No. 11-511

In the Supreme Court of the United States

CATHOLIC ANSWERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the claim by petitioner Catholic Answers (petitioner) for refund of excise taxes is moot because the Internal Revenue Service (IRS) has refunded those excise taxes and abated the assessment.

2. Whether petitioner's claim for declaratory relief with respect to the excise-tax statute and regulations is barred by the Declaratory Judgment Act, which expressly excludes claims "with respect to Federal taxes," 28 U.S.C. 2201(a).

3. Whether petitioner failed to properly exhaust its remaining claims because it did not present them to the IRS.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted in 438 Fed. Appx. 640. The opinion of the district court (Pet. App. 4a-26a) is not published in the *Federal Supplement* but is available at 2009 WL 2486288.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2011. A petition for rehearing was denied on July 22, 2011 (Pet. App. 27a). The petition for a writ of certiorari was filed on October 20, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Internal Revenue Code exempts certain qualifying organizations from income tax. 26 U.S.C.

501(a). Under Section 501(c)(3), an organization may qualify for that exemption if it is "organized and operated exclusively for" specified purposes, such as "religious, charitable, [or] scientific" purposes, and if it "does not participate in, or intervene in * * * any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. 501(c)(3). Alternatively, under Section 501(c)(4), an organization may qualify for income-tax exemption if it is "not organized for profit but operated exclusively for the promotion of social welfare." Unlike a Section 501(c)(3) organization, a Section 501(c)(4) organization may perform some political activity so long as such activity is not its primary focus. *FEC* v. *Beaumont*, 539 U.S. 146, 150 n.1 (2003).

If a Section 501(c)(3) organization makes any political expenditure, the organization is subject to an excise tax on the amount of that political expenditure. 26 U.S.C. 4955(a)(1). As relevant here, the statutory definition of the term "political expenditure" corresponds to the activities in which a Section 501(c)(3) organization is forbidden to engage. Thus, "[t]he term 'political expenditure' means any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. 4955(d)(1); see 26 U.S.C. 501(c)(3).

In certain less serious cases, however, no excise tax is imposed even though a Section 501(c)(3) organization has made a prohibited political expenditure. If the Secretary of the Treasury is satisfied that (1) the political expenditure was "not willful and flagrant," and (2) the political expenditure was "corrected" in a timely fashion, then "[n]o [excise] tax will be imposed * * * or the

initial tax will be abated or refunded." Treas. Reg. 53.4955-1(d); see 26 U.S.C. 4962(a) and (c). To "correct" the expenditure means to "recover[] part or all of the expenditure to the extent recovery is possible," to "establish[] * * * safeguards to prevent future political expenditures," and "where full recovery is not possible, [to take] such additional corrective action as is prescribed by the Secretary by regulations." 26 U.S.C. 4955(f)(3); see 26 U.S.C. 4963(d)(1); see also 26 U.S.C. 4963(e)(1) (time for correction).

b. Before a taxpayer may bring an action in federal court to recover "any internal revenue tax alleged to have been erroneously or illegally assessed or collected," or "any sum alleged to have been * * * in any manner wrongfully collected," he must first file a refund claim with the Internal Revenue Service (IRS). 26 U.S.C. 7422(a). "No suit" for a refund "shall be maintained in any court" unless a timely and proper refund claim has been filed. *Ibid.* As relevant here, a refund claim must be filed within three years after filing the tax return for the relevant year, or within two years after paying the tax, and a timely refund claim is a prerequisite to any refund. 26 U.S.C. 6511(a), (b)(1) and (f). "The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." Treas. Reg. 301.6402-2(b)(1).

Other statutory provisions generally require taxpayers to proceed by filing a refund claim and, if necessary, a refund suit, rather than an action for prospective relief against the enforcement of a tax law. Except as authorized by law, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. 7421(a). Simi-

larly, although the Declaratory Judgment Act generally authorizes federal courts to "declare the rights and other legal relations of any interested party seeking such declaration," that authorization does not apply "with respect to Federal taxes." 28 U.S.C. 2201(a). The only exception, see *ibid.*, is a special procedure by which an organization can seek a declaratory judgment to resolve an "actual controversy" regarding its "initial qualification or continuing qualification" for a particular status (such as Section 501(c)(3) status) under the Internal Revenue Code. 26 U.S.C. 7428(a). Such an action can be brought only in the Tax Court, the Court of Federal Claims, or the United States District Court for the District of Columbia. *Ibid.*

2. a. Petitioner Catholic Answers, Inc., is a nonprofit religious corporation organized under California law. Pet. App. 5a. It is recognized by the IRS as a tax-exempt organization under 26 U.S.C. 501(c)(3). Petitioner Karl Keating is the founder and president of Catholic Answers. Pet. App. 5a. Because the petition does not challenge the lower courts' basis for dismissing Keating from the action, see *id.* at 13a-14a, we refer to Catholic Answers as "petitioner."

Petitioner created, published, and distributed a "Voter's Guide for Serious Catholics." Pet. App. 5a, 23a. Based on Catholic teachings, the Voter's Guide identifies five public issues it describes as "non-negotiable," and it advises the reader to determine whether candidates are acceptable based on the candidates' positions on those issues. *Id.* at 5a; see Pet. 5-6.

On April 13, 2004, petitioner posted on its website an "E-letter," written by Keating, concerning Senator John Kerry, then the presumptive presidential nominee of the Democratic Party. The E-letter stated that "Kerry is

nominally Catholic, and he is vociferously pro-abortion. So far as I can tell, he flunks the test given in Catholic Answers' 'Voter's Guide for Serious Catholics': He is wrong on all five 'non-negotiable' issues listed there." Pet. App. 63a. On May 11, 2004, petitioner posted on its website another "E-letter," also written by Keating, which reiterated that Senator Kerry was not worthy of receiving communion because of his positions on abortion and the other non-negotiable issues. *Id.* at 66a-70a.

b. In January 2005, the IRS notified petitioner that it was conducting an examination to determine whether petitioner had engaged in any prohibited acts of political-campaign intervention. Pet. App. 5a. The IRS subsequently requested that petitioner provide additional information about the E-letters and the Voter's Guide. *Id.* at 23a-24a.

In May and June 2006, while the examination was ongoing, petitioner informed the IRS that a new organization, known as Catholic Answers Action (CA Action), was being incorporated as a tax-exempt entity under Section 501(c)(4). Pet. App. 24a; see p. 2, *supra* (explaining the different rules that apply to Section 501(c)(3) and 501(c)(4) organizations). Petitioner stated that although it would continue to feature E-letters on its website, the letters would be non-political in nature, and that any E-letters featuring political issues would be posted on the CA Action website. Pet. App. 24a.

c. In January 2008, the IRS determined that petitioner had made political expenditures, totaling $831.41, in posting the two E-letters on its website. The IRS calculated the applicable excise tax (1) for petitioner's fiscal tax period ending June 30, 2004, to be $46.81, with an additional $12.00 due for interest, and (2) for petitioner's fiscal tax period ending June 30, 2005, to be

$36.33, with an additional $7.09 due for interest. Pet. App. 5a-6a; 1st Am. Compl. ¶ 32.

In March 2008, petitioner corrected its violation by collecting $831.41 from Keating. Petitioner then paid the excise taxes and submitted proof to the IRS that it had corrected the violation, along with a form waiving restrictions on assessment. See Pet. App. 6a. Shortly thereafter, the taxes were assessed and the tax payments were posted to petitioner's account. C.A. E.R. 107, 112.

In May 2008, the IRS informed petitioner that the examination into petitioner's prohibited campaign activities was being closed and that petitioner continued to qualify for exemption from federal income taxation under Section 501(c)(3). The letter explained that while the Voter's Guide, standing alone, would not have constituted political-campaign intervention, the two E-letters opposed a specific candidate running for President of the United States in the November 2004 election. As a result, the letter concluded, the combination of the Voter's Guide and E-letters constituted political-campaign intervention. Pet. App. 24a.

d. On September 24, 2008, petitioner submitted IRS Form 843, Claim for Refund and Request for Abatement, requesting refunds of the excise taxes it had paid for the two fiscal tax periods. Pet. App. 6a. The claims stated that petitioner "did not make a 'political expenditure,'" as defined in Section 4955(d), and that it therefore "is entitled to a refund of taxes paid pursuant to Section 4955." *Id.* at 14a-15a (quoting 1st Am. Compl. Exh. 1, at 5, 7).

On March 27, 2009, the IRS notified petitioner that it had approved petitioner's claim. Pet. App. 61a-62a. The IRS stated that petitioner's taxable expenditure

"was not willful and flagrant and was corrected within the correction period." *Id.* at 61a. "Accordingly," the IRS stated, "we have abated the tax" and "will issue you a refund including interest." *Ibid.* A few weeks later, the IRS issued refund checks, which petitioner received on April 21, 2009. *Id.* at 7a.

3. On April 3, 2009, after the IRS had notified petitioner that it would issue a refund but before the refund checks were issued, petitioner and Keating brought this suit against the United States. The complaint stated at the outset that "[t]his is an action by Catholic Answers, Inc. for a refund of excise taxes." Compl. ¶ 1; accord 1st Am. Compl. ¶ 1. Petitioner alleged that it had not made political expenditures within the meaning of 26 U.S.C. 4955(d); that the IRS therefore had wrongly collected the excise taxes; and that petitioner should not have been required to "correct" the expenditures by obtaining reimbursement from Keating. Pet. App. 7a. In an amended complaint, petitioner contended that First Amendment and due process considerations required a narrow construction of Section 4955(d), to exclude petitioner's expenditures and include only "express advocacy." 1st Am. Compl. ¶¶ 71-76. Petitioner also contended that, if such a narrowing construction were not adopted, Section 4955 and the regulations that implement the prohibition on political intervention would be unconstitutional. *Id.* ¶¶ 67-70.

The only forms of relief that petitioner expressly sought were (1) "[j]udgment" that its E-letters had not been "political expenditures," (2) "[j]udgment" that petitioner is entitled to return Keating's reimbursement to him, and (3) "[d]eclar[ations]" that the statute and its implementing regulations apply "only to activities that constitute express advocacy." 1st Am. Compl. ¶¶ 79-82.

4. The district court granted the government's motion to dismiss. Pet. App. 4a-26a.

The district court first held that Keating is not a proper plaintiff in a refund action because he was not assessed any tax liability, did not pay any taxes, and did not file a refund claim. Pet. App. 12a-14a.

Next, the district court held that petitioner could not pursue any claim in this refund action that it had not properly exhausted in the refund claim it submitted to the IRS. Pet. App. 14a-17a. The court explained that filing a timely claim that specifies in detail each ground for a refund, in compliance with the applicable statute and regulation, "is a jurisdictional prerequisite to a suit for a refund." *Id.* at 16a. For that reason, a plaintiff may not allege in a lawsuit grounds that are "at 'variance' with those presented to the IRS in a claim for refund." *Id.* at 16a-17a (citation omitted). The court concluded that this rule barred petitioner's constitutional challenge to Section 4955 and the regulations, petitioner's claim that it was entitled to return Keating's reimbursement, and petitioner's request for a declaration narrowly construing those provisions. *Id.* at 15a, 17a.

Accordingly, all that remained of the case was petitioner's request for judgment that the E-letters were not "political expenditures" subject to excise tax. Pet. App. 17a. The district court held that the parties' dispute over that request was moot because, whether or not the IRS agreed with petitioner's *arguments* for a refund, the agency had in fact tendered a full refund of petitioner's excise taxes. *Id.* at 18a-20a.

The district court further held that the case was not saved from mootness as a dispute "capable of repetition[,] yet evading review." Pet. App. 20a. The court

found "no indication" that the "extremely fact specific" set of "circumstances giving rise to the government's assessment of excise taxes against [petitioner is] likely to be repeated," especially since petitioner has now formed a new Section 501(c)(4) organization that may freely engage in the type of advocacy at issue here. *Id.* at 23a-25a. With respect to petitioner's past tax liability, the court observed that the IRS had announced the refund before this litigation even began. *Id.* at 21a. Although petitioner had refused to deposit the refund checks and contended that the IRS could still revoke the refund, the court determined that such speculation was unfounded and inadequate to keep this case live. *Id.* at 20a-23a.

5. The court of appeals affirmed in an unpublished disposition. Pet. App. 1a-3a.

The court of appeals held that the case was moot because the tax had already been abated and there was no relief that the court could grant. Pet. App. 2a. The court rejected petitioner's argument that the case was "capable of repetition, yet evading review." *Ibid.* The court stated that, "should this set of facts recur, the case will not evade review because it will be clear then, while it is not now, that the IRS has intentionally maneuvered to avoid judicial scrutiny." *Ibid.* The court of appeals further noted that the declaratory relief petitioner sought was precluded by the Declaratory Judgment Act, 28 U.S.C. 2201(a), and that petitioner's failure to exhaust (the "doctrine of variance") barred petitioner's constitutional claims. Pet. App. 2a.

ARGUMENT

Petitioner contends (Pet. 14-19) that the decision of the court of appeals departs from the ordinary applica-

tion of the "capable of repetition, yet evading review" exception to the mootness doctrine as applied by this Court. Petitioner further argues (Pet. 19-20) that the court's Declaratory Judgment Act holding conflicts with *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974). Finally, petitioner contends (Pet. 21-22) that the court of appeals' application of the doctrine of variance conflicts with two appellate decisions. The court of appeals correctly rejected petitioner's arguments, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. This Court has made clear that "a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). When the plaintiff has already received the relief that he seeks, his claim is moot. See, *e.g.*, *Alvarez* v. *Smith*, 130 S. Ct. 576, 580, 582 (2009) (return of seized property mooted claims seeking prospective relief from the allegedly unlawful seizure). Even when the parties still disagree about the lawfulness of the defendant's actions, "a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Id.* at 580-581.

In this case, in response to petitioner's claim for refund and petitioner's compliance with the statutory requirement to correct the violation, the IRS abated the assessments of excise-tax liability and refunded the full amount necessary to make petitioner whole. Accordingly, petitioner's claim for refund is moot.

Petitioner contends (Pet. 18-19) that its suit should not have been dismissed as moot because the dispute over its 2004 and 2005 tax liability is "capable of repetition, yet evading review." That argument lacks merit. As the district court explained, based substantially on petitioner's own representations to the IRS, there is no significant likelihood that the now-moot issue will recur. Pet. App. 25a. If a similar controversy arises in the future, moreover, petitioner can take steps to ensure that the dispute does not evade review.

a. "[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983) (citing *DeFunis* v. *Odegaard*, 416 U.S. 312, 319 (1974) (per curiam)). Under the exception's "capable of repetition" prong, the party must show either a "'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur." *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam).

In the present case, there is no indication that the combination of circumstances giving rise to the IRS's assessment of excise taxes against petitioner is likely to recur. As an initial matter, the same controversy—petitioner's tax liabilities for the years 2004 and 2005—is not an issue capable of repetition. The tax amounts in dispute and the nature of the claim for refund are specific to each individual year. Cf. *Commissioner* v. *Sunnen*, 333 U.S. 591, 598, 602 (1948). Furthermore, as the IRS's determination in this case demonstrates, whether a particular communication constitutes political-campaign intervention is a context-sensitive matter. See Pet. App. 24a.

Moreover, to show that it had corrected the violation (thus qualifying for abatement and refund), petitioner represented to the IRS that its future political advocacy would be handled by a separate Section 501(c)(4) organization, CA Action. Pet. App. 24a. Petitioner stated that, although it would continue to feature E-letters on its website, the letters would be non-political in nature, and any E-letters featuring political issues would be posted on the CA Action website. *Ibid.* Petitioner's bare statement (Pet. 10) that it "would like to engage in substantially similar issue advocacy in the future" does not create any substantial likelihood that petitioner will again be affected by the precise question at issue in this refund action.

Contrary to petitioner's contention (Pet. 14-19), the court of appeals' decision does not conflict with this Court's decisions in *FEC* v. *Wisconsin Right to Life, Inc.* (*WRTL*), 551 U.S. 449 (2007), or *Davis* v. *FEC*, 554 U.S. 724 (2008). In *WRTL*, the plaintiff was a nonprofit advocacy corporation that wished to broadcast advertisements criticizing a candidate in the upcoming 2004 primary election for the U.S. Senate. At the time, a provision of federal campaign-finance law prohibited corporations from using their treasury funds to finance such advertisements within 30 days of a primary election or 60 days of a general election. 551 U.S. at 457-458. WRTL sought declaratory and injunctive relief from the prohibition. Although the suit was not resolved before the 2004 election, this Court held that the dispute was "capable of repetition, yet evading review." *Id.* at 462-464. The Court found that the 30- and 60-day windows during which the restrictions applied were sufficiently short to preclude "complete judicial review." *Id.* at 462 (citation omitted). The Court further explained that

"WRTL credibly claimed that it planned on running 'materially similar' future" advertisements prohibited by the statute, a claim substantiated by WRTL's attempt to obtain another, identical injunction in the next election cycle. *Id.* at 463.

Davis involved another dispute that had recurred even more concretely. Davis brought a facial challenge to the so-called "Millionaire's Amendment," which provided for special, asymmetrical contribution limits in any congressional race in which one candidate spent large amounts of his own money. 554 U.S. at 729. Davis's suit arose out his self-financed congressional campaign in 2006, and the FEC conceded in its brief that Davis's claim would be capable of repetition if Davis planned to self-finance another bid for a House seat. *Id.* at 731, 736. After the FEC filed its brief, Davis announced another self-financed campaign. *Id.* at 736. As a result, this Court held that Davis's challenge was not moot. *Ibid.*

Here, by contrast, petitioner's moot claim is not for prospective relief against a statute still in effect, see pp. 15-19, *infra*, but for refund of a past tax payment. And unlike in *WRTL* and *Davis*, the circumstances surrounding this litigation provide no sound basis for concluding that petitioner will again be assessed excise tax for political-campaign intervention. Petitioner was subjected to tax based on conduct specific to the behavior of one candidate running in one election: petitioner's E-letters criticized Senator Kerry, on public-policy and other matters relating directly to Senator Kerry's membership in the Catholic Church, see, *e.g.*, Pet. App. 63a, 69a-70a, at a time when Senator Kerry was a candidate for President and the presumptive nominee of his party. Not only has petitioner provided no evidence that it has

sought to intervene in any other political campaign at any point in the subsequent seven years, but petitioner has actually formed a separate organization that may permissibly devote part of its activities to political advocacy. Petitioner became entitled to abatement and refund precisely because it had "establish[ed] * * * sufficient safeguards to prevent future political expenditures by the organization." Treas. Reg. 53.4955-1(e)(2). Accordingly, there is at most a speculative possibility that petitioner will again be assessed excise tax under Section 4955.[1]

b. In addition, petitioner's claim does not inherently "evad[e] review" as this Court has traditionally used that phrase, *i.e.*, the claim is not "in its duration too short to be fully litigated prior to cessation or expiration." *WRTL*, 551 U.S. at 462 (citation omitted). A suit to recover money will rarely if ever fit that classification, see *Alvarez*, 130 S. Ct. at 581, and this case is no exception. Petitioner's claim became moot only because petitioner qualified for and received a refund. Petitioner suggests (Pet. 16 & n.15) that it wished only to exhaust its claim and did not wish to seek abatement. Petitioner was statutorily *entitled* to abatement, however, if it submitted satisfactory evidence that its violation was not willful and flagrant and that it had corrected the violation. 26 U.S.C. 4962(a) and (c); Treas. Reg. 53.4955-1(d). Petitioner could have exhausted its claim administratively, thereby satisfying the prerequisite to judicial review, without submitting such evidence.

Although failure to correct a violation would have subjected petitioner to additional tax, see 26 U.S.C.

[1] For the same reason, petitioner's speculation that its past tax payment will continue to have "collateral consequences" (Pet. 16-17) is insubstantial.

4955(b)(1), petitioner could have brought suit to review the imposition of the initial excise tax even before paying and seeking refund of the additional tax. See 26 U.S.C. 7422(g)(1); see also 26 U.S.C. 4963(a) and (b). In short, this action became moot only because of petitioner's own decision to correct the violation, which under the law entitled it to an abatement. If petitioner had wanted judicial review of the tax more than it wanted the refund, it could easily have kept this case alive.[2]

2. Contrary to petitioner's contention (Pet. 19-20), the district court lacked authority to grant petitioner's request for a declaration construing Section 4955 (and related Treasury Regulations) to apply only to activities that constitute "express advocacy." The Declaratory Judgment Act, which generally authorizes courts to issue declaratory judgments as a remedy, specifically excludes federal tax matters from its remedial scheme (with one exception for which petitioner does not qualify). 28 U.S.C. 2201(a). And the Anti-Injunction Act, 26 U.S.C. 7421, separately bars prospective relief restraining the enforcement or collection of any tax. To grant the declaratory relief requested by petitioner would

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[2] The court of appeals therefore was incorrect to suggest (Pet. App. 2a) that, if the identical facts recurred, the refund would constitute gamesmanship on the part of the IRS. Congress has directed the IRS to refund certain taxes when the taxpayer meets specified conditions, and the IRS's compliance with that statutory mandate cannot properly be understood as an effort to moot litigation. Indeed, the IRS announced the refund in this case before any litigation was filed. See Pet. App. 6a-7a; *Christian Coal. of Fla., Inc.* v. *United States*, No. 10-14630, 2011 WL 5553651, at *11 (11th Cir. Nov. 15, 2011) (holding that the voluntary-cessation exception to mootness did not apply because the "refund was not granted in response to pending litigation, but rather was compelled by the operation of the Internal Revenue Code") (citation omitted).

amount to an advance determination of what constitutes a political expenditure under 26 U.S.C. 4955(d)(1), a course foreclosed by the tax exception to the Declaratory Judgment Act.

The Court followed precisely those principles in *Bob Jones*, *supra*. Petitioner's suggestion (Pet. 20) that the "spirit" of *Bob Jones* supports its position is without merit. This Court in *Bob Jones* held that the taxpayer, a Section 501(c)(3) organization, could not obtain injunctive relief precluding the IRS from revoking its Section 501(c)(3) status. See 416 U.S. at 738-742. Far from suggesting that the result would have been different if the taxpayer had sought a declaratory judgment, the Court noted that "congressional antipathy for premature interference with the assessment or collection of any federal tax * * * extends to declaratory judgments." *Id.* at 732 n.7.

In response to the *Bob Jones* decision, Congress created a special procedure through which an organization can obtain a declaratory judgment, in one of three specified fora, to resolve a controversy about its Section 501(c)(3) status. See p. 4, *supra*; *Christian Coal. of Florida, Inc.* v. *United States*, No. 10-14630, 2011 WL 5553651, at *7 (11th Cir. Nov. 15, 2011). This is not such a controversy, and petitioner did not sue in one of the specified fora. Because the declaratory relief that petitioner seeks is "with respect to Federal taxes," the authorization generally conferred by the Declaratory Judgment Act does not apply to this suit. 28 U.S.C. 2201(a).

The Court in *Bob Jones* left open the question whether, in the context of a legitimate, ongoing refund action, a party may ever obtain some prospective relief ancillary to the refund. 416 U.S. at 748 n.22. This case does

not provide a suitable opportunity for the Court to address that question, since the IRS had notified petitioner of the forthcoming refund before the suit was commenced. The clear language of the Declaratory Judgment Act is therefore controlling here. Accord *Christian Coal.*, 2011 WL 5553651, at *6-*7.

3. Petitioner contends (Pet. 22) that its refund claim adequately notified the IRS "that [petitioner] intended to raise First Amendment objections to the imposition of taxes based on any classification of the E-letters as political expenditures," and that petitioner's suit did not "substantially vary" from the grounds it asserted in its refund claim. Petitioner seeks review of the lower courts' determination that petitioner's refund claim did not adequately present the legal theory on which petitioner now seeks judicial relief. That fact-bound contention does not warrant further review.

In accordance with the governing regulation, see p. 3, *supra*, the courts of appeals agree—including in a decision on which petitioner relies—that "[a]ny legal theory not expressly or impliedly contained in the application for refund cannot be considered by a court in which a suit for refund is subsequently initiated." *Lockheed Martin Corp.* v. *United States*, 210 F.3d 1366, 1371 (Fed. Cir. 2000) (alteration in original; citation omitted); accord, *e.g.*, *Muskat* v. *United States*, 554 F.3d 183, 195-196 (1st Cir. 2009). That exhaustion requirement applies to constitutional theories. See *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9-10 (2008).[3] Accordingly, petitioner was required to pre-

[3] The other decision on which petitioner relies, *Synergy Staffing, Inc.* v. *United States IRS*, 323 F.3d 1157 (9th Cir. 2003), also does not provide a basis for further review. The Ninth Circuit denied petitioner's petition for rehearing en banc, and petitioner's claim of an intracircuit

sent its legal theories in its refund claim. "It is not enough that somewhere under the Commissioner's roof is the information which might enable him to pass on a claim for refund." *Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293, 299 (1945).

Petitioner's terse refund claim did not even mention the First Amendment; it stated only that petitioner's expenditures did not meet the statutory and regulatory definition of "political expenditure." See Pet. 14a-15a; 1st Am. Compl. Exh. 1, at 5, 7. Petitioner did not advise the IRS of its legal theory that the statute and regulations are unconstitutional as currently construed and must be reinterpreted narrowly, to include an element of "express advocacy." Nor did petitioner explain the legal basis of that theory or identify the facts that would entitle petitioner to prevail if such a theory were adopted.

The requirement to identify each claim with particularity "'advise[s] the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue,' * * * and [allows] the IRS to avoid unnecessary litigation by correcting conceded errors." *Clintwood Elkhorn*, 553 U.S. at 11 (quoting *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931)). Because petitioner did not

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conflict provides no basis for this Court's review. In any event, there is no such conflict. The Ninth Circuit in *Synergy Staffing* simply held that the particular refund claim at issue in that case was factually and legally sufficient to apprise the IRS of the basis of the claim. *Id.* at 1160-1161. The court did not hold that a taxpayer may do what petitioner seeks to do—file a refund claim giving no legal basis, and then in subsequent litigation assert any and all conceivable legal grounds for the refund, including an argument that the governing statute and regulation are unconstitutional.

satisfy that requirement with respect to its constitutional challenges, the courts below correctly dismissed those claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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