ("the IRS") in this case and adopted by the Ninth Circuit and district court, the IRS may perpetually avoid final judicial determination of an organization's tax exempt status and chill protected political speech by forcing such organizations to repeatedly file new refund claims which can then be mooted at the IRS' discretion and thereby avoid constitutional review of the underlying statute.

(1) Whether the IRS can moot a refund action by issuing an abatement while continuing to maintain that the taxes were properly imposed, thereby preventing Catholic Answers from ever raising a challenge to the constitutionality of the underlying statute.

(2) Whether Catholic Answers' efforts to prevent future chill on its constitutionally protected speech by seeking declaratory relief in federal court after it followed the refund procedures mandated by Congress is proper.

(3) Whether Catholic Answers' constitutionality arguments regarding "express advocacy" are

barred by the substantial variance doctrine when Catholic Answers maintained throughout the administrative proceedings before the IRS that the prohibition on political intervention on 501(c)(3) organizations cannot constitutionally apply to activities that are not "express advocacy."

Parties to the Proceedings

The following individuals and entities are parties to the proceedings in the court below:

Catholic Answers, Inc., and Karl Keating, *Plaintiffs-Appellants*;

United States of America, *Defendant-Appellees*.

Corporate Disclosure Statement

Petitioner Catholic Answers, Inc. is a nonprofit religious corporation organized and existing under the laws of California and authorized to do business in that State, with its principal office and place of business in El Cajon, California. Catholic Answers, Inc. has no parent corporation(s) and no publicly held corporation owns 10% or more of its stock.

Petitioner Karl Keating is an individual.

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Petition for a Writ of Certiorari

Petitioners Catholic Answers, Inc., and Karl Keating respectfully request a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The order of the court of appeals affirming the district court is at 2011 WL 2452177. The district court opinion is at 2009 WL 3320498. Denial of rehearing en banc is only available in slip copy and is reprinted in the Appendix on page 27a.

Jurisdiction

The court of appeals upheld the district court's decision on June 21, 2011. App. 1a. Petitioners' Petition for Rehearing En Banc was denied July 22, 2011. App. 27a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I is in the Appendix at 28a.

26 U.S.C. § 501 is at 29a.

26 U.S.C. § 4955 is at 30a.

26 U.S.C. § 4962 is at 34a.

26 U.S.C. § 6532 is at 35a.

26 U.S.C. § 7421 is at 37a.

26 U.S.C. § 7422 is at 38a.

28 U.S.C. § 1346(a)(1) is at 44a.

28 U.S.C. § 2201 is at 45a.

Cal. Corp. Code § 9241 is at 46a.

Treas. Reg. § 1.501(c)(3)-1 is at 48a.

Treas. Reg. § 1.501(c)(4)-1 is at 51a.

Treas. Reg. § 53.4955-1 is at 53a.

Treas. Reg. § 301.6402-2(b)(1) is at 60a.

Statement of the Case

Recently the Supreme Court of Missouri opened an opinion by stating: "This is a $100 case. But sometimes, it's not the money—it's the principle." *Springfield, Missouri v. Belt*, 307 S.W.3d 649, 650 (Mo. 2010). Catholic Answers now asks this Court to likewise consider a case involving a relatively modest financial controversy, but in so doing, it seeks to protect important First Amendment rights from unprecedented invasion by the Internal Revenue Service: it wants to engage in political issue advocacy without threat of tax assessment and onerous investigation each and every time it wishes to engage in such constitutionally protected speech.

The district court compounded this invasion when it determined that it lacked subject matter jurisdiction by ruling that the issues presented by Catholic Answers are moot, that the issues are not capable of repetition yet evading review, and that Catholic Answers cannot raise any arguments related to the proper definition of the phrase "political expenditure." This ruling should be reversed because it allows the IRS to permanently immunize its administrative decisions from judicial review without ever having to confront the constitutionally infirm statutes and regulations that triggered the present dispute.

I. The Facts.

Catholic Answers is a nonprofit religious

corporation exempt from federal income taxes pursuant to section 501(a) and section 501(c)(3). Catholic Answers' mission statement explains that it is "dedicated to serving Christ by bringing the fullness of Catholic truth to the world."[1] Keating, the founder and president of Catholic Answers, is a prominent and well respected Catholic apologist and author.[2]

On Palm Sunday, April 4, 2004, United States Senator John Kerry received communion at an African Methodist Episcopal church. One week later, Senator Kerry took Holy Communion at a Catholic Mass.[3] On April 13, Keating published an E-letter on Catholic Answers' website that discussed the events and why Senator Kerry, a Catholic, should have been rebuked for taking communion from a community that lacked a

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[1] *See* Catholic Answers: About, http://www.catholic.com/home/about.asp.

[2] "Apologetics" is "a branch of theology devoted to the defense of the divine origin and authority of Christianity." Merriam-Webster's Collegiate Dictionary 54 (10th Ed. 2000).

[3] In the Catholic liturgical year, Passion (or Palm) Sunday marks the beginning of Holy Week, which culminates in the Easter Triduum and the celebration of Christ's Resurrection on Easter Sunday, one week after Palm Sunday. These represent the most solemn celebrations on the Catholic Church's liturgical calendar. General Norms for the Liturgical Year and the Calendar (Feb. 14, 1969), §§ 18-21, 30, 59. For a prominent Catholic to publicly violate the Church's sacramental discipline on any day of the year would be worthy of comment, but to do so during Holy Week would be especially so.

valid sacrament of Orders.[4] App. at 63a-65a. Keating was also critical of Senator Kerry's views on abortion and suggested that he should be denied Holy Communion.[5] Keating published a second E-letter on May 11, 2004, again discussing Senator Kerry and the Catholic Church's teachings on abortion and the Eucharist. App. at 66a-70a.

Senator Kerry was the presumptive Democrat nominee for president of the United States when the E-letters were published. Keating did not mention

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[4]*See* Pope John Paul II, *Ecclesia de Eucharistia*, ¶ 46 (2003) ("Catholics may not receive communion in those communities which lack a valid sacrament of Orders."). See also 1983 Code c.844 §§ 1-4 (stating that "Catholic ministers administer the sacraments licitly to Catholic members of the Christian faithful alone, who likewise receive them licitly from Catholic ministers alone" and noting exceptions inapplicable to Senator Kerry receiving Communion at a Protestant church); c.861 § 2 (noting situations in which a non-minister may administer the sacrament of baptism).

[5]*See* 1983 Code c.915 ("Those who have been excommunicated or interdicted after the imposition or declaration of the penalty and others obstinately persevering in manifest grave sin are not to be admitted to holy communion."). *Accord* Joseph Cardinal Ratzinger, *Worthiness to Receive Holy Communion*, (July 2004), (Cardinal Ratzinger was Prefect of the Congregation for the Doctrine of Faith and was elected Pope Benedict XVI on April 19, 2005). *See also*, Pontifical Council for Legislative Texts, Declaration, *Concerning the Admission of Holy Communion of Faithful Who Are Divorced and Remarried*, (June 24, 2000) (describing other situations in which Catholics are to be denied Holy Communion).

Senator Kerry's status as a candidate in either E-letter, nor did he encourage anyone to vote for or against Senator Kerry or any other politician in any election. He did discuss the effect denying communion has had on voters in the past, but only to underscore that the timing of denying communion, not the denial itself, be considered by any bishop so as not to unduly affect an election. App. at 64a.

The E-letters referenced a document entitled *Voter's Guide for Serious Catholics* ("*Voter's Guide*").[6] Catholic Answers produced and distributed the *Voter's Guide* when the E-letters were published on Catholic Answers' website.[7] The *Voter's Guide* states that it is designed to "help you cast your vote in an informed manner consistent with Catholic moral teaching." It discusses the Catholic Church's teachings on five

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[6]An organization exempt from federal income taxes pursuant to section 501(c)(3) may produce a voter's guide without violating the prohibition on political intervention. *See* Rev. Rul. 80-282, 1980-2 C.B. 178; Rev. Rul. 78-248, 1978-1 C.B. 154.

The IRS issued a ruling when it closed the examination that the *Voter's Guide* referenced in the E-letters was 501(c)(3) qualified, meaning Catholic Answers could produce and distribute the *Voter's Guide* without violating the prohibition on political intervention contained in section 501(c)(3). *Infra* at 13.

[7]The production and distribution of the *Voter's Guide* has since been transferred to an organization called Catholic Answers Action. The *Voter's Guide*, although section 501(c)(3) qualified, was transferred to Catholic Answers Action to avoid further confrontations with the IRS and the "all the facts and circumstances" test.

issues that Catholic Answers considers "non-negotiable." The *Voter's Guide* does not contain the name of any individual running for political office. At the time the E-letters were published, the *Voter's Guide* was also available on Catholic Answers' website.

On January 3, 2005, the IRS notified Catholic Answers that it was opening an examination to determine whether Catholic Answers violated the prohibition on political intervention. The examination focused primarily on the *Voter's Guide*. Catholic Answers believes that the examination was prompted by a complaint filed with the IRS by Catholics for a Free Choice, alleging that the *Voter's Guide* violated the prohibition on political intervention.

The ensuing examination resulted in numerous Information Document Requests ("IDRs").[8] In response to the first IDR, which accompanied the notice of examination, Catholic Answers set forth, in detail, its argument that the "'all the facts and circumstances' test" violates the "Due Process Clause of the Fifth Amendment" and encouraged the IRS to close the examination. Catholic Answers renewed these objections in response to IDR #4, which closed the

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[8]Catholic Answers devoted substantial time and resources to respond to the IDR's and the examination generally. For example, IDR #2, contains 73 questions, including 28 discreet sub-parts. If IDR #2 had been an interrogatory served during the course of this proceeding, the IRS would have asked more than four times the number of questions allowed in a single document request pursuant to Fed. R. Civ. P. 33. IDR #2 was one of four served upon Catholic Answers during the course of the examination.

examination process, stating: "only express advocacy communications constitute political intervention."

On May 2, 2008, after an extensive and costly examination, the IRS notified Catholic Answers that the E-letters are political expenditures pursuant to section 4955(d) because they "oppose the election of a specific candidate running in the November 2004 presidential election." The IRS assessed modest excise taxes for tax years 2004 and 2005 pursuant to section 4955(a) and required Catholic Answers to "correct" the political expenditure pursuant to section 4955(f)(3).[9]

During the course of the examination, Catholic Answers transferred the *Voter's Guide* to a new organization called Catholic Answers Action ("CA-Action"). Catholic Answers transferred the *Voter's Guide* activity to CA-Action to avoid future confrontations with the IRS and the "all the facts and circumstances" test.[10] CA-Action has applied for

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[9]The IRS determined that cost of the two E-letters was $831.41 and assessed taxes of $58.81 for the tax year ending June 30, 2004, and $43.42 for the tax year ending June 30, 2005. Keating, as the organization manager that authorized the expenditure, was required to reimburse Catholic Answers for the entire cost of the expenditures, $831.41.

[10]Catholic Answers' First Amended Complaint included an allegation that it would like to engage in substantially similar speech in the future.

Producing and distributing the *Voter's Guide* through CA-Action to avoid becoming subject to the "all the facts and circumstances" test is less than ideal. It is expensive to administer a separate organization. *See Citizens United v.*

exemption pursuant to section 501(c)(4).[11]

Importantly, when the IRS closed the examination, it concluded that the *Voter's Guide* complied with all published guidance regarding section 501(c)(3) voter's guides and was not a political expenditure within the meaning of section 4955. (E.R. at 94.) Nevertheless, Catholic Answers has not resumed production and distribution of the *Voter's Guide* because it fears that it may once again become subject to the "all the facts and circumstances" test.

On March 17, 2008, Keating corrected the political expenditures by reimbursing Catholic Answers for the costs of the E-letters. And on March 19, 2008, Catholic Answers paid the excise taxes and submitted proof that the expenditures had been corrected.

FEC, 130 S. Ct. 876, 897 (2010) (alternative method of speaking does not cure First Amendment problems). The section 501(c)(4) alternative also deprives CA-Action of the ability to receive tax-deductible contributions from donors. *See* I.R.C. § 170. The creation of CA-Action does not lessen the likelihood that Catholic Answers will confront the "all the facts and circumstances test in the future."

[11]Section 501(c)(4) organizations are not prohibited from intervening in political campaigns provided that they are operated primarily for the promotion of social welfare. *See* Rev. Rul. 81-95, 1981-1 C.B. 332. *See also* Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

Because a section 501(c)(4) organization may engage in some political intervention without losing its exempt status, the lack of clarity as to what constitutes political intervention is somewhat less problematic for a section 501(c)(4) organization.

Catholic Answers filed administrative refund claims for both tax years on September 24, 2008, by filing Form 843, *Claim for Refund and Request for Abatement*.[12] Where the form requested an explanation of why the claim or request should be allowed, Catholic Answers stated:

> CA disagrees with the Service's determination that these E-letters constitute "political expenditures" withing the meaning of Section 4955(d). Specifically, CA does not believe that the statements contained in the E-letters constitute "participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office." Accordingly, CA is entitled to a refund of taxes paid pursuant to Section 4955 because it did not make a "political expenditure."

Catholic Answers made no allegation that the taxable event was not willful and flagrant. Catholic Answers also did not suggest that the taxes should be abated pursuant to section 4962. Nor did it ask for an abatement under section 4962.

Catholic Answers also requested an immediate

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[12]Taxpayers are instructed to use the same form to request a "refund" or an "abatement" of excise taxes assessed pursuant to section 4955. *See* IRS, *Instructions for Form 843* (Rev. Feb. 2009), 1 ("Use Form 843 to *claim a refund* or *request an abatement* of certain taxes, interest, penalties, and additions to tax.") (emphasis added) (*available at* http://www.irs.gov/pub/irs-pdf/i843.pdf). Catholic Answers did not use the word "abate" anywhere in the material submitted with its administrative refund claim.

rejection letter from the IRS Taxpayers may request an immediate rejection of an administrative refund claim when the issues raised in the claim have been previously considered and rejected by the IRS during an examination. *See* IRS News Release IR-1600 (Apr. 26, 1976); IRM § 4.90.7.5.2 (*available at* http://www.irs.gov/irm/part4/irm_04-090-007.html#d0e332); IRS, *Publication 556* (Rev. May 2008), at 15 (*available at* http://www.irs.gov/pub/irs-pdf/p556.pdf). Catholic Answers stated "We request that the Service issue an immediate rejection of Catholic Answers' claim for refund because it is based upon issues that were previously considered and rejected by the Service in connection with an examination." (emphasis in original).

On March 27, 2009—the last day before the six month wait period expired under section 6532—the IRS indicated that it was going to abate the excise taxes and credit Catholic Answers' account, with interest, because the "*political intervention* . . . was not willful and flagrant." (emphasis added). App. at 61a. Thus, the IRS indicated that it had rejected Catholic Answers' administrative refund claim, reaffirmed its prior determination that the E-letters constitute political expenditures within the meaning of section 4955, and indicated that it would abate and return the taxes under section 4962.

Catholic Answers would like to engage in substantially similar issue advocacy in the future but will not so long as it can have taxes assessed against it, be subject to another grueling investigation, and possibly have its tax-exempt status revoked for such speech. Because the IRS did not change its position on

whether Catholic Answers' E-letters a political expenditure and gave it an abatement rather than the refund it requested, Catholic Answers has no assurance that this scenario will not happen again, and thus is chilled from engaging in substantially similar political speech.

II. The History of the Litigation

Catholic Answers filed a Complaint for Tax Refund on April, 3, 2009.[13] Catholic Answers alleged that the excises taxes were improperly assessed and collected because the E-letters are not political expenditures within the meaning of section 4955. Catholic Answers also alleged that section 4955 and the supporting regulations are unconstitutional, both facially and as-applied to the E-letters. Catholic Answers' prayer for relief requested: (1) judgment that the E-letters are not political expenditures; (2) judgment that it is entitled to return the monies collected from Keating, and; (3) judgment that the statute and regulations are

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[13]To file a refund claim in the federal courts, a taxpayer must first pay the tax, *Flora v. United States*, 357 U.S. 63 (1958), and then file a proper refund claim in accordance with I.R.C. § 7422(a). *See United States v. Dalm*, 494 U.S. 596, 601-02 (1990). A taxpayer cannot preemptively challenge a tax statute. *See* 28 U.S.C. § 2201 (tax exception to the Declaratory Judgment Act); I.R.C. § 7421 (Anti-Injunction Act); *see also Bob Jones University v. Simon*, 416 U.S. 725 (1974). After filing an administrative refund claim, a taxpayer must wait for the Service to reject the claim, or six months, before filing suit in the federal courts. *See* I.R.C. § 6532(a)(1). Catholic Answers satisfied all these requirements.

unconstitutionally overbroad and vague, both facially and as-applied to the E-letters.

On April 21, 2009, the IRS abated and returned the excise taxes to Catholic Answers. Catholic Answers stated that it has, and will continue, to reject tender of any refund or abatement to the extent that the IRS continues to maintain that the E-letters are political expenditures within the meaning of section 4955.[14]

The IRS filed a motion to dismiss all claims in Catholic Answers' Complaint for lack of subject-matter jurisdiction on June 15, 2009. In support, the IRS argued: (1) that Keating lacked standing to bring suit; (2) that Catholic Answers' claims became moot when the IRS abated and returned the excise taxes; (3) that the claims are not capable of repetition yet evading review, and; (4) that Catholic Answers could not raise any arguments regarding the constitutionality of the statute and regulations, or the return of funds to Keating.

Catholic Answers filed an amended complaint ("First Amended Complaint") on July 15, 2009. The First Amended Complaint clarified that Catholic Answers was not presenting a facial challenge to section 4955, but was instead seeking a proper narrowing construction of section 4955(d) and the supporting regulations. Catholic Answers' amended prayer for relief requested: (1) judgment that the E-letters are not political expenditures within the

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[14]Catholic Answers has not, and will not, deposit the checks so long as the IRS continues to maintain that they E-letters are political expenditures within the meaning of section 4955.

meaning of section 4955(d), as properly construed; (2) judgment that Catholic Answers is entitled to return the funds recovered from Keating, and; (3) a declaration that section 4955 and the supporting regulations apply only to activities that constitute "express advocacy."

The IRS filed a motion to dismiss the First Amended Complaint on July 31, 2009, raising the same arguments presented in its original motion to dismiss. The district court heard oral arguments on September 28, 2009.

On October 14, the district court issued an order dismissing the First Amended Complaint in its entirety, with prejudice. The district court concluded that: (1) Keating lacked standing; (2) that Catholic Answers' claims became moot when the IRS abated and returned the excise taxes; (3) that the issues presented in the First Amended Complaint are not capable of repetition yet evading review, and; (4) that Catholic Answers could not raise any arguments related to "express advocacy" or the return of funds to Keating because the doctrine of variance barred it. App. at 4a-26a.

Catholic Answers filed a timely notice of appeal on December 3, 2009, and the case was argued before the Ninth Circuit on May 4, 2011. On June 21, 2011, the panel issued an unpublished decision affirming the district court. App. at 1a-3a. On July 1, 2011, Catholic Answers filed a Petition for Rehearing En Banc, which was denied on July 22, 2011. App. at 27a.

Reasons for Granting the Petition

The IRS routinely seeks to avoid judicial review of its administrative decisions by giving in without renouncing the policy that gave rise to the dispute with the taxpayer. The jurisdictional statute permits such evasive tactics because a taxpayer cannot file a refund suit until the taxpayer has paid a tax and filed an administrative refund claim. The Ninth Circuit's decision, however, insulates the IRS from judicial review even when the taxpayer has followed the refund procedures mandated by Congress. In this case, abatement has been used to prevent judicial determination of whether the IRS policy violates the First Amendment rights of groups and individuals and has the effect of chilling future political speech because the determination remains, and will forever remain, unresolved. Because of the importance of the underlying issue in this case, as well as the Ninth Circuit's improper analysis of mootness, the Declaratory Judgment Act, and the variance doctrine, review by this Court is necessary.

I. This Case Involves Important Questions of Law.

The underlying legal issue of Catholic Answers' refund claim involves core political speech and the application of a vague and indeterminable IRS standard to that political speech. Currently, the IRS is able to silence core political speech by trickery. Catholic Answers is left in the same position now as when it first spoke on its website about the application of religious teachings to a political official. It engaged in core political speech at the heart of its mission. As

a result of that speech, it was subject to a grueling IRS investigation, after which the IRS determined that Catholic Answers' speech violated the law by engaging in political intervention under the IRS's vague and indeterminable "facts and circumstances" test. And the IRS penalized Catholic Answers. Then, when Catholic Answers contested the penalty, the IRS waited until the last possible moment to give Catholic Answers its money back. The IRS did not change its position on whether the tax should have ever been imposed in the first place. And now, according the district court and Court of Appeals, Catholic Answers is left without any access to judicial review. If Catholic Answers exercises its right to speak again, it will be penalized and placed on the rack once again, only to have the IRS give its money back if Catholic Answers again seeks judicial review. This type of trickery, which leaves the constitutionality of the underlying statute untouchable, affects the speech of hundreds if not thousands of non-profit organizations.

The Ninth Circuit could have resolved this controversy by allowing Catholic Answers to reach the merits of its underlying claim like the D.C. Circuit did in an IRS claim it considered. *See Big Mam Rag v. U.S.,* 631 F.2d 1030 (D.C. Cir. 1980) (reviewing appellant's denial of their tax exemption application and holding that the IRS's "full and fair exposition" standard was wholly subjective and unconstitutionally vague under the First Amendment). But instead, the Ninth Circuit has chosen to sanction the IRS's trickery. It has done this, in part, by inappropriately holding that these claims are moot, ignoring the continued controversy that still exists for Catholic Answers.

The Ninth Circuit's entire discussion of mootness in this case consists of three sentences: "This suit is moot. There is no relief that this court could grant. The tax paid has already been abated." App. at 2a. These assertions, however, misapply the Supreme Court's doctrine on mootness.

Catholic Answers sought a refund under Section 4955 of the tax code. Instead of granting Catholic Answers its requested relief, the IRS abated the imposition of taxes under a separate statute, Section 4962.[15] Section 4962 differs from 4955 in that it does not involve an admission by the IRS that the tax in question was improperly imposed. Just the opposite. Abatement under Section 4962 presumes that Catholic Answers' E-letters were political expenditures, but that because its violation of the tax code was not "willful and flagrant," taxes would be abated as a discretionary matter.

Because the IRS abated the taxes under Section 4962 rather than issue a refund under Section 4955, Catholic Answers continues to face several collateral consequences from the IRS' original determination. First, denial and abatement prevents Catholic Answers from returning the cost of the E-letters to Keating. The abatement letter clearly indicates that the IRS reaffirmed its prior position that the E-letters are political expenditures within the meaning of section

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[15] It should be noted that Catholic Answers has not deposited the check tendered by the IRS and will not do so as long as the IRS continues to maintain that the E-letters are political expenditures within the meaning of Section 4955.

4955. App. at 61a ("We have determined that the *political intervention* . . .) (emphasis added). And the abatement is also clearly conditioned upon the correction of the political expenditures.[16] App. at 61a ("We have determined that the political intervention . . . was not willful and flagrant and was *corrected* within the correction period. Accordingly, under section 4962, we have abated the tax.") (emphasis added). Therefore, Catholic Answers cannot return the funds to Keating because the abatement was conditioned upon the fact that it had recovered the cost of the E-letters from Keating.

Second, denial and abatement increases the likelihood that additional tax penalties or potentially revocation of Catholic Answers' exempt status will follow materially similar speech in the future because Catholic Answers would be seen as a repeat offender. And even if its tax status is not revoked, if Catholic Answers engages in substantially similar speech in the future, it can, at minimum, be confident that an investigation and excise taxes are forthcoming.

Finally and most importantly, because of this, Catholic Answers is chilled from engaging in constitutionally protected speech because the IRS has not revoked its prior position that its speech is not taxable and may again find that such speech

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[16]It is unclear how the IRS would respond if Catholic Answers returned the funds to Keating now that the excise taxes have been abated. At a minimum, the monies are taxable income to Keating pursuant to section 61. Thus, unlike a refund of the excise taxes, an abatement is not tax-neutral.

constitutes an improper political intervention that warrants another excise tax assessment.

And where collateral consequences are present, the mere fact that the IRS has returned the tax money collected does not render a challenge moot. *See Church of Scientology*, 485 F.2d at 316 (holding that a tax case was not moot despite a return of taxes paid by the IRS because "the failure to resolve the legal issue results in adverse collateral consequences which would be resolved by a determination of the underlying issue.").

Moreover, a return of funds does not moot a federal tax refund claim when there are issues capable of repetition yet evading review. As this Court stated in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), a controversy is not moot when there is a "reasonable expectation that [a party] . . . will be subject to the threat of prosecution under the challenged law." *Id.* At 463. This capable-of-repetition "exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. FEC*, 128 S. Ct. 2759, 2769 (2008) (internal citations omitted).

The Ninth Circuit held that Catholic Answers had met the "capable of repetition" prong, due to "Catholic Answers' assertion that it will engage in similar political speech in the future." App. at 2a. The court held that the "evading review" prong was not satisfied, however, because "should this set of facts recur . . . it will be clear then, while it is not now, that the IRS has intentionally maneuvered to avoid judicial scrutiny and will not be permitted to engage in evasion of this

kind." App. at 2a. This, however, misapplies the capable of repetition yet evading review exception.

To avoid the capable of repetition yet evading review exception, a court must have "assurance that the challenged action will not again take place." *Anderson v. Evans*, 371 F.3d 475, 502 n.27 (9th Cir. 2004). Nothing in the Ninth Circuit's unpublished decision precludes the IRS from selectively granting abatements to moot future challenges, precisely as they have done in this case. Nor do the facts suggest that the IRS will not do so. The speculation in the opinion below as to how a future court might decide a future challenge is not sufficient under this Court's jurisprudence to render this case not capable of repetition yet evading review. Indeed, were that the case, a court could always deny relief by saying, "if it happens again, then we'll hear the case." Because the Ninth Circuit's decision departs from the ordinary application of the capable of repetition yet evading review doctrine as applied by this Court, this Court should grant Petitioner's writ petition.

II. The Panel Decision's Holding that Relief is Barred by the Declaratory Judgment Act Conflicts with the Spirit of *Bob Jones*.

Without offering any elaboration, the Ninth Circuit's decision below also states that "[t]he Declaratory Judgment Act grants federal courts jurisdiction to declare the rights and relations of interested parties 'except with respect to Federal taxes.' 28 U.S.C. § 2201." App at 2a. To the extent this statement is construed as holding that Catholic Answers' claims are barred by the tax exception to the Declaratory Judgment Act, the Panel decision is

contrary to the spirit, if not the letter, of this Court's opinion in *Bob Jones University v. Simon*, 416 U.S. 725 (1974).

In that lawsuit, Bob Jones University filed suit in federal court seeking preliminary and permanent injunctive relief to prevent the IRS from revoking its exempt status. *Bob Jones*, 416 U.S. at 735. Notably, no tax had been assessed or collected when Bob Jones University commenced the lawsuit. *Id.* at 748 n.22. So the Supreme Court held that the Anti-Injunction Act deprived the Court of subject-matter jurisdiction because no tax had been assessed or collected. *Id.* at 747. However, the Court observed that Bob Jones had a right to contest the IRS' actions in a suit for refund. *See also Ctr. on Corp. Resp., Inc. v. Shultz*, 368 F. Supp. 863, 879 (D.D.C. 1973) (tax-exempt organization granted permanent injunctive relief in tax refund suit to recover employment taxes). And it emphasized that it was not permanently foreclosing the possibility of permanent injunctive relief in the event that a tax was ultimately assessed and collected. *Bob Jones University*, 416 U.S. at 748 n.22 ("But our decision today that § 7421(a) bars *pre-enforcement* injunctive suits by organizations claiming § 501(c)(3) status unless the standards of *Williams Packing* are met should not be interpreted as deciding whether injunctive relief is possible in a refund suit in a district court.") (emphasis added). The Court clearly countenanced tax lawsuits being properly before the federal courts.

Because the opinion below conflicts with this Court's jurisprudence, this Court should review this matter.

III. The Panel Decision's Holding That the Doctrine of Variance Precluded Consideration of Catholic Answers' Arguments Conflicts with Other Circuit Precedent.

Before filing a refund lawsuit, a taxpayer must file a refund claim with the IRS in accordance with the relevant Treasury regulations. I.R.C. § 7422(a). The regulation states that the "claim must set forth in detail each *ground* upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." Treas. Reg. § 301.6402-2(b)(1) (emphasis added). The "substantial variance" doctrine precludes a taxpayer from raising claims in a "refund suit that '*substantially vary*' the legal theories and factual bases set forth in the tax refund claim presented to the IRS." *Lockheed Martin Corp. v. United States*, 210 F.3d 1366, 1371 (Fed. Cir. 2000) (emphasis added). The doctrine is designed to prevent surprise and to give the IRS adequate notice of the claim so that it can be investigated and resolved." *Synergy Staffing, Inc. v. United States IRS*, 323 F.3d 1157, 1161 (9th Cir. 2003).

Catholic Answers' administrative refund claim stated:

> [Catholic Answers] does not believe that the statements contained in the Eletters constitute "participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office." Accordingly, [Catholic Answers] is entitled to a refund of taxes paid pursuant to Section 4955 because it did not make a "political expenditure."

The Panel decision's discussion of variance consists of the following sentence: "The doctrine of variance precludes Catholic Answers' First Amendment claims. *See* 26 C.F.R. § 301.6402-2(b)(1)." App. at 2a. This misunderstands the doctrine. Catholic Answers' First Amendment arguments are not separate *grounds* for relief that must satisfy the requirements of section 7422(a). Rather, the arguments are part of the analysis necessary to determine whether the E-letters are political expenditures. The IRS had notice that Catholic Answers intended to raise First Amendment objections to the imposition of taxes based on any classification of the E-letters as political expenditures throughout this process. Thus, the Ninth Circuit's bare ruling, without analysis, conflicts both with the Federal Circuit's ruling in *Lockheed Martin*, which requires *substantial* variance to trigger the doctrine and which is plainly not present here, as well as with its own analysis in *Synergy Staffing*, which is concerned with notice, a concern that is easily put to rest under the facts of this case. Indeed, the court below has left wide open just how or what can trigger application of the doctrine, allowing for broad discretion its application. This Court should grant this petition for certiorari to ensure uniform application of the variance doctrine among the circuits.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari and reverse the Ninth Circuit's decision.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Anita Y. Woudenberg
THE BOPP LAW FIRM
The National Building
1 South 6th Street
Terre Haute, IN 47807
812/232-2434 (voice)
812/235-3685 (facsimile)
jboppjr@aol.com (email)
Counsel for Petitioners