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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: HAROLD DAVIS, ET UX, Petitioners v.
UNITED STATES

CASE NO: 89-98

PLACE: Washington, D.C.

DATE: March 26, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 HAROLD DAVIS, ET UX., :

4 Petitioners :

5 v. :

 No. 89-98

6 UNITED STATES :

7 -----x

8 Washington, D.C.

9 Monday, March 26, 1990

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.

13 APPEARANCES:

14 REX E. LEE, ESQ., Provo, Utah; on behalf of the
15 Petitioners.

16 SHIRLEY D. PETERSON, ESQ., Assistant Attorney General,
17 Department of Justice, Washington, D.C.; on behalf of
18 the Respondent.

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P R O C E E D I N G S

(10:02

a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 89-98, Harold Davis v. the United States.

Mr. Lee.

ORAL ARGUMENT OF REX E. LEE

ON BEHALF OF THE PETITIONERS

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

At issue in this case is the Federal income tax deductibility of contributions by the parents of Mormon missionaries made directly to the missionaries for the sole purpose of supporting the missionary efforts. It is common ground that payments to support missionary work of a church that qualifies as charity, such as the Mormon church does, are in general deductible. And the sole issue here concerns the means by which those payments are made.

The crucial language of the statute requires that in order to be deductible payments must be made to or for the use of the church. The government's position that any method other than undifferentiated payments to the church itself can never, regardless of any other

1 circumstances, be for the use of the church, not only
2 ignores the plain language of the statute, but it also
3 reflects, as does the government's entire brief, a
4 profound failure to recognize even the most fundamental
5 principles and operational aspects of Mormon missionary
6 work as they are reflected in the record in this case,
7 which must in any event be viewed in a light most
8 favorable to Petitioners, against whom summary judgment
9 was entered.

10 The only reason that the petitioners Harold and
11 Enid Davis --

12 QUESTION: When you say that the record must be
13 viewed in the light most favorable but the petitioners,
14 you just mean any factual evidence that could have been
15 drawn?

16 MR. LEE: Excuse me, record, the factual record,
17 yes, yes.

18 QUESTION: And on that point, Mr. Lee, can we take
19 this case as one in which the donations or the payments
20 would not have been made but for the parent-child
21 relation?

22 MR. LEE: Oh no, no. You can take it as one that
23 would not have been made but for the fact that they were
24 missionaries. But these very petitioners have made
25 contributions to missionary work other than to their sons,

1 and it most assuredly is not the case that they would not
2 have been made but for the fact that they are their own
3 sons.

4 QUESTION: Well, if -- suppose we had had a trial,
5 and as a factual matter the parents said well, I just want
6 it understood that of course I supported the church and
7 its doctrines and the missionary movement, but the only
8 reason I made these particular payments was the fact that
9 it was my boy that was doing the missionary work.

10 MR. LEE: It would be --

11 QUESTION: Would that be, then, a different case?

12 MR. LEE: I don't think so.

13 QUESTION: So motive isn't irrelevant?

14 MR. LEE: Well --

15 QUESTION: Or isn't relevant?

16 MR. LEE: The motive to support the church's
17 efforts is very relevant, because it demonstrates that the
18 payments are for the use of the church.

19 QUESTION: Well, then, suppose there is a mixed
20 motive?

21 MR. LEE: Then I think you look to what the Tenth
22 Circuit said, what was the, who was the primary
23 beneficiary. It is not so much motive that --

24 QUESTION: Well, is it the primary motive or the
25 primary beneficiary?

1 MR. LEE: It's the primary beneficiary. It's not
2 so much motive, Justice Kennedy, it is who is the
3 beneficiary, for whose use is it. And the fact of the
4 matter is --

5 QUESTION: Well, I think those are two different
6 tests.

7 MR. LEE: Oh, I think they are. I think they are.
8 And I think the question is not so much the subjective one
9 of what the motive is, but rather what the use is, which
10 is an objective test.

11 QUESTION: Mr. Lee, supposing that -- then, I am
12 not saying the record does show this, supposing it had
13 showed that for 20 years before their children became
14 missionaries the Petitioners gave \$500 a year to the
15 church, and then in the years when their children were
16 missionaries they gave \$3,000 or \$4,000 a year to the
17 church, or to their children, and claimed a religious
18 deduction. Then when their children ceased to be
19 missionaries they went back to giving \$500 a year to the
20 church. Now, does that make any difference in your case?

21 MR. LEE: No, not so long as the difference between
22 the 500 and the amount they gave did not exceed the
23 church's guide -- which the church has identified as the
24 amount that is necessary in order to support their work.

25 QUESTION: Well, in my hypothetical though, they

1 give a lot more when their children are involved than when
2 they are not.

3 MR. LEE: That is correct. That is correct. And
4 there are --

5 QUESTION: But doesn't that show that there is not
6 a detached motive of generosity for the church?

7 MR. LEE: What that shows, Justice Kennedy, is 160
8 years' worth of history in which the Mormon church prefers
9 that its missionary work be a total family effort,
10 including not only the family support, but also including
11 specifically the direct payment.

12 And if I may elaborate on that just a bit, these
13 are reasons that go twice as deep as the history of the
14 income tax laws themselves, and they are borne out by the
15 church's amicus brief and by the affidavit of Elder Robert
16 Backman, who at the time was the executive director of the
17 missionary work.

18 Over its 160-year history the church has found that
19 missionary work has always been family centered, from the
20 very beginning, with one or more members devoting full
21 uncompensated time and effort, usually for a period of two
22 years, while other family members have stayed at home but
23 have participated through their prayers, their letters and
24 most significantly, from the very beginning, their
25 financial support.

1 And what the church has found is that the most
2 effective missionary is one whose efforts are an integral
3 part of a total, largely -- larger family endeavor, and
4 that that contribution to success from the family
5 involvement is more effectively achieved if the missionary
6 each month receives his check direct from his family
7 rather than from the church itself.

8 QUESTION: Mr. Lee, could I come back to your, as I
9 understand your position it is that the motive doesn't
10 matter, it is just whether the primary effect is to -- is
11 for the benefit of the church?

12 MR. LEE: That is the way I would read the statute,
13 Justice Scalia.

14 QUESTION: Well, then that would mean that if I --
15 if I am walking along the street, and I'm a compulsive
16 benefactor, and I meet a young man that I take a liking to
17 and I say here, young man, here is \$5,000, and that young
18 man turns out to be a Mormon missionary and he uses that
19 to live for the next year as a missionary, then I have a
20 deduction?

21 MR. LEE: Most assuredly not.

22 QUESTION: Well, but the primary effect would be to
23 support the missionary work of the church.

24 MR. LEE: Not because -- no. The primary effect is
25 not to support the missionary.

1 And that brings us to another determination that
2 the church has made which is also of more than 100 years'
3 duration, and that is that up to the limits, that there
4 are certain limits which are near survival, they border -
5 - frugality in the extreme, that serves the church's
6 purposes for them to have that much money to do their
7 missionary work.

8 Now, if they have money beyond that then they have
9 time to spend on things like movies, plays and so forth,
10 and their missionary work decreases. And as a
11 consequence, if you were to offer money to a Mormon
12 missionary to support his efforts, if he is doing his job
13 right he would just as politely as possible refuse it.

14 QUESTION: Why wouldn't he take it and give the
15 church back the \$5,000 that he is using?

16 MR. LEE: He could if you --

17 QUESTION: And if he does that, then I would have a
18 tax deduction, even though I don't even know he is a
19 Mormon missionary. I gave him \$5,000 --

20 MR. LEE: That is correct. That is correct.

21 QUESTION: -- and he writes back to the church and
22 he says you know, this fellow gave me \$5,000. Here is the
23 money for my missionary support, I am going to use this
24 other money. And I have a tax deduction, even though I
25 had no idea the person was even a Mormon.

1 MR. LEE: That is not for the maximal use of the
2 church. That is not the way the church wants it done.
3 His first job is to talk you out of giving it to him, or
4 to give it directly to the church --

5 QUESTION: No, you have to take my hypothetical.
6 He doesn't do that.

7 MR. LEE: All right. I will take your
8 hypothetical. Here is what he does do then. He still
9 supports his own efforts on what his family sends him, for
10 reasons that I have just stated. That is the way he is
11 the most effective missionary. What he can do is take the
12 money that you give him and send it in to the church.

13 QUESTION: You are not taking my hypothetical. He
14 doesn't do that. He accepts the money, he sends back to
15 the Mormon church the money that his parents have given
16 him, and he says here, somebody else has given me money.

17 MR. LEE: All right.

18 QUESTION: And you really think that I would have a
19 deduction, even though I had no motivation to help the
20 Mormon church at all?

21 MR. LEE: No, clearly you don't.

22 QUESTION: Okay, so motive has to enter into it
23 somehow, doesn't it?

24 MR. LEE: I guess there is a relationship between
25 the motive and -- and it comes from the other end also.

1 Because what we are really concerned about here is the
2 deductibility to his parents, who of course did make the
3 contribution. And I think that while it is principally an
4 objective test, I suppose I have to say, Justice Kennedy,
5 that it is not unaffected by the motive, for reasons that
6 have just been borne out by Justice Scalia's hypothetical.

7 QUESTION: Well, I suppose it's common ground in
8 the government that if, if in the Chief Justice's example
9 the family gave \$500 a year to the church and then they
10 gave -- and then they send their children \$5,000 a year or
11 whatever the amount is -- I suppose it's common ground,
12 instead of sending it to them, they gave the church
13 \$5,000, that there would be a deduction.

14 MR. LEE: Well, I would surely hope so. I would
15 surely hope so.

16 Now, the government's misunderstanding --

17 QUESTION: So if the church ran its missionary
18 support program differently, took the money itself from
19 the parents, there would be no problem.

20 MR. LEE: I would certainly hope so. I can't tell
21 that for sure by reading the government's brief, but I
22 would surely hope so.

23 The government relies principally on a fairly
24 consistent line of lower court cases which involve
25 charities, contribution to charities, but that are

1 earmarked for particular individuals. Now, those are
2 lower court cases, they are not binding on this Court.
3 But we hope the Court finds them persuasive, because they
4 solidly favor us and not the government. Some earmarked
5 contributions have been held deductible across a rather
6 broad range, and most notably missionary contributions
7 made to a church, but earmarked for the use of named
8 individuals. And the leading cases are the Fifth
9 Circuit's Winn decision and the tax court's holding in
10 Peace. The classic case of an earmarked contribution that
11 is not deductible is a contribution to pay the educational
12 expenses of a student, where the donor, rather than the
13 school, designates the recipient. The government contends
14 that those --
15 QUESTION: Not a seminary student?
16 MR. LEE: That is correct. That is correct.
17 The government says that those donor-selected
18 tuition earmarking cases are analogous. But they are
19 analogous only if you accept the premise on which the
20 government builds its entire case, and that premise is the
21 following. Although the church receives some indirect
22 benefit from Petitioners' support of their children, the
23 principal beneficiaries of the payments were these
24 individuals. The government's whole case depends on the
25

1 correctness of that assumption, that the church's
2 missionary program and the contributions that support it
3 are the missionaries themselves. If that assumption is
4 correct, then the tuition earmarking cases are relevant
5 because students are clearly the beneficiaries of the
6 tuition payments. But that assumption bears no
7 resemblance to fact, as the record here shows.
8 Far from being its beneficiaries, Mormon
9 missionaries are the church's missionary program. The
10 church has no other agents by which it carries out its
11 missionary programs, other than these young people who
12 wear white shirts and blouses and go in pairs. The
13 beneficiaries are the people that they teach. These
14 people devote two prime-time years, putting everything
15 else on hold, school, social life, dating, family
16 contacts, recreation, everything, not because it will
17 advance any interest of their own, but because of their
18 religious convictions about the importance of their
19 message.
20 QUESTION: It advances their spiritual interest,
21 surely, right? I mean --
22 MR. LEE: That is correct.
23 QUESTION: -- and their parents can say I am doing
24 this because I think it will do my, my son spiritual good.
25

1 It reminds me of a case we had earlier this term
2 that involved donations to a church in exchange for
3 spiritual benefits. It's sort of the same issue, isn't
4 it?

5 MR. LEE: Well, except that it is not the same
6 issue for two reasons. You are talking, of course, about
7 the Hernandez case, and there the issue was not the,
8 whether it was to or for the use of, it was a question of
9 whether these were gifts or contributions. And if there
10 should be any doubt about this, there is no quid pro quo
11 problem here. And the reason is, there is a very
12 important reason, the church itself has the ultimate
13 responsibility to see that these missionary expenses are
14 paid for. And in the event that some parents cannot or
15 will not pay the missionary expenses, the church picks it
16 up and pays it out of its own, out of its own funds.

17 But to a greater extent than is true of any other
18 endeavor of which I am aware, the life of the Mormon
19 missionary is devoted exclusively to one use, and that use
20 belongs to The Church of Jesus Christ of Latter-day
21 Saints. These people are no more beneficiaries of the
22 church's missionary program than a Catholic nun is the
23 beneficiary of the school in which she teaches, or a Red
24 Cross volunteer is the beneficiary of the Red Cross'
25 disaster relief efforts.

1 Look at the record. Benjamin Davis averaged over
2 70 hours a week in proselyting, plus another 10 in study
3 and preparations to proselyte, and his brother Cecil
4 averaged 60 hours a week proselyting, plus 10 to 25 hours
5 in preparation, which included language study, because he,
6 unlike his brother, did his proselyting in a foreign
7 tongue. Now, 80 hours a week is hardly incidental. They
8 were doing only one thing, and that was proselyting. Any
9 other activities were incidental to and in support of
10 their proselyting, and they were doing it on behalf of or
11 for the use of the church. And it necessarily follows
12 that donations which do nothing more than sustain those
13 proselyting efforts are also necessarily for the use of
14 the church.

15 Harold Davis's affidavit, which is part of the
16 record, states unequivocally that his motive was a sincere
17 religious desire to support the church's missionary
18 program, and that his contributions were subject to a
19 clear understanding and commitment by the sons that the
20 money would be used only in accordance with church
21 guidelines for necessary mission-related expenditures, and
22 was not intended by this -- for the sons to use as they
23 might see fit.

24 Now, there is no question that there are benefits,
25 but they are religious in nature. Insofar as any progress

1 toward any other goal that might relate to the kind of
2 thing that would be motivated by other than religion, it
3 is negative. After those two years, typically it comes
4 right in the middle of a college career, and there is some
5 retooling time and effort that is required once they
6 return.

7 QUESTION: How about the point that at the age
8 these children were the parents might well have been
9 supporting them, even had there been, had they been doing
10 something else?

11 MR. LEE: Of course. And they were supporting them
12 had they been doing something else. And that something
13 else was attending college. But the attending college was
14 preparing them for something that was related not to the
15 use of the church, not for -- but rather for their own
16 interest, and therefore for their parents interest.

17 This involved taking time out from that, putting
18 everything else on hold, and devoting 100 percent of their
19 time solely for the use of the church.

20 QUESTION: Mr. Lee, do we know from the record, as
21 I recall these funds were sent to the locations where
22 these students were proselytizing and deposited in a bank
23 account in their --

24 MR. LEE: Yes.

25 QUESTION: Do we know from the record what would

1 have happened if the children had just taken off, what
2 would have happened to the bank account? Would it have
3 gone to the church?

4 MR. LEE: Yes, it would.

5 QUESTION: Do we know that from the record?

6 MR. LEE: The record sets that forth, yes. Those
7 are church monies. Once they are devoted, and the record
8 is very clear, Elder Backman's affidavit is very clear on
9 this point. Once those monies are given to them for that
10 purpose, they are for the use of the church. And
11 similarly, if I can just drive that home a little further,
12 there are areas in the world where those guideline amounts
13 are so low that if you multiplied the monthly amount times
14 12 it comes out to less than \$1,000 a year.

15 So that it would actually be more advantageous to
16 the parents to take them as an exemption than it would to
17 claim the income tax deductions. They are not entitled to
18 that exemption, in our view, notwithstanding the fact that
19 it would be more advantageous, because they are not being
20 supported by their parents. They lack therefore the
21 support feature. Those are church monies once they are
22 given to them.

23 QUESTION: May I ask, you say the money belonged to
24 the church?

25 MR. LEE: Yes.

1 QUESTION: Does the bank account show that?

2 MR. LEE: No, belong to the church in the sense
3 that the church was -- if I can, there was a fiduciary
4 relationship in which the money was technically and
5 legally in their name, but the use belonged to the church,
6 in typical fiduciary --

7 QUESTION: I am sure it seldom happens, but what if
8 a missionary did spend the money going to the theater?
9 How is it policed? Is it, do you rely entirely on the
10 moral commitment of the missionary?

11 MR. LEE: Yes. Yes, particularly for de minimis
12 kinds of things like that.

13 QUESTION: What evidence in the record shows that
14 this was a fiduciary relationship, and that the money
15 would have gone to the church had the children simply run
16 off?

17 MR. LEE: Elder Backman's affidavit, plus --

18 QUESTION: Whose affidavit?

19 MR. LEE: Excuse me?

20 QUESTION: Whose affidavit?

21 MR. LEE: Robert Backman, and it is in appendix to
22 the petition. And also, there is a letter that went out
23 from the church that states it even more clearly. And I
24 need to clarify the status of that letter. It appears in
25 the appendix to the church's amicus brief. It is part of

1 the record in the White case in the Tenth Circuit. For
2 some reason it is not in the record in this case.

3 QUESTION: Well, we don't ordinarily consider --

4 MR. LEE: I understand.

5 QUESTION: -- appendices to amicus briefs as part
6 of the record.

7 MR. LEE: I understand.

8 QUESTION: What part of the record in this case
9 shows what you want to show?

10 MR. LEE: Elder Backman's affidavit.

11 QUESTION: And where is that?

12 MR. LEE: That is in the petition -- in the
13 appendix to the petition.

14 QUESTION: Appendix to the petition.

15 MR. LEE: Yes. In our view, --

16 QUESTION: Under that affidavit, which is at page
17 28a, suppose, following Justice Stevens' question,
18 contrary to the doctrines of his church and the wishes of
19 his parents, a missionary took the money for a color
20 television set and bought the color television. Would the
21 church have an action against him for embezzlement, or
22 civil action for return of the funds?

23 MR. LEE: We have talked about that, and I think
24 the answer is, technically, yes. In fact --

25 QUESTION: Is there something in the Backman

1 affidavit that tells us --

2 MR. LEE: No. No, there is not. What would
3 happen, in fact, Justice Kennedy, is self-help. There is
4 a great deal of control that the church exercises over
5 these missionaries, and that is much more effective than a
6 prosecution.

7 I come next to the fact that "for the use of"
8 really is, to a large extent, fact bound. And in reaching
9 the final question of which -- of whether these are or are
10 not "for the use of," I would invite the Court's attention
11 to two propositions.

12 First of all, to the extent that there are any of
13 these factual issues that are not adequately developed, we
14 would invite the Court to remand for the development of
15 any further issues. Indeed, I would point out that in the
16 Brinley case, which is the Mormon missionary case in the
17 Fifth Circuit, the circuit did just exactly that with
18 regard to such issues as the Chief Justice, necessarily,
19 the Chief Justice has just been asking.

20 But I would also invite the Court's attention to
21 these four considerations. The first is that the church
22 carries out its missionary program exclusively through the
23 efforts of these young men and women. There are no
24 others.

25 Second, it is the church's program. They are the

1 church's missionaries, and the ultimate financial
2 obligation is on the church. There are thousands of cases
3 throughout the world in which they can't do it the
4 preferred way, and the church always picks up the slack,
5 and they have the ultimate responsibility.

6 Third, the church, in its own interest, has set
7 guidelines for monthly missionary expenditures in
8 different parts of the world. As the Court can determine
9 from consulting those guidelines, they can only be
10 described as frugal in the extreme. And they always will
11 be, because the church has determined that above those
12 guideline amounts there is an inverse relationship between
13 the amounts that are spent and the effectiveness of their
14 missionary work.

15 And finally this, absent religious conviction there
16 is not a person in this court room who would send his son
17 or daughter off for two years to do the kinds of things
18 that Benjamin and Cecil Davis did, in the prime of life
19 and educational opportunity. The incidental benefits to
20 the children and the parents simply would not be worth the
21 cost. Why, then, did Harold and Enid Davis do it, and why
22 were Cecil and Benjamin anxious to go? And the answer is
23 obvious. It was because of religious conviction that they
24 gave two of their best years, plus the meager amounts to
25 pay their expenses, and they did it that way because the

1 church wanted it done that way. It was for the use of the
2 church.

3 I would like to save the rest of my time for
4 rebuttal.

5 QUESTION: Mr. Lee, matter of curiosity, you spoke
6 of men and women. Was there a time when only young men
7 were sent out?

8 MR. LEE: Very, very early in the church. But that
9 has not been within either my memory or yours.

10 QUESTION: How many women -- what is the proportion
11 of women, roughly?

12 MR. LEE: About four to one.

13 QUESTION: About what?

14 MR. LEE: About four to one.

15 QUESTION: Mr. Lee, just on your last point, I am
16 not sure I understand the relevance of that. Suppose some
17 -- that is to say that the parents would not have out of
18 material motivations done this, but it might have been
19 spiritual motivation for their children. I mean, I can't
20 take a deduction, I assume, if I want to send my son off
21 to a monastery to think about his soul for -- for -- for
22 several months, can I?

23 MR. LEE: That is correct.

24 QUESTION: Or can I?

25 MR. LEE: Excuse me, you cannot?

1 statute QUESTION: I cannot; I assume I cannot. I mean,
2 suppose I pay his, you know, his living expenses so he can
3 go think --irectly to their children are deductible as

4 charity. MR. LEE: That is correct. I will assume --ormon

5 church. QUESTION: -- think about the permanent things. arly

6 do. MR. LEE: I will assume with you that that is
7 correct, but that is quite different from the church
8 asking that they go and do things that are -- that carry
9 out a responsibility that is one of the three core ent of
10 functions that the church has identified, and do it on
11 behalf of the church. ets the requirements set forth in the

12 statute. QUESTION: The missionary aspect of this is central
13 to the whole case, isn't it? statute can be reasonably

14 adminis. MR. LEE: Absolutely, absolutely. that all

15 contrib. QUESTION: Mr. Lee, when you resume I would
16 appreciate your pointing out the paragraph in the Backman
17 affidavit pertinent to our previous discussion.

18 Ms. Peterson, we'll hear from you now. ou accept the

19 proposition. ORAL ARGUMENT OF SHIRLEY D. PETERSON he parents

20 to the church. ON BEHALF OF THE RESPONDENT gran, that

21 those. MS. PETERSON: Mr. Chief Justice, and may it please
22 the Court: PETERSON: Justice O'Connor, if the parents

23 made th. This case does not concern the admittedly noble ad
24 purposes of the Mormon church or its missionary program.

25 The only issue before the Court today is a question of hat

1 statutory construction arising under Section 170 of the
2 Internal Revenue Code, namely, whether payments made by
3 taxpayers directly to their children are deductible as
4 charitable contributions to or for the use of the Mormon
5 church. We believe the answer to that question is clearly
6 no.

7 Congress has provided a mechanism in the statute
8 for distinguishing between public and private charity.
9 Specifically, Congress has required that the recipient of
10 deductible gifts be a qualified donee. That is an
11 organization which meets the requirements set forth in the
12 statute. The only way to ensure that a gift is for the
13 public benefit and that the statute can be reasonably
14 administered and enforced, is to require that all
15 contributions for which deductions are granted under
16 Section 170 be subject to the discretion of a qualified
17 donee. That is what the statute requires --

18 QUESTION: Mrs. Peterson, do you, do you accept the
19 proposition that if contributions were made by the parents
20 to the church for use in the missionary program, that
21 those are deductible?

22 MS. PETERSON: Justice O'Connor, if the parents
23 made the contributions to the church, and the church had
24 complete, unfettered control over the use of those funds
25 in its general missionary program, there is no doubt that

1 the contribution would be deductible.

2 However, if the contribution were given to the
3 church with the express understanding or limitation that
4 the funds could be used only to support these particular
5 missionaries, the contributions would not be deductible.

6 The government reads the Winn case and the Peace
7 case quite differently from the manner in which Mr. Lee
8 has described it to you. In the Peace case, the court
9 there determined that the contributions were made to the
10 control of the mission generally, and for that reason the
11 contributions were found deductible. And those that were
12 made to individual missionaries were found not deductible
13 in the Peace case.

14 QUESTION: Now, if the taxpayer making -- filing
15 the return was the missionary himself, I assume he could
16 presumably deduct the expenses of his subsistence while
17 serving in that capacity?

18 MS. PETERSON: That would depend on whether or not
19 the missionary was away from home. The question that you
20 are asking, Justice O'Connor, is whether or not the
21 amounts, had the contribution deduction been claimed by
22 Petitioners' sons, whether or not those amounts would be
23 deductible under Regulation (g) as an unreimbursed
24 expense.

25 It would be deductible, if at all, only by

1 Petitioners' sons, but it is the government's position
2 that they would not -- those expenses that were incurred
3 for meals and lodging would not be deductible because
4 these young men were not away from home for tax purposes
5 at the time that the expenses were incurred.

6 QUESTION: Well, I suppose you would say that -- was
7 that even if the parent gave to the church some money and
8 earmarked it for named individuals who were not their sons
9 or daughters, that it would not be deductible either?

10 MS. PETERSON: That is correct, Justice White.

11 That is correct.

12 QUESTION: And so, a fortiori, it wouldn't make any
13 difference if these particular people involved were not
14 the children of the givers?

15 MS. PETERSON: That is correct, Justice White.

16 When Congress established the mechanism for
17 determining deductibility under Section 170, it relied on
18 the mechanism of a qualified donee. Those are
19 organizations which by their charter are limited to
20 expending funds for certain purposes that have been
21 determined in advance to be charitable. And it is by
22 placing control in the hands of such qualified donees that
23 the statute's purpose can be achieved.

24 QUESTION: It doesn't say that, Ms. Peterson. It
25 says "to or for the use of." I can give it for the use of

1 someone without giving it to that person. control in the

2 MS. PETERSON: Justice Scalia -- mark of a

3 QUESTION: That must mean that I can give it to
4 somebody else, so long as it is used for that
5 organization.

6 MS. PETERSON: Justice Scalia, "for the use of" was
7 inserted into the statute in 1921 for the express purpose
8 of permitting deductions to trusts or other intermediary
9 entities that served as fiduciaries having a legal
10 obligation to hold and administer the funds for ultimate
11 distribution to charity. Congress viewed the insertion of
12 those words as a minor change in the statute. Congress -

13 - MS. PETERSON: The trustee, though, has a legal

14 QUESTION: Well, that might have been the immediate
15 purpose, but its language goes beyond that. It is common
16 that Congress has a particular problem in mind, but adopts
17 language that solves that problem and has other effects as
18 well. The assertion here is made that this is for the use
19 of the church, and that the funds would -- would even have
20 to be returned to the church if the, if the children
21 didn't use them for the purpose designated.

22 MS. PETERSON: Justice Scalia, the entire thrust of
23 Section 170 requires that the gift be for a public
24 benefit. The control requirement in the qualified donee
25 is inherent in the basic definition of charitable.

1 contribution. It is only the unfettered control in the
2 charitable donee which -- it's the hallmark of a
3 charitable contribution because it ensures that element of
4 indefiniteness of beneficiary, which is essential to
5 having the contribution be deemed charitable. And with
6 respect to your -- going back to your --

7 QUESTION: But that is not the case, you say, when
8 I give it to a trustee.

9 MS. PETERSON: The trustee --

10 QUESTION: I can give it to a trustee who is not at
11 all a charitable person. He may be a very commercial
12 person.

13 MS. PETERSON: The trustee, though, has a legal
14 obligation to hold and administer the funds for the
15 benefit of charity and for ultimate distribution to
16 charity, Justice Scalia.

17 QUESTION: But that is what the church asserts is
18 the case here. That these individuals had to use the
19 funds in the work of the church.

20 MS. PETERSON: Justice Scalia, there is no evidence
21 in the record of this case that I am aware of to indicate
22 that these young men were fiduciaries of the church. The
23 facts of this case are undisputed, and contrary to Mr.
24 Lee's invitation to remand, I would just point out that
25 the -- the facts are absolutely not in dispute here. It

1 is the taxpayer who petitioned for certiorari and who now
2 suggests that there are factual issues that might require
3 remand.

4 The facts here are very clear. The parents made a
5 direct deposit into their children's bank accounts. The
6 children were the sole signatories on those bank accounts.
7 The children determined how they would use the funds.
8 They determined how they would spend it, on food, housing,
9 whatever. Had they used the funds for some non-charitable
10 purpose, to the best of my knowledge, the only result
11 would have been -- or could have been, that the mission
12 might have been terminated and the child might have sent -
13 - been sent home.

14 QUESTION: Well, how do we know that?

15 MS. PETERSON: The record in the case indicates
16 that the children were the sole signatories over the
17 accounts, and the church indicates that its control
18 consisted of reviewing the expenditures, the total
19 expenditures, not even the itemized expenditures, but the
20 total expenditures that the children made, after the fact.

21 QUESTION: If -- if the case showed that the --
22 that the church had legal control over the funds, would
23 the case be different?

24 MS. PETERSON: If, if the church had received the
25 funds --

1 QUESTION: No, no, it's this case, but the church
2 has legal control over the funds.

3 MS. PETERSON: If the church had legal control over
4 the funds, yes, then that would be a contribution to the
5 church, Justice Kennedy, and would be deductible.

6 QUESTION: So -- so -- so then your argument that
7 it be, that it is paid directly to the missionary is, is
8 not dispositive.

9 MS. PETERSON: Well, I am afraid I don't understand
10 how the church could have total control over the funds if
11 the payment is to the missionary.

12 QUESTION: Well, let's say the missionary writes a
13 letter to the church and said as your agent I have just
14 received \$1,500, which I am depositing in a bank account
15 subject to whatever control you wish, and until I hear
16 further from you I shall expend it for my support during
17 my mission.

18 MS. PETERSON: If in fact a relationship was
19 established under which --

20 QUESTION: Well, it's the case I gave you.

21 MS. PETERSON: If the agent is in fact an agent for
22 the church --

23 QUESTION: Well, suppose he says that he is.

24 MS. PETERSON: The agency -- the establishment of
25 an agency relationship, it seems to me, Justice Kennedy,

1 requires a contract between two parties, which, to the
2 best of my knowledge, has not been established by the
3 record in this case, except that --

4 QUESTION: Well, Mr. Lee said it has been
5 established over hundreds of years.

6 MS. PETERSON: The record in this case will
7 indicate that the Mormon church prefers that its
8 missionaries not receive contributions from any party
9 except their parents. To the extent that they are agents
10 of the church, they are agents only for the purpose of
11 receiving money from their parents to spend on their own
12 support.

13 QUESTION: Well now that isn't -- that isn't --
14 that can't be so. You say that it is not the practice
15 sometimes for non-parents to support missionaries?

16 MS. PETERSON: There is no question that non-
17 parents occasionally support missionaries, Justice White,
18 but the record in this case indicates that the church does
19 not want its missionaries to receive funds directly from
20 third parties. That is part of the affidavit that is in
21 the record in this case. The only person from whom these
22 children -- from whom these children are authorized to
23 receive funds on behalf of the church is their parents.

24 QUESTION: Well, you don't -- I take it that even
25 if there isn't some sort of a formal contract, I would

1 think that it's perfectly plain that the children on the
2 missions think they are under some obligation not only to
3 their parents, but to the church, to spend this money only
4 for their missionary activities.

5 MS. PETERSON: Justice White, they --

6 QUESTION: Is that right or not?

7 MS. PETERSON: I think not. They used the money to
8 support themselves.

9 QUESTION: You think --

10 MS. PETERSON: They used it to purchase food --

11 QUESTION: That isn't what I asked you.

12 MS. PETERSON: They used it to purchase housing.

13 QUESTION: Do you think they feel under an
14 obligation to spend it for -- to support themselves so
15 that they can be missionaries?

16 MS. PETERSON: Yes, but they had to eat, and they
17 had to have housing.

18 QUESTION: Well, I know, of course.

19 MS. PETERSON: And as, as the court in the Orr case
20 said, the words "to or for the use of" cannot be stretched
21 to cover payments that the taxpayers would have made in
22 any event. And as was pointed out in the earlier
23 questioning, these young men were 19 and 20 years of age.
24 It is likely that their parents would have supported them
25 whether or not they were serving as missionaries for the

1 church.

2 QUESTION: Well, you don't argue, I take it, along
3 the lines of the Court's earlier questions to Mr. Lee that
4 there was a motive here that is relevant to the
5 determination of the case. Or --

6 MS. PETERSON: Justice Kennedy --

7 QUESTION: Is that in your brief or not?

8 MS. PETERSON: I don't know that we addressed
9 motive in great detail, but motive is relevant here in two
10 respects, Justice Kennedy.

11 QUESTION: Well, you didn't argue it in your brief,
12 in other words.

13 MS. PETERSON: No, and I will address that. Motive
14 is relevant to determine whether or not there has been a
15 contribution or gift. That question is not before the
16 Court here this morning, but it certainly would be very
17 relevant if this case were remanded. Motive is also
18 relevant to determine whether or not a gift favors a
19 particular individual. And when a gift favors a
20 particular individual, as we believe it did in this case,
21 it lacks the indefiniteness of bounty that qualifies it as
22 a charitable deduction.

23 This Court has recognized --

24 QUESTION: Ms. Peterson, what cases do you cite for
25 that proposition?

1 MS. PETERSON: Well, since at least 1882 this Court
2 has recognized --

3 QUESTION: But what case do you cite in your brief
4 for that?

5 MS. PETERSON: Russell v. Allen. Russell v. Allen.

6 QUESTION: Russell v. Allen?

7 MS. PETERSON: Yes. This Court has recognized that
8 indefiniteness of beneficiary is key to a charitable gift.

9 QUESTION: Well, maybe --

10 QUESTION: I take it if -- if my child were, say, a
11 Methodist missionary in China, I could not send a donation
12 to my child as a Methodist missionary and say do this,
13 spend this money to support yourself while you are
14 preaching the gospel. That would not qualify because it
15 is directed to a particular individual?

16 MS. PETERSON: That is right, Justice Rehnquist.

17 QUESTION: Well, you can read that case. I mean, I
18 -- that case is, it depends on whom you consider the
19 beneficiary. If it is a student in a secular college, you
20 have to give the money to the college unrestricted. You
21 can't designate it for a certain student, because that
22 student would be the beneficiary.

23 The church's argument here is that the beneficiary
24 of this expenditure is not the, is not the son who got the
25 money, but the people to whom he is preaching. And all

1 our earlier cases can certainly be reconciled with this on
2 that theory, can't they?

3 MS. PETERSON: Justice Scalia, there is no doubt
4 that the people to whom these boys were preaching were
5 beneficiaries of the missionary program. That's not the
6 issue here. The issue here, to the extent that use and
7 beneficiary is relevant, is who is the beneficiary of
8 these funds and who controlled these funds. That is the
9 real issue.

10 QUESTION: Well, may I ask about --

11 MS. PETERSON: Did a qualified donee have control.

12 QUESTION: -- about control. You, when you say
13 somehow the paradigm case for this provision of the
14 statute you say is a trust, like a community trust, which
15 -- which holds the money and then distributes it to
16 various charities. Does any one of the charities that get
17 those monies control the trustee?

18 MS. PETERSON: They are -- the trustee, however --
19 well, there are two answers to your question, Justice
20 Scalia. The first is that the intermediary trustee who is
21 holding it for the charity has a legal obligation -- a
22 case, a suit could be brought against him to enforce his
23 legal obligation. Second of all --

24 QUESTION: The church asserts that here.

25 MS. PETERSON: Second of all, that trustee will

1 ultimately distribute the funds to the charity. Congress
2 understood the words "for the use of" to mean only that
3 there would be some delay in the distribution to charity.
4 They did not mean that charity would never receive it.
5 When Congress reenacted this section of the statute in
6 1954, the legislative history, and again in 1964, the
7 legislative history makes it very clear that Congress
8 thought that the use of the words "for the use of" meant
9 only that there would be some delay in the transmission of
10 the funds to the charity.

11 QUESTION: But insofar as control is concerned, it
12 is no different from here, if you assume -- if you assume
13 that the church would have the right to those funds if the
14 child abandoned missionary activity.

15 MS. PETERSON: Let's talk about that, because I am
16 unable to find anything in the record that would indicate
17 that in fact the funds would be distributable to the
18 church at the end of the mission. The affidavit to which
19 Mr. Lee refers, at paragraph 22 on page 33a, says
20 surpluses of contributions over expenditures are not
21 contemplated because the monthly amount requested is
22 determined by the Mission President based upon
23 conservative estimates of actual need. I am not --

24 QUESTION: Why don't you read the next sentence
25 too.

1 MS. PETERSON: Furthermore, if a surplus starts to
2 develop, the missionary is expected to take action to have
3 the amount of the donation sent to him appropriately
4 reduced.

5 Now, if there is something in the record I am not
6 aware of it --

7 QUESTION: May I ask you a question on this?

8 MS. PETERSON: Yes, Justice Stevens.

9 QUESTION: Supposing that they modified their
10 arrangement in this respect, and said that the parent
11 shall send the money in the form of a check payable to X
12 as trustee for the Mormon church. And they open a bank
13 account in so, in his name as trustee for the Mormon
14 church. And the Mormon church writes them a letter saying
15 you are our trustee, and you may spend the money for the
16 following missionary purposes, including buying food and
17 sustenance for yourself, but no other purpose. And it is
18 clear that it is a trust account. Would the case be
19 different?

20 MS. PETERSON: If the beneficiaries of that trust
21 are determined in advance, and there is an understanding
22 between the charity and the donor that it -- in fact, the
23 funds are going to be used to benefit specific
24 individuals, then the transfer lacks the indefiniteness
25 which is the hallmark of a charitable contribution. It

1 would not be deductible.

2 QUESTION: Your answer is that would be the same
3 case.

4 MS. PETERSON: It would not be deductible.

5 QUESTION: That would be the same case, even though
6 the church would then have a legal cause of action for
7 misspent funds?

8 MS. PETERSON: That is correct, because any
9 transfer that will qualify for a contribution deduction
10 under 170 must be indefinite in nature. It cannot be
11 earmarked for the specific benefit of any person. And I
12 would like --

13 QUESTION: Now, if the church spent money to
14 support these individuals while they are on mission work,
15 you would not say that that money was being spent for the
16 benefit of those individuals. You would say the money was
17 being spent for the benefit of those whom they are
18 proselytizing.

19 MS. PETERSON: That is correct, Justice Scalia.

20 QUESTION: But if the parents, if the same thing
21 happens and the money comes from somebody else, you
22 suddenly say that it is being spent for the benefit of
23 those individuals and not for the benefit of the persons
24 that they are proselytizing. Why is that?

25 MS. PETERSON: Because that is what the statute

1 requires, Justice Scalia. The statute -- well, let's talk
2 about this for just a moment.

3 QUESTION: How can it be for their benefit when the
4 parents pay it, but it's not for their benefit when it
5 comes from the church? I mean --

6 MS. PETERSON: The statute doesn't say for the
7 benefit of. The statute says pay the contribution to or
8 for the use of a qualified donee. Can you imagine how
9 difficult it would be to administer this statute if checks
10 written to individuals suddenly became subject to the
11 contribution deduction under Section 170?

12 The Internal Revenue Service would find it
13 impossible to administer the statute. Not only would it
14 be necessary to audit the donor's records, it would also
15 be necessary to audit the donee's records to see whether
16 or not the payment in question had in fact been used for a
17 public purpose. And when you are talking about
18 missionaries in a missionary program, we could have the
19 missionary in Tanzania or China, or wherever, and then
20 determining whether or not they have used that money to
21 advance the public benefit would be impossible.

22 QUESTION: You probably should have that covered by
23 statute. That does sound like a real problem.

24 (Laughter.)

25 MS. PETERSON: We believe that is what this statute

1 does provide. And I would just emphasize that it is not
2 sufficient simply to confer a benefit on the charity.
3 Private charity, private donations, no matter how
4 laudable, no matter how benevolent, are not deductible.
5 Congress has not seen fit to provide for deductions for
6 individuals, and they simply are not deductible unless
7 they pass to a qualified donee.

8 QUESTION: May I ask you again, the problem of
9 identifying -- you are looking at checks, if you use my
10 hypothetical and they wrote checks payable to X as trustee
11 for the Mormon church, you wouldn't have any trouble
12 identifying those checks.

13 MS. PETERSON: Well, yes, Justice Stevens, but that
14 then goes back to the question of whether or not that
15 transfer was designed to benefit a particular individual.
16 It is like -- that could be analogous to the tuition case.
17 If I write a check to Bryn Mawr College to pay my
18 daughter's tuition, it doesn't make it deductible just --

19
20 QUESTION: But there isn't even arguably a second
21 beneficiary there.

22 MS. PETERSON: I beg your pardon, sir?

23 QUESTION: There isn't even arguably a second
24 beneficiary there. Here at least it is arguable that the
25 people that the missionary contacts when he is proselyting

1 are the beneficiaries.

2 MS. PETERSON: Let me just point out that the lower
3 court cases that have addressed this question have held
4 that gifts or transfers to persons who are serving as
5 missionaries, i.e., providers of services, are treated in
6 the same way as those for receivers of services. So that
7 if -- just because someone is serving as a missionary and
8 is providing missionary services, the money still cannot
9 be earmarked for that person, or it is not deductible
10 under Section 170. The statute is set up to ensure that
11 the money passes through the hands of a qualified donee.
12 That is the only way that we can ensure that the public
13 benefit is advanced, and that the indefiniteness of
14 beneficiary is ensured.

15 QUESTION: I suppose you would have the same --
16 have the same -- take the same position if some, if some
17 member of the Mormon church agreed with the church to pay
18 the salaries of the church employees in its office in
19 London.

20 MS. PETERSON: I, would -- I am sorry, Justice
21 White, I didn't --

22 QUESTION: Well, the church has an office in
23 London, let's assume, and it has some employees there.

24 MS. PETERSON: Yes.

25 QUESTION: And some one agrees with the church to

1 pay their salaries.

2 MS. PETERSON: Uh-hum. I agree. I think that we
3 would, we would continue to have that problem.

4 QUESTION: Well, you would say, you would say that
5 that, the amount that they pay to those individuals --

6 MS. PETERSON: Yes.

7 QUESTION: -- is not deductible.

8 MS. PETERSON: Yes. Justice White, the statutory
9 requirement of payment has been interpreted to deny a
10 deduction where there is no payment of cash or property,
11 even though the taxpayer's action may confer a measurable
12 economic benefit on the charity.

13 QUESTION: Ms. Peterson --

14 QUESTION: Well, in Justice White's hypothetical,
15 suppose that the donor said I don't know who any of your
16 people in London are, but I think it is important for you
17 to do your work in London. I will simply send a check to
18 all the people that are working for you in London for
19 their year's work. Just give me their names.

20 MS. PETERSON: And the check is made not to the
21 church, but --

22 QUESTION: It is not to the church, it is made to
23 the people.

24 MS. PETERSON: -- but to individuals.

25 QUESTION: The donor never, didn't know it, doesn't

1 know who they are. He just asked the church for their
2 names.

3 MS. PETERSON: I would have to say that in that
4 event they have not, again not complied with the statutory
5 requirement of having the money passed to the qualified
6 donee. The statute sets up formalities which must be
7 observed if we are going to be able to administer the law.
8 In fact --

9 QUESTION: Ms. Peterson, suppose you have a -- a -
10 - small church, a small Catholic church, only one priest
11 there. And I write out a check, you know, St. Mary's
12 Church, and put it in the basket. All the funds are kept
13 in a bank account by the only priest in the church. Would
14 I be able to deduct that?

15 MS. PETERSON: Justice Scalia, it is my
16 understanding --

17 QUESTION: Under your theory.

18 MS. PETERSON: Yes. It is my understanding that
19 under those circumstances the priest would be serving as a
20 fiduciary for the Catholic church for all purposes, that
21 he is authorized to receive funds, to hold funds, and to
22 administer funds on behalf of the church for every
23 possible purpose.

24 QUESTION: Why is that different from Justice
25 Stevens's hypothetical, where you write a check to the

1 missionary as trustee for the Mormon church?

2 MS. PETERSON: I understood Justice Stevens'
3 hypothetical to involve earmarked contributions for the
4 direct benefit of certain missionaries. Whereas I
5 understood your question to relate only to a contribution
6 to the church's general program.

7 QUESTION: I see. So it would hinge upon whether
8 that money could be taken out of St. Mary's and sent to
9 other parishes.

10 MS. PETERSON: No, it would hinge on whether or not
11 the priest could use it for the church's general program
12 within St. Mary's parish, or for whatever purpose, but not
13 for a specific individual's benefit.

14 I would just like to point out the possibilities of
15 abuse that may arise if the Court were to accept the
16 taxpayers' exceedingly broad reading of Section 170.
17 First of all, as I mentioned before, if direct payments to
18 individuals were deductible, the Service would be required
19 to scrutinize how the funds were spent, to ensure that a
20 public purpose was served. Moreover, we would raise the
21 risk of double deductions. And, as inadvertently occurred
22 in this case, the problem where the parents claimed
23 initially both a dependency deduction and a deduction for
24 the monies that were contributed for the missionary
25 service.

1 We have the possibility of shifting deductions
2 between taxpayers, and, as you know, it is a fundamental
3 principle of the tax law that income and deductions may
4 not be shifted between taxpayers. And absent a specific
5 statutory exception, such as for medical expenses which
6 are set forth in Section 213, the Code consistently treats
7 individual family members as separate taxpayers. If their
8 parents had paid their sons' interest expense or taxes or
9 any other deductible expense, they would not have been
10 entitled to the deduction. And this case is no different
11 from that.

12 It would also permit the anticipation of
13 deductions, because we have no way of knowing that the
14 year in which the expenditure is actually made would be
15 the same as the year in which the payment from the parent
16 to the child is made.

17 In short, we believe that the taxpayers' reading of
18 Section 170 is simply not justified by the statutory
19 language. It is not what Congress intended. And we think
20 that it would extend it far beyond what Congress intended
21 and would make the administration of the statute almost
22 impossible --

23 QUESTION: Did I understand you to answer Justice
24 Stevens that if I make a == if I am a member of the Mormon
25 church and I make a, send some money to somebody, not my

1 child, and say this is in trust for the Mormon church and
2 you are to spend it as the church tells you to. That is
3 not deductible, is that it?

4 MS. PETERSON: Oh, so long as it is not earmarked
5 for a specific individual, Justice White.

6 QUESTION: Well, he sends it -- I send it to a
7 specific individual.

8 MS. PETERSON: But, as a trustee --

9 QUESTION: Exactly.

10 MS. PETERSON: -- in a fiduciary relationship.
11 Clearly, no -- that would be deductible, assuming that --

12

13 QUESTION: Well then, all, all the parent has to do
14 every month is to write a letter like that, then?

15 MS. PETERSON: No, because then he has earmarked it
16 for a specific individual.

17 QUESTION: No, I send the money to some named
18 person.

19 MS. PETERSON: Right.

20 QUESTION: And I -- a missionary. And I say this
21 is in trust for the church and you are to spend it as the
22 church tells you to.

23 MS. PETERSON: Well, it seems to me that the
24 example that you were positing is in effect a sham --

25 QUESTION: I thought that was the example that

1 Justice Stevens --

2 MS. PETERSON: I may have understood Justice
3 Stevens. I was, I understood him to say a true fiduciary
4 relationship, but --

5 QUESTION: Well, let's take my example --

6 MS. PETERSON: -- where the beneficiary of the
7 funds is not earmarked. The moment you have earmarked
8 funds to be used for the benefit of a specific --

9 QUESTION: Well, I am the trustee. I make the
10 person a trustee for the church. I write him a letter,
11 you are the trustee for the church. And you are to use
12 this money and spend it as the church tells you to. Now
13 what about that?

14 MS. PETERSON: Only if it is ultimately
15 distributable to the charity. The charity must exercise
16 control over it, Justice White, that is the only way that
17 --

18 QUESTION: Well, the church, the donee here is
19 under an obligation from the donor, if he accepts it, to
20 spend it the way the church tells him to. And the church
21 tells him here is what you are to spend it on: food,
22 clothing and shelter.

23 MS. PETERSON: It seems to me that what you have
24 suggested here is the equivalent of the sort of sham
25 transaction that existed with the tuition payments. And

1 so long as you have an understanding or arrangement
2 between the donor and the donee that specific individuals
3 are going to benefit by it, then the church does not have
4 the unfettered discretion and control that is required.

5 QUESTION: So a missionary -- the church has a
6 missionary sign a piece of paper that says that any funds
7 you receive for your support will be held in trust for the
8 church.

9 MS. PETERSON: Again, if it is earmarked for the
10 use of a specific individual, it ought not to be
11 deductible. That is not what Congress intended when it
12 enacted Section 170, I would submit.

13 QUESTION: What language do you rely on for that?

14 MS. PETERSON: The legislative history of Section
15 170, in addition to this -- Court has recognized the
16 public charity aspect and the public benefit aspect of
17 Section 170 repeatedly, Justice Scalia. As recently as
18 Bob Jones University this Court said public benefit
19 permeates Section 170.

20 We agree with that.

21 QUESTION: Thank you, Ms. Peterson.

22 Mr. Lee.

23 REBUTTAL ARGUMENT OF REX E. LEE

24 ON BEHALF OF THE PETITIONERS

25 MR. LEE: Thank you, Mr. Chief Justice.

1 With regard to whether they were fiduciaries, I
2 think probably the better support, Mr. Chief Justice, I
3 was mistaken, is probably in the Davis affidavit,
4 paragraphs nine and 10. I think it also permeates the
5 Backman affidavit. Actually the best statement is in that
6 letter from the church that is in the record in the White
7 case, but not this case -- but not this case.

8 But I would refer you to Justice White's question
9 to Ms. Peterson. Aren't they under an obligation to spend
10 this money only for missionary work, and there is just no
11 question about that. And if there is any, then it ought
12 to be remanded for those purposes.

13 Moreover, the government itself on other occasions
14 has taken a position quite inconsistent with the one it
15 has taken here. In the Rockefeller case, in a brief that
16 has been lodged with the Court, the government said many
17 payments, other than payments to a trust, are payments for
18 the use of charity.

19 But the language of this statute says is not to an
20 intermediary trust that will eventually be transferred to
21 someone else. It says for the use of. And there are many
22 instances, many instances in which the lower courts have
23 recognized payments as being for the use that are not in a
24 strictly fiduciary capacity, such as, and those are cited
25 in our brief, such as payments by a big brother directly

1 to a little brother, disaster relief payments, unwed
2 mother payments, and -- so that in short we think we
3 satisfied the trust relationship --

4 QUESTION: Well, Mr. Lee, I am sure that for the
5 use of is construable like you say it is, but don't you
6 think it is also possible to construe it like the
7 government does?

8 MR. LEE: No. No court has construed it the way
9 the government does, Justice White, and I want to make
10 that very, very clear --

11 QUESTION: Well, no court?

12 MR. LEE: No court. Absolutely none. The Ninth
13 Circuit does not agree with Ms. Peterson. What the Ninth
14 Circuit says is that earmarking is all right, so long as
15 the church has possession. Now that's -- that's not our
16 preferred position, but we like it a lot better than what
17 the government is suggesting. And there is no court that
18 supports the proposition that absolutely no earmarking is
19 ever sufficient.

20 QUESTION: Well, isn't it -- isn't this
21 construction in the regulations, or not?

22 MR. LEE: I yield to no one, Justice White, in my
23 respect for the government's -- for that rule, not from
24 this pulpit. I have advocated it many times. But that
25 rule has never said that the government wins its cases and

1 it can use it to bootstrap -- there has never --

2 QUESTION: I asked you is it in the regulations?

3 Is this construction in the regulations?

4 MR. LEE: No, it definitely is not in the
5 regulations.

6 QUESTION: It isn't?

7 MR. LEE: No, no. They use it for litigation
8 purposes -- well, I wouldn't say that.

9 (Laughter.)

10 MR. LEE: But you can see that in Rockefeller, when
11 it served their purposes to do otherwise, they said there
12 are many cases other than a trust that can be for the use
13 of the church.

14 Now let me, let me just lay to rest this business
15 about abuse and about the impossible -- I have never
16 understood those arguments. First, insofar as the
17 impossibility of administration. It is not the church
18 that is going to be audited; it is the taxpayer that is
19 going to be audited. And you ask two questions. And the
20 burden of proof to satisfy these questions is on the
21 taxpayer. First, are these people on missions? Yes or
22 no, and present me proof.

23 Second, do these payments come within the
24 guidelines that the church has set, and are those
25 guidelines out of line? Now, you are going to have to do

1 that in any event. And if I make the payment directly to
2 a church fund and the church then sends that money on to
3 my child, I will assure you the church is not going to
4 send any more nor less money than what I am sending within
5 those guidelines. I do not understand that administration
6 problem.

7 Similarly, I do not understand the abuse problem.
8 We are told that there are two. The first is that of
9 shifting deductions from a higher taxpayer to a lower
10 bracket taxpayer. That is just plain not a problem.
11 These people who are -- because you can only shift if you
12 shift large amounts. And the only amounts that are going
13 to be deductible are the amounts that the church has
14 designated in any event for its own use.

15 QUESTION: You can certainly shift small amounts.
16 It wouldn't do you as much good.

17 (Laughter.)

18 MR. LEE: Justice Rehnquist, there is no one who is
19 going to be able to live in Washington, D.C. on much less
20 than \$310 a month. And so the only thing that you are
21 going to be able to shift is the difference between
22 whatever in fact they spend and the \$310 a month.

23 Now, insofar as the double deductions are
24 concerned, that is equally illusory because of the fact
25 that these are people who don't have any income. These

1 are college students who take time out from their college.
2 They don't have anything from which to deduct those
3 amounts.

4 QUESTION: It may be -- it may be that the Mormon
5 church is one example where the -- maybe the problems of
6 abuse or administration wouldn't be hard, but that might
7 not be true of all the other situations where these kind
8 of deductions might be claimed in connection with all
9 sorts of other churches.

10 MR. LEE: But wouldn't it be too bad if we lost
11 this case and lost 160 years' worth of tradition because
12 of problems that you might attribute to somebody else?

13 QUESTION: Well, all you, you would just
14 internalize this operation. You would just get -- you
15 would just have the money come to the church.

16 MR. LEE: Earmarked? They won't let us do it that
17 way.

18 QUESTION: No, but you wouldn't have any problem.
19 You would just have -- you would then accumulate the total
20 funds from people to support your missionaries.

21 MR. LEE: May I just respond to that, Mr. Chief
22 Justice?

23 QUESTION: No, I don't think it was a question.
24 Your time has expired.

25 (Laughter.)

1 CHIEF JUSTICE REHNQUIST: The case is submitted.

2 (Whereupon, at 11:02 a.m., the case in the above-
3 entitled matter was submitted.)
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HAROLD DAVIS, ET UX, PETITIONERS V.
UNITED STATES

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BY Lona M. May

(REPORTER)

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