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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: JIMMY SWAGGART MINISTRIES, Appellant V. BOARD OF
EQUALIZATION OF CALIFORNIA

CASE NO: 88-1374

PLACE: WASHINGTON, D.C.

DATE: October 31, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 JIMMY SWAGGART MINISTRIES, :
4 Appellant :
5 v. : No. 88-1374
6 BOARD OF EQUALIZATION OF :
7 CALIFORNIA :
8 -----x

9 Washington, D.C.

10 Tuesday, October 31, 1989

11 The above-entitled matter came on for oral argument
12 before the Supreme Court of the United States at 10:00 a.m.

13 APPEARANCES:

14 MICHAEL W. McCONNELL, ESQ., Chicago, Illinois; on behalf of
15 the
16 Appellant.

17 RICHARD E. NIELSEN, ESQ., Deputy Attorney General of
18 California, Los Angeles, California; on behalf of the
19 Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

MICHAEL W. McCONNELL, ESQ.

On behalf of the Appellant

3

RICHARD E. NIELSEN, ESQ.

On behalf of the Respondent

21

REBUTTAL ARGUMENT OF

MICHAEL W. McCONNELL, ESQ.

On behalf of the Appellant

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1 California is the first state to assert the authority
2 to tax materials of this sort. Since the 1930s and '40s, when
3 sales and use taxes came into widespread use, these
4 specifically religious activities and transactions have
5 consistently been held to be immune from taxation. Now, in
6 part this is because of the decisions of this Court and the
7 trilogy of cases in *Murdock v. Pennsylvania*, *Jones v. Opelika*,
8 and *Follett v. McCormick*, which held that the dissemination of
9 religious materials by itinerant and other evangelists for the
10 purpose of communicating their message is exempt even from
11 generally applicable taxes on other commercial vendors.

12 QUESTION: There you were dealing with a flat license
13 tax, were you not, Mr. McConnell?

14 MR. McCONNELL: That is right, Mr. Chief Justice, but
15 the point of the decisions is that that flat license tax in
16 the context of individual itinerant evangelists amounted to a
17 very serious burden on their ability to communicate the
18 message. It's our position, Mr. Chief Justice, that the tax
19 in this case, although not flat, is similarly a serious,
20 substantial burden on the -- on the communication of the
21 materials under the circumstances today, not --

22 QUESTION: Well, Mr. McConnell, what is the evidence
23 that the imposition of the ordinary sales tax, I guess it is
24 around 6 percent, would burden the Petitioner? I assume the
25 tax is passed on, is it not, to the purchaser?

1 MR. McCONNELL: Justice O'Connor, the tax can be passed
2 on to the purchaser.

3 QUESTION: That is the norm in -- when sales tax is
4 opposed -- imposed, is it not?

5 MR. McCONNELL: It is the norm, but, Justice O'Connor,
6 don't get me wrong. We are not complaining that this, that
7 the religious organization itself necessarily has to pay the
8 tax. The point is that the transaction, the dissemination of
9 religious materials, is itself burdened, discouraged,
10 inhibited by this tax. And you may say that 6 percent is not
11 a lot --

12 QUESTION: Is there any indication that sales are
13 reduced by virtue of the imposition of the tax?

14 MR. McCONNELL: Justice O'Connor, the -- it's almost a
15 golden, an iron rule of economics that when the price of
16 something is increased the number of sales are going to go
17 down. But, in addition to that, the very -- the aspect of
18 this tax that makes it particularly troubling to religious
19 organizations is not so much the 6 percent, or 6.5 or 7 --
20 remember there are three different rates in California, but
21 the -- but the almost impossible administrative difficulty of
22 dealing with the varying and changing rates of tax in some
23 7,000 taxing jurisdictions around the country. And the record
24 in this case shows that the difficulty of dealing with that
25 kind of a burden is something that only the largest ministries

1 could possibly deal with.

2 QUESTION: Mr. McConnell, I assume that there is no
3 more -- maybe I shouldn't assume it. Is there any more right
4 to convey a religious message than there is to receive it?

5 MR. McCONNELL: No, Your Honor.

6 QUESTION: Well, we held -- we held last term, if I
7 recall correctly, that a state not only could impose a tax
8 upon the sale of bibles, but indeed had to impose a tax upon
9 the sale of bibles if it imposed a tax upon the sale of other
10 books. And the only difference in that case, as I understand
11 it, is that the seller was not an itinerant or non-itinerant
12 preacher, but was, as far as the facts of the case were
13 involved, a regular bookstore. Now, why wouldn't that violate
14 the principle you are urging upon us here?

15 MR. McCONNELL: Two reasons, Justice Scalia. First of
16 all, when an ordinary commercial bookstore is selling a bible
17 simply for profit, it is not doing so for the purpose of
18 communicating a particular religious philosophy.

19 QUESTION: No, but I am buying it for that purpose.

20 MR. McCONNELL: That may --

21 QUESTION: And you acknowledged that I have as much
22 right to receive a religious message as someone else has to
23 convey it. So long as I want to buy it for my own religious
24 edification, why shouldn't that be exempt as well?

25 MR. McCONNELL: The constitutional protection here has

1 to do with the longstanding relationship between religious
2 institutions and the government, under which religious
3 institutions are both immune and exempt from various forms of
4 regulation and taxation, and also ineligible for subsidies and
5 other forms of support. The principle here is that the
6 government must leave religious organizations alone insofar as
7 they are engaged in the dissemination of religious materials.
8 When B. Dalton sells a bible, it is not -- it is not part of
9 that tradition.

10 QUESTION: Well, do you say, Mr. McConnell, that the
11 government must exempt churches from real property taxation?

12 MR. McCONNELL: I think it would be a mistake for this
13 Court to try to paint with too broad a brush. Various taxes
14 have very different impacts.

15 QUESTION: Well, but I think it is you who are painting
16 with a broad brush, when you say that the government must
17 simply stay away from all religions, and I got the
18 implication, perhaps not tax any aspect of them.

19 MR. McCONNELL: What I mean by that, Mr. Chief Justice,
20 is that the government must leave the churches alone in their
21 dissemination of religious doctrine and in their worship
22 activities. I don't know how, ultimately, a property tax
23 would come out if the state or local government were to --
24 were to abolish the exemptions that have existed throughout
25 our constitutional history, but this Court in *Follett*, and in

1 -- and in Murdock, indicated that there might well be a
2 distinction. And several lower courts have held in the
3 context of personal, not real, property taxes that there is a
4 distinction.

5 And if I might inform the Court of the distinction that
6 those courts have found, there, the principle is -- is that
7 property is not itself a religious act, that the Free Exercise
8 Clause is concerned with the exercise of religion, that is,
9 the actual transmission of religious doctrine and the worship
10 of religion. Property -- the ownership of property that might
11 be used in the course of that is one step removed. It is
12 something that might be useful for the exercise of religion,
13 maybe even necessary in some cases, but it is not the act of
14 religion itself.

15 QUESTION: Why can't you say the same thing about the
16 receipt of money? This is just a tax when you sell religious
17 material, not when you distribute it. And the state is
18 saying, you know, if you want to proselytize and ask for
19 contributions, that is one thing. But if you sell something,
20 if it is a quid pro quo, that is no religious act.

21 MR. MCCONNELL: First of all, Justice Scalia, it is not
22 clear that there is a quid pro quo in the sense that -- and
23 that the record shows that it is a policy of Appellant to
24 distribute these materials, whether they receive the price or
25 not. But the other -- but the other thing to consider is that

1 there are two sides. The two sides of this transaction are on
2 the one hand the ministries, which is trying to communicate
3 the gospel as it understands it, and at the same time to try
4 to defray the cost of doing so. And on the other hand, the
5 receiver is both engaged in receiving the message and also in
6 supporting the conveyance of this message to further believers
7 at the same time. The -- the monetary aspect of the
8 transaction is completely tied to the -- to the communication
9 of the message.

10 As this Court quite clearly held in *Murdock*, the fact
11 that money changes hands in the course of the transaction does
12 not transform this religious practice, which is of millennia,
13 literally millennia old, into a purely commercial transaction.

14 QUESTION: Mr. McConnell, the Court certainly sustained
15 in *Lee* a rather substantial burden on the exercise of
16 religion. Do you think this imposes a greater burden than the
17 burden in *Lee*, which the Court upheld?

18 MR. McCONNELL: Greater, but most importantly, very
19 different. The tax that was upheld in *Lee* was a tax upon
20 secular employment by a farmer, by farmers working in
21 agricultural labor. Their objection to the tax was its use.
22 They objected to the Social Security system because of their
23 religious tenets, and therefore believed that they should not
24 have to pay the tax. We are not contending that there is
25 anything about the tenets or doctrines of the ministries that

1 entitle them to an exemption. It is the fact of being a
2 religious organization --

3 QUESTION: Well, it would seem to me that would be,
4 that would be an even stronger claim than yours, would it not?

5 MR. McCONNELL: Well, I don't think so, Justice
6 O'Connor, because the separation of church and state has to do
7 with the institutional relationship between religious
8 organizations and government. It doesn't hinge upon whether,
9 upon the particular ecclesiology or view of church/state
10 relations that any individual church organization has. It
11 goes back to the basic principle that James Madison advocated
12 and that this Court has come back to in case after case, which
13 is that the civil jurisdiction has no cognizance over the --
14 over the practice of religion. And that is going to hold true
15 for all religions and not just -- not just those with
16 particular tenets.

17 QUESTION: Do you think that a general sales tax can be
18 imposed on the sale of newspapers?

19 MR. McCONNELL: I think that a general sales tax can be
20 imposed upon profit making corporations in the sale of
21 newspapers.

22 QUESTION: Does the ministry make a profit on any of
23 the items it sells?

24 MR. McCONNELL: The ministries is a nonprofit
25 organization, and so in the technical tax sense there is no

1 profit at all. If by that you are asking whether the cost of
2 the materials exceeds the revenue directly from that -- the
3 record is -- is not very clear on the point. In the record,
4 however, you will find of the Form 990, the federal income tax
5 returns from the ministries, which indicate that insofar as
6 you are looking specifically at the -- at the pure sales, the
7 I'll send you \$10 and you send me a sermon tape, that kind of
8 a pure sale, that in fact the materials, the cost of the
9 materials falls, is, greatly exceeds the revenue that is
10 generated. It is only when you take into consideration the
11 contributions that are received in connection with the
12 distribution of these materials and other activities of the
13 ministries that this is -- that they are able to keep their
14 heads above water.

15 QUESTION: Mr. McConnell, did I understand you to say a
16 moment ago, or perhaps to suggest, that the government could
17 not tax a nonprofit corporation which published a newspaper?

18 MR. McCONNELL: The Court -- I was in a sense
19 summarizing the Court's holdings. In *Breard v. Alexandria*,
20 the Court confronted the question of sales by a profit-making
21 magazine distributor, and this was shortly, this was just ten
22 years after *Murdock*, and the Court distinguished between for
23 profit businesses and non-commercial businesses -- non-
24 commercial speakers in the context of disseminating their
25 messages.

1 I don't really know what a nonprofit newspaper would be
2 like, but if, for example, you might be referring to a
3 political organization that would be distributing, let's say
4 the Sierra Club might sell a book, not just for the purpose of
5 making money on it, but because it contains information that
6 they want to get out to the public, I think that is a
7 difficult question, but --

8 QUESTION: What is difficult about it?

9 MR. McCONNELL: Well, it is difficult because the
10 Sierra Club is not a religious organization and there is no
11 requirement of separation between the government and what the
12 Sierra Club is doing. If the government wanted to give a
13 direct subsidy to the Sierra Club to produce and disseminate
14 that book, the Constitution would not be offended. The
15 government is permitted to subsidize the Sierra Club's
16 dissemination of its doctrine. It is not permitted --

17 QUESTION: But you haven't yet pointed out what the --
18 you're saying where the difficulties aren't. Where is the
19 difficulty? Why can't the government, if it taxes all other
20 sales of magazines, tax the sales of a nonprofit corporation?

21 MR. McCONNELL: I am suggesting that it probably could,
22 and that the difference is that -- is that a religious
23 organization is any -- stands in a different footing. A
24 religious organization may not be -- may neither be
25 subsidized, nor may it be taxed, for the dissemination of its

1 message. Whereas, I think that most other non-commercial
2 organizations could. Whether there might be some argument
3 under the Free Speech Clause, I don't know, but those issues
4 are not -- if so, those issues are not being raised here.

5 The key, the key point that I would like to emphasize
6 here is that it is simply not the case in our constitutional
7 tradition that religious organizations are to be treated the
8 same way as commercial book sellers, or even as other
9 nonprofit organizations. That has not been the case for 200
10 years, and the reason is that the obligations of separation,
11 of a division of the spheres of authority, and those with
12 respect to religion and government, that that has been kept,
13 that has been kept carefully apart by the First Amendment and
14 by the practices of the states in compliance with the First
15 Amendment and their own constitutions in the years since then.

16 That this tradition is different from the tradition
17 ascribed to commercial businesses, and it has to be that way.
18 Because the government is able to regulate, and indeed even
19 put out of business, an ordinary commercial business. Other
20 than any limit, any remaining tinges of substantive due
21 process that there might be in the economic sphere,
22 essentially the government can do what it wants with
23 commercial businesses.

24 The same thing is just not true of religious
25 organizations. With religious organizations, the -- the

1 requirement of the Constitution is that the government keep
2 its hands off. It may not help them; it cannot assist them or
3 subsidize them when -- in their dissemination of religious
4 doctrine, but it does not have the authority to -- to tax them
5 or to regulate them in those areas.

6 QUESTION: That is not really true, Mr. McConnell, and
7 maybe there are those of us who think some of the cases
8 suggest going too far in both directions, both in prohibiting
9 non-discriminatory assistance and in -- and in prohibiting
10 non-discriminatory taxation. Certainly, a municipality can
11 station policemen in front of a church on a Sunday, just as it
12 would station policemen in front of any theater that is having
13 a major opening. It can provide normal, municipal services
14 to, even for purposes that are directly related to religious
15 worship, just as it can provide it to other businesses.
16 Indeed it must, I -- I would suppose.

17 MR. McCONNELL: That is right. This Court has
18 carefully --

19 QUESTION: So why can't it apply a non-discriminatory
20 tax similarly?

21 MR. McCONNELL: This Court has carefully distinguished
22 between various forms of municipal services that indirect --
23 that provide indirect benefits to religious organizations,
24 along with all others, and direct subsidies of cash, even when
25 those direct subsidies of cash are being distributed on a --

1 on a general and completely neutral basis.

2 Take, for example, the Court's recent decision in Bowen
3 against Kendrick, in which religious organizations were
4 allowed to participate in -- in the adolescent family life act
5 programs. But this Court held, and I believe rightly, that
6 none of those organizations participating in that could be
7 permitted to use any of that money, or even their own money in
8 the course of the program, to disseminate religious doctrine
9 in the course of administering that. Even though -- even
10 though secular organizations are being treated perfectly
11 equally, religious organizations are under a special
12 constitutional disability to use government funds for the --
13 for the dissemination of religious doctrine.

14 I would suggest to you that separation is a two way
15 street. It is not true that churches are only separate from
16 the government when it comes to subsidies. They are also
17 separate from the government when it comes to the government
18 calling upon them to support the government, when that support
19 is based upon their spreading of the gospel as they understand
20 it. It is -- the -- a religious organizations carrying out
21 its religious function may not be used as an occasion for fund
22 raising by the state.

23 QUESTION: But isn't the difference between the two
24 that one is prohibited by the Establishment Clause, and you
25 are making a free exercise claim, aren't you?

1 MR. McCONNELL: Well, Justice Stevens --

2 QUESTION: I mean, the subsidy is an establishment
3 problem.

4 MR. McCONNELL: That is right, but subsidy and penalty
5 are two sides of the same coin, just as free exercise and
6 establishment are two sides of the same coin. The principle
7 is one of separate jurisdictions, that -- and I'm going -- I'm
8 referring now, again, to James Madison's original formulation
9 of this theory in his Memorial and Remonstrance, which this
10 Court has referred to dozens of times in explicating the, the
11 religion clauses. The point is that the civil jurisdiction
12 does not have authority over religion, whether to subsidize it
13 or to -- or to penalize it, or to tax it or to regulate it.
14 Only, the only --

15 QUESTION: But I think you acknowledged that if you had
16 sales, say you sell sacramental wine or vestments or something
17 like that to a church organization for use in purely religious
18 ceremonies, I don't think you deny that a tax could be imposed
19 on those, do you?

20 MR. McCONNELL: I do not deny that a secular wine
21 producer who produces the sacramental wine could be taxed --

22 QUESTION: But the burden would be passed on to the --

23 MR. McCONNELL: -- that a transaction between the
24 church and commercial entities is subject to tax. When the
25 church is going in -- is dealing with profit-making, non-

1 religious bodies, that transaction is not an exercise of
2 religion. When, however, a ministry is providing a bible to
3 one of its believers, even if it is receiving money in return,
4 that is a -- that is the exercise of religion, and that is
5 what is protected by the First Amendment.

6 The most important point here, then, is that -- is that
7 the state's simple position that so long as commercial
8 businesses are being treated the same way, that it does not --
9 that their tax simply doesn't raise a constitutional
10 question, I think has to be rejected. It is a somewhat more
11 difficult question whether, once -- once we recognize that the
12 special status of religious organizations in their carrying
13 out of religious functions requires special treatment, whether
14 this particular -- or where does one draw the line. Does this
15 particular side of transactions warrant constitutional
16 immunity?

17 And it is here where I think Justice Stevens' question
18 is -- is most important, because our position is not that
19 religious organizations are exempt or immune from taxation
20 with respect to everything that they do. And in fact,
21 religion -- it has been the religious community, particularly
22 the National Council of Churches and the United States
23 Catholic Bishops Conference, which has insisted in the federal
24 area that that -- that that is intolerable and
25 unconstitutional a claim. Churches should not be exempt in

1 everything that they do. What churches should be exempt in is
2 their actual dissemination of religious doctrine and their
3 carrying on of worship with those who choose to receive their
4 message or participate in their worship services. And it's
5 that narrow claim, the same claim that was upheld in *Murdock*
6 and *Jones and Follett*, that we are defending here today.

7 In addition to this, there is a separate ground of
8 objection that we have to the imposition of tax in this
9 particular case, which would apply even if the Court were not
10 to conclude that religious organizations are immune from
11 taxation --

12 QUESTION: Let me just pursue a minute, because I want
13 to be sure I thoroughly understand your answer to my previous
14 question. The sale of a tape recording of a sermon by a
15 minister, that a person would listen to sometime later at his
16 or her leisure, the sales transaction, you say, is the same as
17 if the person were attending? What is the dividing line
18 between a commercial transaction and a religious transaction?

19 MR. McCONNELL: The distinction is -- is the purpose of
20 providing this thing, this tape, to spread the word or is it
21 to make a buck. And the record here makes it very clear --

22 QUESTION: Well, it's to spread the word and to get the
23 money for the religious ministry, both, always, I suppose.

24 MR. McCONNELL: But the record here is very clear, and
25 the state has not challenged that the reason why the

1 ministries is distributing these materials is to get them out
2 to the public. That is the whole purpose of it. Now, to be
3 sure, getting the word out requires -- requires money, just as
4 it required money in Murdock and Jones and Follett. But the
5 -- but this ministry is not in the business to make money; it
6 is in the business to spread the bibles and the religious
7 tracts and sermon tapes and so forth to people who are
8 interested in hearing the word.

9 QUESTION: Suppose that the tape costs \$10 to make, and
10 it was sold for \$50.

11 MR. McCONNELL: That would be a question that goes to
12 income tax rather than sales tax, because a sales tax is
13 collected on the whole --

14 QUESTION: Still exempt from sales tax in your view?

15 MR. McCONNELL: Oh, yes, yes. And indeed exempt from
16 income tax under the federal income laws as well. In a sense
17 what I am suggesting here is that the Congress, in devising
18 its federal income tax laws, is essentially drawing the line
19 that the First Amendment had already drawn at a constitutional
20 level, when the federal income tax code taxes churches for
21 their income that they receive in the course of businesses
22 that are not related to their religious purposes, but exempts
23 them from the income that they receive on activities that are
24 related to their exempt purposes, namely the carrying out of
25 their religious activities. Was there -- did I cut off a

1 question?

2 QUESTION: (Inaudible) emphasis that they weren't
3 interested in the buck.

4 MR. McCONNELL: Your Honor, the record is quite clear
5 as to each and every one of these items. There is testimony
6 in the record as to precisely why it was developed, what
7 function it plays in the -- in the ministry, and that the
8 purpose of all of this is to spread the gospel. Now, all of
9 us can be somewhat cynical, and with good reason, that there
10 are those engaged in the practice of religion that have, that
11 do that for their own private purposes. But the law accounts
12 for that in prosecution such as we have seen recently. But,
13 unless that kind of -- unless we are going to say that all
14 religious leaders are charlatans, we have to recognize that a
15 distinction -- has to be -- has to be made. And if there is a
16 suggestion that this is being done for private profit rather
17 than for the religious purposes, the laws of every state allow
18 for the state to challenge the exemption on that basis.

19 QUESTION: There are people involved that draw
20 substantial salaries --

21 MR. McCONNELL: The record --

22 QUESTION: -- and those salaries come from the sale of
23 these books.

24 MR. McCONNELL: Your Honor, the record shows that at a
25 time --

1 QUESTION: Am I correct?

2 MR. McCONNELL: The record shows that at a time when
3 the annual revenues of this ministry were \$28 million, the
4 total -- the total compensation for all officers and directors
5 was \$110,000. And Jimmy Swaggart himself was getting a salary
6 of \$20,000.

7 Mr. Chief Justice, I have reserved the remainder of my
8 time for rebuttal.

9 QUESTION: Very well, Mr. McConnell.

10 Mr. Nielsen.

11 ORAL ARGUMENT OF RICHARD E. NIELSEN

12 ON BEHALF OF THE RESPONDENT

13 MR. NIELSEN: Mr. Chief Justice, and may it please the
14 Court:

15 Before I start addressing points I would like to make
16 today, I want to clarify a few points made by Mr. McConnell.
17 The record does show that the items taxed in these matters
18 involve a quid pro quo. On page 178 of the Joint Appendix --
19 171 on the Joint Appendix, their witness testified that, with
20 respect to donations and money sent in, that only in the
21 instance when money was sent in and could be identified to a
22 book or a tape or some tangible personal property --

23 QUESTION: Mr. Nielsen, you referred us to a page of
24 the record. Now, what question and answer are you talking
25 about there?

1 MR. NIELSEN: Starting with the question about the
2 middle of the page, where it says if they ask for the item and
3 you know the price of the item, could you break that out. The
4 response was if they use the order form, those that use the
5 order form we could. So the evidence is that, with respect to
6 their internal records, they have segregated sales of tangible
7 personal property from donations.

8 The next question was, and those that did not use the
9 order form, what was the procedure. The response is, the
10 procedure that the organization followed was that it was
11 charged to a donation. So in the situation where they were
12 not clear as to what amount was being given for tangible
13 personal property, they charge it to donation. The evidence
14 in the case is that when they arrived at the taxable amounts
15 in this case, they only went to the items that were directly
16 set up on their books as sales. So there is no question here
17 that we are going after any donations, there is no --

18 QUESTION: Now, wait, wait, wait. I don't think that
19 that at all establishes what you want it to establish. All
20 this establishes is that where they had a fixed price for the
21 book, they would set that separately. But that doesn't at all
22 speak to whether the person who paid the price believed he was
23 making a donation or believed he was engaging in a strictly
24 commercial exchange. I mean, that -- that's a matter of
25 intent of the parties, it seems to me, not of how they carry

1 it on their books.

2 MR. NIELSEN: That is correct, it's a matter of the
3 intent of the parties, Your Honor. In this case there were
4 advertisements, there were order forms. The order forms
5 provided that if you wanted three tapes for \$7, you sent in
6 the \$7.

7 QUESTION: I thought Mr. McConnell's point was that the
8 cost of the tapes to them exceeded the sale price, not that it
9 was a donation, but just that they didn't charge as much for
10 the thing as it cost them.

11 MR. NIELSEN: That was another point, Your Honor. The
12 first point was he, there was a question about quid pro quo,
13 and he said there necessarily wasn't any evidence of that.
14 And I was trying to point out there was.

15 The second point, there was a question as to whether
16 what they were selling exceeded the cost. And with respect to
17 that, on page 203 of the Joint Appendix, with respect to the
18 answers to interrogatories number 15, they indicated the
19 factors considered in determining the price, number 9, are the
20 cost of the item and the prices of similar items in the
21 marketplace. They also, further down below, said amounts
22 given away were never significant. Over on page 204 near the
23 bottom, under --

24 QUESTION: What does the first one prove? I don't see
25 how that proves that they're making a profit on it. It just

1 proves how much we choose to lose depends to some extent upon,
2 you know, how much we got to lose.

3 MR. NIELSEN: Well, I'm following in on page 204, Your
4 Honor, on the bottom of number 12, it says with respect to
5 other items, that prices -- the last phrase is prices were not
6 reduced below cost. It is correct, and I believe there is
7 other testimony that I can't point to right off hand, that
8 they basically said the tapes usually sold for \$7 or \$8, and
9 they only cost about \$1 to produce. So, I think the record
10 indicates there is a profit. But that is not the key in this
11 case.

12 The sales tax is not determinative on whether a profit
13 is or is not made. Sales tax applies when there is a transfer
14 of tangible personal property for a consideration.

15 QUESTION: Mr. Nielsen, does the state tax also, for
16 example, the sale of votive candles in the Catholic churches
17 in California?

18 MR. NIELSEN: That is -- that is an interesting
19 question, because I believe it came up in another case
20 recently. The answer to that is it depends on whether there
21 is a transfer of tangible personal property for sale. You've
22 got to look at the definition of sale. If you get possession
23 of that candle, then that would be a taxable sale. But
24 generally, I think the example you are --

25 QUESTION: Well, is California taxing these things or

1 not?

2 MR. NIELSEN: I have no reason to believe that they are
3 not.

4 QUESTION: Do you think California can levy a generally
5 applicable property tax on property owned by religious
6 institutions?

7 MR. NIELSEN: I think so. California, in its 1946
8 Watchtower decision, the California Supreme Court upheld an ad
9 valorem property tax on items similar to those in question
10 here. So, I believe as long as there is not a constitutional,
11 unconstitutional burden, such as a flat tax or differential
12 taxation or discrimination, if it is a general tax that
13 applies to all property in the state alike, I believe it
14 could.

15 QUESTION: What about sales of literature in the
16 vestibules of churches. They just have books up there,
17 bibles, tracts, and what not, and they have little prices
18 under it, you know, \$2, \$1.50. Is that taxed? You're going
19 to tell me you have no reason to believe it is not. Do you
20 know that it is?

21 MR. NIELSEN: I personally do not. The Board of
22 Equalization --

23 QUESTION: Do you know that the candles are?

24 MR. NIELSEN: The candle situation, Your Honor, I
25 believe, in order to follow up on the other question, is

1 generally in that situation. You go in and you put the money
2 into the receptacle and you light a candle.

3 QUESTION: And you leave the candle there.

4 MR. NIELSEN: There is no transfer of property.

5 QUESTION: You are buying the fire, I suppose, aren't
6 you? I mean --

7 (Laughter)

8 MR. NIELSEN: I think that --

9 QUESTION: You're buying something, I suppose. What
10 about seats in synagogues on high holy days, which --

11 MR. NIELSEN: That is not tangible personal property.

12 QUESTION: I see. It's only tangible personal
13 property. But you think the state could tax that, no doubt?

14 MR. NIELSEN: No.

15 QUESTION: Could not?

16 MR. NIELSEN: No.

17 QUESTION: Why not?

18 MR. NIELSEN: Because you are not -- you are not
19 getting possession or buying property. You are occupying a
20 space.

21 QUESTION: Well, it has another kind -- it has a rental
22 tax. Anybody who rents anything has to pay --

23 MR. NIELSEN: Yes, I believe an occupancy tax --

24 QUESTION: So it could?

25 MR. NIELSEN: -- a general occupancy tax, that would be

1 broad enough to encompass any type of activity, yes. If it is
2 just attending a religious service --

3 QUESTION: So they just don't, haven't thought of that
4 tax yet, but if they thought of it, they could do that.

5 (Laughter)

6 MR. NIELSEN: The legislature in states have many means
7 of raising taxes, and I believe that is why it is very
8 critical in this case that you have to look that this is a
9 general, non-discriminatory revenue-raising tax. It is
10 broadly based, and if you start carving out exceptions, you
11 are basically, you're going to have to force the legislature
12 to raise the rate or to think of other taxes. The question
13 presented --

14 QUESTION: Maybe you could take back a suggestion to
15 the state?

16 (Laughter)

17 MR. NIELSEN: The question presented is whether the
18 imposition of the California sales tax and the responsibility
19 to collect the use tax on a religious organization concerning
20 its sales of religious materials violates the First Amendment
21 free exercise rights. California sales and use taxes are
22 generally applicable, non-discriminatory taxes, imposed when
23 there is a sale and use of tangible personal property in the
24 state. As I previously pointed out, the Board of Equalization
25 has consistently held since the 1930s, when the sales and use

1 tax was enacted, that sale of tangible personal property by
2 religious organizations are not immune from tax.

3 California sales and use taxes place no prior restraint
4 on Swaggart's practice of religion, nor do the taxes conflict
5 with any asserted religious belief of Mr. -- of Swaggart. The
6 taxes are of general application and are not a special tax on
7 religion. Swaggart is asking this Court to do what it has
8 held state legislatures cannot do, create an exemption based
9 solely on religious grounds. There is no --

10 QUESTION: What do you respond to Mr. McConnell's point
11 that that is only fair because it works that way in the other
12 direction? The State of California wants to give money to
13 particular organizations that do good things, it can, but it
14 can't give money to a church that does those good things in
15 the course of its ministry. I mean, that's correct, isn't it?

16 MR. NIELSEN: I think that is an improper distinction,
17 because I think what they are comparing is basically apples
18 and oranges. What they are saying is if you can't give a
19 subsidy of cash or, as Texas Monthly held, an exemption,
20 therefore you can't tax them. I would agree to the extent if
21 you can't have a special --

22 QUESTION: Seems fair to me.

23 MR. NIELSEN: If you can't have a special exemption,
24 you also cannot have a special tax aimed selectively at a
25 religion, just like in Minneapolis Star and the other cases

1 where you have differential taxation or selective taxation,
2 that follows. But, if you have -- I think this Court has
3 recognized that if you have a general exemption for, let's
4 say, books, and if there are religious books, that that would
5 not violate anything. And on the other side, if you have a
6 general tax, which is what we're saying, if you have a general
7 tax that applies to all tangible personal property in the
8 state, then there is no unconstitutional problem with that.

9 QUESTION: So the state can tax these candles, but if
10 it decides it is going to have a candle distribution program
11 to all organizations that want candles, you don't have any
12 doubt that it couldn't give candles to a -- to a church that
13 is going to use them for devotional purposes.

14 MR. NIELSEN: That is similar to distribution of books
15 to schools and so forth. Yes, that is correct. There is no
16 burden on California to demonstrate that its sales and use
17 taxes on religious materials are the least restrictive means
18 of achieving a compelling state interest. Swaggart wants this
19 Court to extend its compelling state interest test to
20 situations not involving coercion or prohibition of religious
21 beliefs or practices. Swaggart urges application of the test
22 to situations involving any government burden rather than
23 unconstitutional burdens.

24 This Court in Lyng, and most recently in Frazee, held
25 that the compelling state interest test is applicable when

1 individuals would be coerced or penalized by government action
2 into violating their religious belief. No such coercion or
3 penalty flows from the application of the California sales and
4 use tax. This Court observed in Lee that not all burdens on
5 religion are unconstitutional, and in Murdock that religious
6 groups are not free from all financial burdens of government.
7 Recently in Lyng this Court observed that only government
8 action that prohibits one from free exercise of his or her
9 religion is subject to the compelling state interest test.

10 The Board submits that the California sales and use tax
11 does not prohibit the practice of religion. The taxes in
12 question are not fixed in amount, but are related to the
13 realized revenues; they are minimal -- 6 percent, and they are
14 payable after the sale occurs. There is no cumulative effect
15 of the taxes, and it can be passed on to the seller.

16 QUESTION: What if the rate were so high that the
17 evidence showed it prevented some adherents of the faith from
18 obtaining religious materials they wanted for their worship?

19 MR. NIELSEN: Your Honor, I believe the Court has
20 addressed that in Minneapolis Star and in some other cases
21 where it held that absent differential or discriminatory
22 taxation, the concern -- the -- of crippling an organization
23 is addressed basically through the political process. I
24 believe, if you -- that the rate in and of itself, although
25 high, would not be a defect.

1 QUESTION: (Inaudible) idea in any case that no person
2 who would otherwise have bought one of these bibles or tracts,
3 was dissuaded -- would be dissuaded by the additional six or
4 seven percent?

5 MR. NIELSEN: There is not only no evidence in the
6 record about that, there is also no evidence in the record
7 that Swaggart, the organization, was affected in how -- in
8 distributing -- except for the argument that if you have less
9 funds you can't do as much as you would normally do. But in
10 this case the tax can be passed on.

11 QUESTION: Except for the argument that the higher the
12 price the lower the number of purchases. Is that an
13 extraordinary argument?

14 QUESTION: You don't challenge the iron --

15 MR. NIELSEN: That's with respect to the individual.

16 QUESTION: Isn't your opponent quite right that that is
17 an iron rule of economics? You cannot raise the price and
18 have the number of sales be precisely the same.

19 MR. NIELSEN: I believe it follows that obviously when
20 you make a decision, anybody who makes a decision to buy
21 something looks at the price.

22 QUESTION: Sure. And that even a small increment will
23 discourage some sales. I mean, you really have to make that
24 assumption, don't you?

25 MR. NIELSEN: Yes. On that point, the incidental

1 economic impact of the tax may make it more costly for one to
2 practice his or her religion, but it has no tendency to coerce
3 Swaggart into acting contrary to any asserted religious
4 belief. Swaggart below challenged the taxes on the basis that
5 the burden caused by having less funds available after paying
6 the tax unconstitutionally burden its right to spread the
7 gospel. Now it has apparently abandoned this ground, and even
8 concedes that taxes on alleged secular transactions are
9 lawful, even if they result in less funds.

10 Also, Swaggart recognized that it does not have to
11 absorb the taxes in question, as they can be passed on to the
12 buyer. Administrative burden has now been emphasized by
13 Swaggart as the unconstitutional burden. But again Swaggart
14 fails to realize that said burden is not unconstitutional, or
15 every religious organization's compliance with the government
16 regulation or tax would be deemed an unconstitutional heavy
17 burden. Such compliance is deemed a substantial burden in
18 California's broad public interest in having a uniform and
19 comprehensive general revenue-raising tax, with as broad a
20 base as possible, would constitute a compelling state
21 interest.

22 California sales and use taxes account for over 30
23 percent of the state revenue. Accommodation of religion in
24 this system would unduly interfere with the high government
25 interest as a myriad of forced exceptions would compromise the

1 system. Swaggart's primary --

2 QUESTION: On that point, may I just ask you, do you
3 agree with your opponent that this is really the first time
4 that this particular kind of levy has been imposed by a state?
5 If it is, it is kind of strange to say it is going to destroy
6 your revenue resources not to be able to do something nobody
7 else has ever done.

8 MR. NIELSEN: Well, I think the analogy in this case is
9 that made in Lee, that it is not -- the impact of having to
10 create forced exemptions, whether it is for this basis or for
11 other basis, will hinder the system.

12 QUESTION: But his point, I think one of his points is
13 that we have been in this business for a couple hundred years,
14 and the systems have gotten along perfectly well without ever
15 -- with just precisely the kind of exemption he is asking for
16 here.

17 MR. NIELSEN: Well, in other states that is possibly
18 true, but in California it has held since 1930 that sales of
19 all tangible personal property, except those carved out
20 specifically by the legislature, are taxable. And I think
21 that is the point this Court has emphasized in dealing with
22 states. That it doesn't want to start getting into the
23 province of what state legislatures should or should not do.
24 And the other side of the coin is --

25 QUESTION: So your answer, I guess, is that in

1 California the rule has always been the same; we just have a
2 new kind of religious ministry that is selling articles that
3 generate this kind of revenue.

4 MR. NIELSEN: That is right.

5 QUESTION: That is what's new, not the -- not a new
6 law.

7 MR. NIELSEN: That is correct.

8 QUESTION: Maybe, but you, you don't know -- you cannot
9 say of your own knowledge that in fact churches that sell
10 tracts in their vestibules or that sell candles or other
11 things have been paying this tax. Do you know that they have?

12 MR. NIELSEN: I have no reason to believe they are not.
13 We -- California makes the best compliance effort as possible
14 to go out and audit -- it is a self-assessed tax. We don't
15 have an auditor to go out and look at every taxpayer to see
16 that something is being done. We have no -- we have rulings
17 that have held that transfers of tangible personal property,
18 which would include that, are taxable. And absent a specific
19 case, I can represent that I am not aware of a specific case
20 where that has come up.

21 QUESTION: Well, one doesn't have to pay a self-
22 assessed tax one believes is unconstitutional. And it may
23 well be that all the churches in California have been
24 proceeding on the same basis that Mr. Swaggart proceeded on,
25 that they didn't have to pay for these things. I frankly find

1 it, you know -- maybe you do have agents who walk into the
2 vestibules of churches and check out how many of these things
3 are being sold.

4 MR. NIELSEN: With respect to that specific example,
5 from my own personal information, being a Roman Catholic, is
6 usually what is said in the vestibule of the church is the
7 literature is there for the taking, whether you leave
8 something or not. And in a situation like that, where the
9 intent, again getting back to your question regarding isn't it
10 the intent of the parties that sort of determine a quid pro
11 quo and so forth, the same thing here. The intent of the
12 church in that situation is to let someone come in and freely
13 take that pamphlet or brochure, whatever, irrespective of
14 whether there is a transfer of money or not. In that
15 situation, most likely, it is not a sale. The church is
16 probably a consumer of that property and Swaggart has conceded
17 that when you buy property that you should pay tax on it to
18 the wine maker, or to whatever. So in the situation I think
19 you are referring to, Your Honor, is that it is probably not a
20 sale.

21 Swaggart's primary administrative burden arguments
22 relate to determining what price items are sold for, and
23 complying with a potential 7,000 jurisdictions. Both
24 arguments are overstated and contradicted by the evidence in
25 the record. Taking the last point first, California and Baton

1 Rouge are the only ones taking Swaggart's sales. So this risk
2 is minimal. And if it ever developed, there is evidence that
3 Swaggart's computer system could be programmed to handle it.

4 Swaggart's other concern regarding donations versus
5 sales is likewise overstated. Swaggart was able to ascertain
6 sales amounts for the period in question, and even though his
7 records were not set up for said purpose. Certainly for the
8 future the evidence indicates that Swaggart can design an
9 adequate system to comply for reporting purposes. He can
10 design forms. Organizations deal with this problem for
11 internal revenue service purposes, as recognized in Hernandez.

12 This Court recognized in Breard that the fact that
13 periodicals were sold did not put them beyond the protection
14 of the First Amendment, but the selling, however, brought into
15 the transaction a commercial feature. This does not mean that
16 religious organizations are to be treated as commercial
17 businesses, but only that when a religious organization seeks
18 to raise funds by selling tangible personal property, it may
19 become subject to non-discriminating general revenue-raising
20 statutes such as the California sales and use tax law.

21 Swaggart also contends that another administrative
22 burden in complying with the sales and use tax laws would be
23 entanglement, caused allegedly through intrusive monitoring,
24 on-site investigations, audits, allegedly all touching on
25 religious matters of significance. The record clearly doesn't

1 support this and neither does common sense. In fact, there
2 would be more of a risk of improper entanglement if an
3 exemption based solely on religious grounds is mandated.

4 The briefs of this case reflect a debate of what is and
5 isn't religious, and what is and isn't core. Swaggart has
6 conceded that tax is due on t-shirts, mugs, pens and other
7 items that it says "do not have specific religious message
8 content." Should courts be burdened with lawsuits to
9 determine what items are core or contain religious message
10 content. Would symbolic items qualify: instrumental music,
11 bumper stickers, making such determinations would clearly
12 involve entanglement concerns under the First Amendment.

13 If the Board is compelled to grant exemptions based on
14 religious content, then the potential for discrimination
15 against religious -- religions, could exist due to
16 administrative decisions as to what is or isn't religious.
17 This potential for discrimination has been disfavored by this
18 Court, especially when exercised on a case-by-case basis.

19 My next point is that the Board's position is not
20 inconsistent with Murdock and Follett, as asserted by Swaggart
21 in his reply brief. It is correct the Board does not rely on
22 the privilege analysis undertaken by this Court in Murdock,
23 because it was effectively overruled by this Court in Complete
24 Auto. As a proper analysis, it is based upon the nature of
25 the tax rather than its label. Contrary to Swaggart's

1 assertion in his reply brief, the Board distinguishes Murdock
2 based upon the difference between all the facts in that case
3 from those present in this case. Murdock involved a special
4 occupation tax, a flat tax, payable in advance, unrelated to
5 receipts or income of the solicitor, and imposes a condition
6 to solicit. It was a prior restraint. None of these facts
7 exist in this case. As this Court observed in its footnote 9
8 in Minneapolis Star, a generally applicable sales tax is
9 distinguishable from the taxes in Murdock and Follett.

10 Justice Brennan in Texas Monthly observed that the
11 sales tax there was equal to a small fraction of the value of
12 each sale, and in view of its generality, could not be viewed
13 as an attempt to curtail religious activity.

14 My final point concerns exhaustion of administrative
15 remedies. Swaggart asserts that it was not required to
16 exhaust administrative remedies regarding Nexus because the
17 California courts did not always follow said rule. Swaggart
18 misstates California law on this point. Sales and use tax
19 matters, this Court, in Richfield Oil Corporation v. State
20 Board of Equalization, a 1946 case, recognized the
21 jurisdictional procedural requirement for filing a claim and
22 setting forth the grounds in said claim. The court of appeals
23 analysis in Swaggart below clearly states California law on
24 the issue of exhaustion.

25 California sales and use tax law achieves a religious

1 neutrality in its application because sales of tangible
2 personal property are subject to tax, irrespective of the
3 contents or who is selling or who is buying that property.
4 Swaggart is using the Free Exercise Clause as a sword to claim
5 an exemption that it does not mandate, and that California
6 would otherwise be prohibited to give a religious organization
7 under the Establishment Clause.

8 I think it is interesting in this case that Swaggart
9 concedes that the individual that goes to a bookstore has to
10 pay tax, to a commercial bookstore, or I guess now even a
11 nonprofit bookstore. But its only concerns are whether
12 Swaggart is involved in the transaction or not. I think that
13 is a line that just doesn't seem reasonable. These -- as
14 pointed out by one of the judges, when someone reads a book or
15 buys a book, is he not doing it for basically the same purpose
16 when he is buying it from Swaggart?

17 Initially in their brief they started out with a
18 proposition that religious organizations are exempt from tax.
19 Then throughout their brief they sort of moved away from that
20 position and narrowed it down to only when they sell religious
21 material. Initially they started this case saying because
22 they had less funds that was a burden, but they concede that
23 by paying other secular taxes on other types of materials that
24 they use they have less funds --

25 QUESTION: Well, they have lost all along the line. It

1 would be strange if they didn't change their argument,
2 wouldn't it?

3 (Laughter)

4 MR. NIELSEN: That's the point.

5 Unless there is any questions, I have concluded.

6 QUESTION: Thank you, Mr. Nielsen.

7 Mr. McConnell, do you have rebuttal? You have four
8 minutes left.

9 REBUTTAL ARGUMENT OF MICHAEL W. McCONNELL

10 ON BEHALF OF THE APPELLANT

11 MR. McCONNELL: Thank you, Mr. Chief Justice. Just a
12 few points. It is interesting to hear my friend talk about
13 California's commitment to no exemptions from its sales tax,
14 and how long this practice has been in effect. I have here
15 the Sales and Use Tax Law, Chapter 4 Exemptions. There is a
16 page and a half of them, beginning with gas, electricity and
17 water, gold monetized bullions, vessels, ice, bottled water,
18 bracelets commemorating American prisoners of war and, most
19 importantly, newspapers and periodicals, the value of which in
20 total is many times the value of religious materials. The
21 state is evidently engaged in riddling its tax code with
22 exemptions. It is just not interested in the free exercise of
23 religion.

24 However, there is also the problem that perhaps this is
25 a new-found proposition. My friend says that this practice of

1 the state of taxing religious articles goes back to the '30s
2 or the '40s, but, as we have cited in our brief, the -- an
3 official opinion of the state attorney general issued in 1980
4 which flatly contradicts that proposition. Now, I gather that
5 there is some difference of opinion between the Board of
6 Equalization and the state attorney general, but at least his
7 opinion, upon which we relied during the tax period, would
8 seem to stand as some kind of an authoritative statement of
9 the state's position on this.

10 I might add that after the administrative proceeding in
11 this case, a different appellant court and a different
12 division in California, and the Institute for Basic Youth
13 Conflicts, also held that as a constitutional matter
14 California could not impose a sales tax on religious
15 organizations disseminating religious material. So this is
16 not such a long-standing practice.

17 The final observation I would like to make is that I
18 don't want the Court to forget, just because it hasn't been a
19 subject of the argument today, that there is the second
20 problem of the chilling effect on an out-of-state ministry of
21 the way California calculates Nexus. Because under the
22 Commerce and Due Process Clauses, California would not be able
23 to require a ministry located in Louisiana to pay any of this
24 tax at all, but for the fact that the ministries conducts
25 occasional worship services, evangelistic crusades within the

1 state --

2 QUESTION: Well, did the -- did the court below pass on
3 your Nexus argument?

4 MR. McCONNELL: It was presented to the superior court
5 --

6 QUESTION: Did it pass on it?

7 MR. McCONNELL: -- and it did not pass on it. No, Your
8 Honor. The impact here is quite plain, if you, if you are
9 conducting a national ministry and you have mail transactions
10 with your adherents throughout the country, you had better not
11 go and conduct any worship services in California. It could
12 be a very costly thing to do. It is that kind of chilling
13 effect that we believe that the Free Exercise Clause
14 prohibits.

15 The general theme of my friend's presentation is his
16 statement, and I quote, "The concern of crippling a religious
17 organization is left to the political process." Your Honors,
18 I submit that that is not true, that the concern for crippling
19 religious organizations at the hands of the state was this
20 very subject of the First Amendment.

21 Thank you.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. McConnell.
23 The case is submitted.

24 (Whereupon, at 10:57 a.m., the case in the above-
25 entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-1374 - JIMMY SWAGGART MINISTRIES, Appellant V. BOARD OF EQUALIZATION OF CALIFORNIA

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BY Lena M. May
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