82-1275

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

SUN MYUNG MOON, *et al.*,

Appellants.

On Appeal From The District Court
For The Southern District Of New York

BRIEF FOR THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., THE UNITED PRESBYTERIAN CHURCH IN THE U.S.A., THE AMERICAN BAPTIST CHURCHES IN THE U.S.A., THE AFRICAN METHODIST EPISCOPAL CHURCH, THE UNITARIAN UNIVERSALIST ASSOCIATION, AND THE NATIONAL BLACK CATHOLIC CLERGY CAUCUS AS AMICI CURIAE

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ISSUES PRESENTED FOR REVIEW

1. When someone's religious beliefs and practices are relevant to his defense to charges against him in proceedings before governmental authorities, may those beliefs and practices be disregarded in assessing that person's challenged conduct?

2. May governmental authorities condition a religious entity's title to property on its willingness to assume formal corporate status, or decide for the entity which expenditures of its funds are, in a jury's discretion, to be deemed for "religious" purposes?

3. May a controversial religious leader's criminal conviction be upheld where:

(a) the religious leader requested a non-jury trial to minimize the risk of prejudice, but the government was permitted to override that choice—and to do so in retaliation for the religious leader's public statements criticizing the government for engaging in religious persecution?

(b) the conviction rested on the government's treatment, as personally owned, of assets entrusted for a *religious* mission, despite the fact that assets held for *non*-religious political purposes would not be so treated in similar circumstances?

(c) the conviction rested on the use of religious beliefs and loyalties to establish guilt by religious association and bias by religious conviction?

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INTEREST OF AMICI

The National Council of the Churches of Christ in the U.S.A. is the cooperative agency of 32 national Protestant and Eastern Orthodox religious bodies in the U.S., having an aggregate membership of over 40,000,000. This brief does not purport to represent the views of all of those persons, but is based on policy determined by their representatives sitting as the

Governing Board of the National Council of Churches, a deliberative body of about 250 persons, chosen by the member denominations in proportion to their size and support of the Council. The policy which underlies this action was expressed by the Board in 1955: "The National Council of Churches defends the rights and liberties of cultural, racial and religious minorities. The insecurity of one menaces the security of all. Christians must be especially sensitive to the oppression of minorities." Policy Statement: Religious and Civil Liberties in the U.S.A. Three of the national denominations which are members of the National Council of Churches have been particularly concerned about this case and, from their own respective policy bases, have joined this brief as *amici* in their own right in addition to being represented by the Council.

The United Presbyterian Church in the U.S.A. is a national, Christian denomination with churches in all 50 States. It has more than 2,387,000 active members and more than 8,900 congregations organized into 150 Presbyteries and Synods. The General Assembly is the highest governing body of the Church, meets annually, and is composed of approximately 600 delegates elected by the Presbyteries, known as commissioners, one-half of whom are ordained ministers, the other half ordained lay officers known as ruling elders. This brief does not purport to reflect the views of all members of the Church, but is based upon policies decided by the General Assemblies or incorporated into the Constitution of the Church by vote of the Presbyteries. Chapter I of the Form of Government, a part of the Church's present Constitution, was first published in 1788 by an antecedent body, the Synod of New York and Philadelphia, where the founders of the Presbyterian Church asserted (and the Church still affirms in its basic documents) that "they consider the rights of private judgment, in all matters that respect religion, as universal and inalienable: they do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, and, at the same time, be equal and common to all others." Consistent with this "principle of common rights," they recog-

nize that every church is entitled to declare "the whole system of its internal government."

The American Baptist Churches in the U.S.A. is a national Baptist denomination of some 6,000 congregations with some 1.5 million members, with national offices in Valley Forge, Pennsylvania. The American Baptist Churches in the U.S.A. has a mandate from its General Board to speak whenever Baptist principles are involved. The preservation of religious liberty is a tenet of the Baptist religious belief. The issues present in this case are basic to the Baptist principles of religious liberty and separation of church and state.

The African Methodist Episcopal ("AME") Church was founded in Philadelphia in 1787, while the Framers were considering the Constitution of the United States. It arose because of racial discrimination within the existing Methodist Episcopal Church. Today, the AME Church includes 6,000 churches with 2,050,000 members operating 5,500 Sunday or Sabbath schools with enrollments of 156,000. The Church includes 6,170 ordained clergy with 18 Bishops for 18 Districts, plus a Bishop in charge of Ecumenical Relations and AME Chaplaincy Relations, in addition to six retired Bishops in the AME Church. The Church joins the instant brief out of deep concern for the issues of religious freedom involved—issues which seem especially compelling when the defendant on trial is a man of color.

The Unitarian Universalist Association is a voluntary association of 1,000 societies and fellowships in North America. While not a member of the National Council of Churches, it joins the Council and the other *amici* in submitting this brief based upon its policy of *amicus* intervention in First Amendment cases. In this brief, the Unitarian Universalist Association relies solely upon the argument developed in connection with Point I of this brief as the basis for its intervention.

The National Black Catholic Clergy Caucus is a national association of black priests, brothers, permanent deacons, and seminarians formed in August 1967. It numbers 700 members, and exists for the support and personal development of its members, and, more especially, for the growth of the Catholic

Church in the black community. The National Black Catholic Clergy Caucus has never before filed an *amicus* brief. It does so in this case for the compelling reasons described by the other *amici*.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the brief of appellant Moon, insofar as the facts set forth therein are relevant to the arguments below. *Amici* accept for purposes of this brief the conclusion of the New York Court of Appeals and the United States District Court for the District of Columbia that the Unification Church is a religious organization entitled to the protection of the First Amendment, a characterization not disputed in the court below. *See Holy Spirit Association* v. *Tax Commission*, 55 N.Y.2d 512, 528 (1982); *Unification Church* v. *INS*, No. 81-1073, slip op. at 10 (D.D.C. Sept. 16, 1982).

Amici stress that their filing of this brief is motivated not by any particular sympathy for Reverend Moon, nor by any agreement with his faith. Those *amici* who are members of the National Council of the Churches of Christ accept the finding of its Faith and Order Commission that the doctrine of the Unification Church is not consistent with that of traditional Christian theology as believed through twenty centuries. *Amici* are motivated, nevertheless, by deep alarm at the means by which defendant Moon's conviction below was secured, and by the consequences for religious liberty should his conviction be allowed to stand.

No claim is made here that religious officials or indeed entire churches enjoy absolute immunity from the law simply by virtue of their religious status; many legal principles apply in the same way to church officials as they do to others. Nothing in the First Amendment, properly construed, sets any religion or religious leader "above the law." The conduct of government officials, however, is strictly circumscribed by the First Amendment, which establishes a uniquely preferred position for religion.

Amici believe that, when someone's religious beliefs and practices become *relevant* to refuting the charges against him, treating him *as though* religion had nothing to do with the matter is the very essence of unfairness and discrimination. Indeed, to disregard religion when it is relevant to that person's defense violates the Religion Clauses of the First Amendment in addition to the Due Process Clause of the Fifth Amendment. For these and the other reasons stated above, *amici* file the instant brief in support of reversal in this case.

ARGUMENT

I.

Upholding The Conviction In This Case Would Establish The Dangerous Principle That Courts May Simply Disregard The Religious Reasons For, And The Religious Meanings Of, Someone's Conduct.

A. The Government's Case Depended On Filtering Out Critical Religious Explanations Of This Religious Leader's Actions And This Religion's Transactions.

1. The Government's Approach

At trial, the government's entire approach was to make certain assets placed in the defendant's hands by his followers and held by defendant in his own name appear to be *personal* assets, the receipt of which or the interest on which the defendant should have reported as personal income. The focal point of the defendant's trial, therefore, was the question of what was *meant* by the entrusting of assets to him by followers of his faith and by the holding and investment of such assets in his name. The government sought to prove the defendant's personal ownership of those assets substantially on the basis of the *uses* to which those assets were put, arguing that the defendant used those assets "for business for the economics of his empire." (T.5521.) Accordingly, the government repeatedly urged the jury to accept *its* label of each investment made with the assets entrusted to the defendant as being a "strictly business deal." (T.6270; *see* T.6269, 6281.) The defense sought

to argue that, given the defendant's special role within his religion, the meaning of the defendant's control and use of those assets was that they belonged to the church as a whole, and were merely held *for* it by defendant as the church's embodiment.[1]

Although the government's strategy was to proceed against the defendant "as if . . . [he had been] an ordinary high-ranking businessman" (A.1905),[2] the defendant was stymied in two respects—each of which is discussed below—in his effort to show that, with respect to the use of the assets in question, he could *not* be treated simply as a businessman, without regard for either his role in his church or his religion's commitment to establishing a firm financial base for itself through religious investments in commercial enterprises.

2. Evidentiary Rulings

On key occasions the defense was prevented from placing before the jury explanations that would have translated the defendant's position in his religion into a convincing account for the jury of *why* various supposedly "business investments" indeed had to be viewed as investments of the church, by the

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[1] *See e.g.*, T.2202-03 (defendant's opening argument); T.4547, 4550-51 (Elliott); T.4906-07 (Kamiyama) (grand jury testimony); T.5681 (Choi); T.5713-14 (Hose); T.5825-26 (Kim); T.6367-68 (defendant's closing argument). As will be discussed below, *see* Part I(A)(3) *infra*, there was no dispute at trial over the defendant's central place within his religion.

The citations herein to the record in this case will follow the form used in appellant Moon's brief.

[2] *See also, e.g.*, T.2163 (portraying defendant to jury as "a very, very successful businessman"); T.3926 (same); T.4222-23 (same); T.5521 (monies in question were used by defendant "for business for the economics of his empire"); T.6471-73 (same). The government confirmed, following the trial, that it had sought to deal with the defendant "just as the government deals with any high ranking business executive . . . [or] corporate executive[ ] . . . [or] any other business[man]." S.125-26.

church, and for the church—albeit in the name of the defendant as the church's embodiment. Thus, the trial court cut short a key defense witness's effort to explain that the defendant's individual signature on the major investment contract upon which the government relied to show "personal" use of the assets in question was *not* a sign that the investment was private and personal, but rather a sign that, given this religion's beliefs about the defendant, the investment was one he made solely as spiritual leader of the religion and on its behalf.[3] (T.5681.) Indeed, the court summarily sustained the government's objection to the witness's answer that the investment came "from the church" rather than from the defendant personally! (*Id.*)

Likewise, defense counsel was prevented from eliciting from a church witness on cross-examination testimony "that the purpose [of various commercial enterprises with which the defendant was involved] is to allow the church to develop a financial base so that it can be self-supporting and go on and do [its] work." (T.4819.) The defense was also prevented from asking a knowledgeable government witness to testify as to the defendant's stated views with respect to the "relationship between church and business" (T.5254), and was prevented from eliciting testimony from other witnesses that would establish their belief—or the defendant's—that investments made with the funds held by the defendant in his own name were for religious purposes. (*See, e.g.*, T.5681 (Choi).)[4]

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[3] Such practices can hardly be said to have originated with the defendant in this case. As John Wesley noted in his *Journal* of May 9, 1739, with reference to the building of a meeting house, his followers in England had insisted on making their religious contributions not to the ministry's trustees or "feoffees," but to Wesley himself, on the ground that "such feoffees always would have it in their power to control [him]; and if [he] preached not as they liked, to turn [him] out of the room [he] had built."

[4] Such testimony was hindered even though the defendant's "state of mind concerning . . . religious matters," as the court acknowledged, "may explain why certain things were done or not done." (T.5256.)

Moreover, the government—with the trial court's approval—repeatedly warned the defendant that it would meet any religious defense he might offer by disclosing to the jurors what they would deem "negative things about the church." (T.5760.) Thus, defense counsel was repeatedly warned that efforts to offer religious explanations of various church relationships and practices would "inadvertently open the door" to the introduction of damaging evidence by the government. (T.3044; *see* T.3042-45, 4818-20, 5257, 5735, 5759-60.) As defense counsel was forced to conclude, "if your Honor's feeling is that my asking [a religion-oriented] question opens the door to the kind of thing they are talking about, then I feel precluded from asking the question." (T.4820.)

Surely corporate executives are not denied the opportunity to explain the *business* meaning of their activities and signatures or other statements. Here, religious explanations of the uses to which the defendant put the assets entrusted to him were undoubtedly critical to convincing the jury that the assets in fact belonged not to the defendant but rather to the movement. Yet the defendent was refused the opportunity to offer such explanations, prevented from doing so in key instances both by the court's evidentiary rulings and by prosecution threats that introduction of such explanations would be met with disclosures by the government to the jurors of all manner of supposedly "negative things about the church." (T.5760.)[5]

Amici respectfully submit that denying to religious officials the same opportunity that would be afforded to business executives in like circumstances is not simply to reduce religion

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[5] It was the fact that the defendant was forced to be tried before a jury he suspected of bias that rendered plainly potent the prosecution's threats—and the trial court's warnings (*see, e.g.*, T.4818-20)—that questions by the defense as to religious motive would "open the door" to the introduction of damaging evidence by the government. As the court itself recognized, a defense based on expounding such matters "would have been disastrous to try before a jury." (S.60.)

from the high estate assigned it by the First Amendment, but to assign it a rank distinctly *lower* than that of its secular counterparts. *NO* religion is safe when *any* religious group may be so dismissively treated.

3. Jury Instructions

The fact that religion was inescapably involved in the defendant's tax trial is clear both from the nature of the charges and from the trial court's own comments. Thus, the trial judge recognized that he had to

> get before the jury the notion that if the jury believes that the people who gave the money intended it to be for the International Unification Church Movement, and if Moon believed he was holding it for that purpose, and if he believed he was using [it] for that purpose, even though he may have in a few instances made bad investments or used some of it for himself, . . . the monies could still be viewed as not being his but being the Movement's. (T.6122-23.)

Nevertheless, the trial court *refused* the defendant's request to instruct the jury that, in determining whether the assets held in defendant's own name were those of the religious movement, simply being held for it by him, the jury should take into account the defendant's ample evidence that the assets in fact "came from . . . church *sources*"; that they were given with *intent* that they be used "for . . . church *purposes*; and that they were not "*primarily*" used for *personal* purposes. (A.1371-72 (emphasis added).) (*See* T.6159, 6661.)[6] In refusing to instruct the jury to take such evidence into account, the court failed to apply the settled presumption that a religious trust exists in the circumstances present in this case, as discussed in Part IV-A of appellant Moon's brief.

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[6] For defendant's uncontradicted evidence on these issues, *see, e.g.*, T.3117-25 (Porter); T.3393, 3405-06, 3415 (Werner); T.3996-98, 4086-90, 4144 (Tully); T.4513, 4525-29, 4562-63 (Elliott); T.4605-07, 4616-17 (Matsumara); T.4747-61 (Runyon); T.5713-14 (Hose); T.5853-55 (DeBoe).

The trial court also refused defendant's request to instruct the jury that, within this religion's theology, defendant is the embodiment of the faith (T.6119) — an instruction that was also amply supported by the only evidence on the point (as the court evidently recognized (*see* T.5516)). For not only was there no dispute at trial over the defendant's central place within his religion; in fact, the identification of the defendant with his religion was acknowledged even by non-church witnesses called by the government.[7] The court itself recognized that, even "[l]ooking at the evidence from a favorable standpoint to the government[,] . . . [the defendant] conceived . . . himself, the embodiment of the International Church." (T.5516.)

The defendant's requested instruction as to his place within his religion was obviously crucial if the jurors were to understand the defendant's explanation of why he signed certain documents in his own name, why others of his faith referred to the assets as "his," and why intra-church loans involving funds held in the defendant's name were often described as loans to or from the defendant. The court summarily dismissed the request for such an instruction, commenting that treating the defendant as the embodiment of the faith would render him "a walking unincorporated association." (T.6119.) But the defendant was not asking for an instruction that would have placed him above the law, as the court seemed to imply, but only for an instruction that would enable the jury to understand what it signified for the defendant to hold and use assets entrusted to him by others of his faith.

By virtue of the court's omission to give such critical instructions, the government was allowed to rely precisely upon certain evidence—to wit, evidence that the assets held by the

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[7] *See* T.3489 (Norton); T.3659 (Galbraith). Moreover, the government in fact *relied* on the defendant's role as founder and prophet of his religious movement to *discredit* the defendant and church witnesses generally. *See* Part III(C) *infra*.

defendant had been collected through religious donations and fund raising—to paint a highly prejudicial portrait of the defendant as running, in the court's words, a "Fagin-like operation" with "hundreds of people collecting money and turning it over to him." (T.4878.)[8] *See* Part III(C) *infra*. As defense counsel observed, such an approach violates the First Amendment because "it ignores the existence of the church. It ignores the fact [of] the church's right to treat [the defendant] as they choose to treat him." (T.4879.) Surely the right of the church's members to treat the defendant as trustee of assets they have placed in his control for religious purposes cannot be denied.

Yet given (1) the resistance with which the defendant was met in seeking to explain the religious purposes for which the assets were used, *see* Part I(A)(2) *supra*, and (2) the trial court's refusal to instruct the jury, as requested, on the significance of the source of the assets and the intent with which they were donated, the defendant faced a grim fate indeed — portrayed as having huge sums of money and other property placed at his disposal by zealous followers, and then spending those sums as just a "businessman" (T.6472), engaged in "strictly personal" business deals. (T.6270.) Permitted to paint this damning, "Fagin-like" portrait, the government was enabled to draw from the jury a negative answer to the question regarded by the court as central to the case — that is, "the question of whether [the defendant] can *simultaneously* be a business and a religion." (T.5520 (emphasis added).)

A refusal to instruct the jury on such relevant matters as the defendant's role as leader of this religious movement and the objectives of the religious movement's economic activities and fund raising, in a case involving alleged financial misconduct by the religion or by its leader, constitutes a stark refusal to

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[8] Nowhere did the government allege or offer any evidence that Reverend Moon was engaged in any illegal fund-raising or solicitation.

expose the jury to the relevant religious view of what was actually going on in the case, and what the underlying facts signified. If affirmed on appeal and repeated in other trials, such a refusal would mean that much tax-exempt activity by even the most traditional religious groups might well become taxable, and that much innocent behavior by religious groups today could be made to appear suspect or even criminal tomorrow.

B. The Government's Approach, As Approved By The Trial Court, Would Destroy Many Vital Protections Conferred By The First Amendment's Free Exercise Clause.

As discussed above, it is a settled principle of our legal heritage that only an illusory and inadequate even-handedness is achieved when the law, in a supposed exercise of "neutrality," chooses to disregard religious explanations for an individual's or group's actions—for example, a couple's decision as to the education of their children, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), or an individual's explanations for his decisions as to employment, *Thomas* v. *Review Board*, 450 U.S. 707, 714-19 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). *Cf. Welsh* v. *United States*, 398 U.S. 333, 338-39 (1970); *United States* v. *Seeger*, 380 U.S. 163 (1975). If the conviction in this case were affirmed, our law would take a major step backward from this tradition of respect for religion and the religious.

Moreover, as is obvious from even the most cursory review of the cases noted above, the principle that religious notions and explanations must at least be fully taken into account when offered by a defendant to explain or justify his actions is critical to followers of *all* faiths, not simply those faiths that are new or small or in disfavor; and the principle is applicable not simply in criminal contexts but in civil contexts as well. From the tax-exempt status of a church parking lot, to the validity of an unincorporated church association's assertion of power to direct the actions of a church corporation, little of what even modern-day *mainstream* churches routinely do would survive intact if squeezed through a religion-extracting filter.

II.

Upholding The Conviction In This Case Would Also Establish The Proposition That Judges And Juries May Simply Override A Religion's Own Decisions About How To Organize Itself, How To Allocate Responsibility Over Church Matters, And How To Expend Church Resources.

A. The Verdict In This Case Was Predicated On Assumed Governmental Authority To Disregard and Overide A Church's Own Views Of Such Issues.

1. The Government's Approach.

To prove its position that the assets held in the defendant's name belonged to him personally rather than to his international religious movement, the government relied heavily on two premises: (1) that this international religious movement did not really exist because it had no formal corporate status; and (2) that the assets held by the defendant were his own because they were treated in ways that the jury could consider, on any basis it wished, not to be "religious." Both of these premises, as will be discussed below, are constitutionally impermissible.

2. Choice of Structure.

In order to discredit the defendant's claim that he held the assets at issue in trust for his international religious movement, the government tried to show that the movement did not exist by pointing to the fact that the defendant and his followers "avoid[ed] the structures that exist in the United States where . . . funds [contributed to a religious entity] should rightly go." (T.5518.) That the defendant's international religious movement had no "corporate structure" during the period in question (T.5521) was, indeed, the central element of the government's contention that the defendant was lying when he claimed to hold the money for the movement in trust. Moreover, the government took the position that the international movement's unincorporated status was especially suspi-

cious in light of the fact that some movement entities here and abroad were in fact incorporated. (T.5517.)[9]

The court, too, appeared to accept the government's inference that the movement did not exist because it had failed to

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[9] Adverse inferences drawn from the organizational structure chosen by the defendant's religious movement were treated by the government as critical to its claim that the defendant regarded the assets at issue as his own. This is aptly illustrated by a striking colloquy during the hearing on the defendant's mid-trial motion for judgment of acquittal:

> MR. FLUMENBAUM: . . . [T]here is no entity, there is no structure. And indeed, your Honor, if you look at the evidence in the case every time they want an entity they know how to go about doing it. They incorporate it, they apply for tax exemptions. Moon is responsible for all of these things.
>
> We have the International One World Crusade, we have the International Cultural Foundation, we have Unification Church of New York, we have also HSA which has a tax exemption.
>
> When it comes to these funds there is no incorporation, there is no application for tax exemption and there is only one reason [*sic*] it is because it is Reverend Moon's money. He says it, Kamiyama says it, this is Father's money to be used exactly as he wants. (T.5517.)
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> * * *
>
> MR. FLUMENBAUM: . . . [I]t is the government's position that these funds, that there was a corporate structure for religion in the United States. It was HSA. All the properties bought in the name of HSA. Any time the church—the Unification Theological Seminary, any time they wanted to put something in the rubric of a church they did that. They knew exactly what they were doing. (T.5521).

Only if it is assumed that a religion must incorporate *all* of its entities or *none* of them in order to prove its legitimacy may a religion's choice to incorporate *some* of its entities but not *others* support any adverse inference as to its *bona fides*. It was on just such an assumption—that no corporate structure in this case means no church—that the government heavily relied to defeat the defendant's motion for a judgment of acquittal, and to defeat the religious trust established by his followers. *Amici* submit that the government's reliance on such an assumption was impermissible. *See also* Part II(B) *infra*.

assume formal corporate status rather than function through the defendant as its nominee. Thus, the court openly wondered why the defendant, who claimed to have used the international religious movement's funds to purchase the movement's headquarters, wanted the property, at one point, in his own name *rather* than "just create a new corporate body . . . and transfer title to it rather than to [the defendant]." (T.5523.) Indeed, the court *instructed* the jury to take this religious movement's organizational characteristics into account in determining whether the assets in question belonged to it or to the defendant (T.6584-85), lecturing defense counsel that "the nonexistence of [some organizational characteristics] would be proof the other way" (T.6661)—*i.e.*, proof that the religious movement did *not* exist.

3. Choice of Expenditures.

The government itself conceded that the sources of the funds in question were "evangelical activities, fund raising, things like that." (T.6231; *see* T.6232.) And the trial court recognized during the argument on the defendant's mid-trial motion for a judgment of acquittal that the assets he held had been given to him "for a higher cause," by church members who "thought they were advancing [their common religious movement] internationally." (T.5521.) Ordinarily these facts would be enough to establish that the donors had intended to create a religious trust in turning over to the defendant monies they had raised.[10]

But the government here was permitted to deny the existence of such a trust by relying heavily on how the defendant *used* the assets he had received from his followers. As noted above, the government contended that the defendant used those assets "for business for the economics of his empire" (T.5521)—all the while impeding the defendant's efforts to explain the religious motivations of these investments. *See*

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[10] *See* Brief for Appellant Moon at Part IV-A.

Part I(A) *supra*. In a word, the government argued that the defendant's use of the monies in question "for . . . business ventures primarily and real estate investments" (T.5519) was itself *proof* that no religious trust existed—despite the fact that churches routinely and necessarily invest their funds in "business ventures" as part of the effort to sustain and spread their spiritual mission.[11]

No relief from such prejudicial and profoundly misguided argument was afforded by the trial court. Indeed, the court compounded, the prejudice to the defendant caused by the government's approach. Thus, the court *directed* the jury to find that the funds at issue all belonged to the defendant personally—rather than to the international church—if the jury concluded that the defendant was free to use *any part* of the funds as "personal" compensation (T.6586),[12] or if the jury concluded that any of the ways in which defendant expended or invested the funds did not serve what the jury, applying its *own* standards, deemed to be "church purposes."

B. Affirming Such Governmental Authority Over A Church's Choices Of Structure And Spending Practices Would Threaten Religious Freedom and Church Autonomy.

It is elementary that the Constitution forbids government intrusion both into a religion's choice of structure and into its decisions on where and how to invest and/or expend its assets. Religious liberty encompasses not only the freedom to believe in and worship one's God in solitude and peace, but also the power of those of shared faith "to decide for themselves, free

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[11] For example, the United Presbyterian Church has invested more than $357.9 million in securities of more than 175 corporations, and the four National Boards of the American Baptist Churches in the U.S.A. have combined investments of some $370 million in securities of more than 100 corporations.

[12] This, of course, is a misstatement of trust law. *See* Part III(B) *infra*.

from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Serbian Eastern Orthodox Diocese* v. *Milivojeich*, 426 U.S. 696 (1976) (state cannot reorganize church even for supposedly violating its own by-laws).[13] Yet the government called for just such intrusion in this case when, with the trial court's blessing, it asked the jury to draw adverse inferences from this international religious movement's failure to incorporate itself, and from the particular *mix* of structures—with some parts or branches in corporate form, and others in unincorporated form—chosen by this religious movement for its subordinate national or other entities.[14] For a jury to be allowed to draw adverse inferences from any religious movement's choice of structure obviously penalizes that choice in violation of the Free Exercise Clause, and entangles the government impermissibly in the movement's internal affairs.

Similarly, the Constitution forbids the government to defeat a religious trust, or otherwise to transform church assets into personal assets, by characterizing the uses to which parts of such assets are put as "business" or "personal" rather than "religious." There is no doubt, after all, that most churches feel that they must make "business" investments and that they must pay many of their religious officials' "personal" living

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[13] Solicitude for a religious movement's choice of structure is especially warranted where the movement is still in its infancy, and its structure and practices therefore somewhat fluid and inchoate.

[14] It should not be forgotten that some of the most long-established religious bodies in this country have never been incorporated, and probably never will be. The Episcopal Church in the United States is not incorporated as such; all of its national property is held for it by a corporation known as "The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the U.S.A." Nor is the United Methodist Church incorporated as such in the United States; but its major agencies, such as the General Council on Finance and Administration, are continuing and corporate bodies.

expenses—all as part of their use of church assets to support the religion's spiritual activities.

At stake is who shall decide which such investments and payments advance a given religion's aims, and which do not. The First Amendment tolerates only one answer to this question: each church must decide for itself. It is surely impermissible under the First Amendment for the government, including any civil or criminal court or jury, "to determine which expenditures are religious and which are secular." *Lemon* v. *Kurtzman*, 403 U.S. 602, 621-22 (1971). *See Wolman* v. *Walter*, 433 U.S. 229, 252-55 (1977). *Cf. Widmar* v. *Vincent*, 102 S.Ct. 269, 274 n.6 (1981). The principle asserted by the government to obtain the result in this case would interpose the supervision and control of civil authorities over spending decisions by church leaders—despite the settled precept that "allocation and expenditure of [church] funds is intimately bound up in [the church's religious] mission . . . and thus is protected by the free exercise clause." *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979).

A judgment upholding the conviction in this case would thus create a precedent even more dangerous than *Jones* v. *Wolf*, 443 U.S. 595 (1979).[15] For the trial court's approach in effect overrode the intention of the donors in violation of *Wolf*, 443 U.S. at 603-04, *see* note 6 *supra*, and alienated assets the church faithful had entrusted to the defendant for religious purposes, awarding the corpus of such assets to defendant and his heirs as their personal property—a gift that defendant undoubtedly found most unwelcome in his capacity as leader of his flock. (*See* T.6120-21.) Such an alienation of assets given in trust could readily befall any religious body if the approach of

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[15] *See* Dallin H. Oaks, "Trust Doctrines in Church Controversies" [1981] B.Y.U.L. Rev. 805, 907 (criticizing *Jones* for "secularization of the resolution of church property disputes," and for applying a neutral principles approach that may mean "inhibiting the freedom of hierarchical churches to govern their internal affairs").

this trial court should be approved on appeal. The upshot is a forbidden taking and governmental redistribution of religious property in contravention not only of the First Amendment but of the Fifth Amendment as well. *See Terrett* v. *Taylor*, 13 U.S. (9 Cranch) 43 (1815). *Cf. United States* v. *564.54 Acres of Land*, 441 U.S. 506, 515-16 (1979).

III.

The Judgment In This Case Does Not Simply Run Roughshod Over Religion: It Positively Penalizes Religious Fervor And Spiritual Expression.

A. The Insistence On A Jury Trial For A Controversial Religious Figure, Especially In Retaliation For His Public Statements About Religious Persecution, Penalizes And Endangers Religiously Motivated Speech.

The trial judge himself observed that, if defendant's religion had been less "controversial," the government would have been less likely even to have begun the investigation that led to this prosecution. (S.36-37.) Indeed, in a post-arraignment speech the defendant had suggested precisely that religious and racial prejudice had motivated the government to prosecute him.[16]

Yet the defendant's reward for making this very suggestion on the eve of his trial was the government's veto of his request to be tried before a judge. (P.370-71; A.1028-29; A.811-12.) That veto not only punished him for the exercise of his freedom of speech, but penalized him for complaining of unfair treatment at the hands of the government by denying him a trial before the tribunal *most* likely to treat him fairly. The defendant was thereby deprived of a means of avoiding *further* religious and racial prejudice of the very sort he protested in the speech for which the government had retaliated by demanding that he be denied a bench trial!

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[16] A. 813-17.

Any controversial or previously persecuted religious figure, at least, should have the right to insist on a bench trial in order to avoid likely juror prejudice whenever sensitive religious issues or biases are potentially involved in his case. Certainly a religious figure must never be *penalized*—as the defendant clearly was here—for attacking as religiously biased the government's motives in investigating him and/or bringing him to trial as an alleged criminal.

Cases such as this, while nominally related to taxes, bear a striking resemblance to the ordeals of Roger Williams, Ann Hutchinson, Joseph Smith, and Mary Baker Eddy, all of whom appeared hardly less alien and threatening to many in the early days of their movements than Reverend Moon appears to many today. The type of prosecution that occurred here also recalls such disciminatory treatment of unpopular minority religions as the denial of conscientious objector status to the Jehovah's Witnesses during the Second World War.

B. The Insistence On Treating, As Personally Owned, Assets Entrusted As Part Of A Religious Mission Discriminates Against Religion As Compared With Politics.

A politician holding campaign funds in his own name can spend portions thereof for his own use without transforming the *entire* corpus into his own personal property, so as to render him liable for federal income tax on the interest earned on that corpus. *United States* v. *Scott*, 660 F.2d 1145, 1151 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1252 (1982); Rev. Ruling 71-499, 1971-2 C.B. 77. Indeed, the law is clear that when *any* trustee disburses assets out of trust funds for personal purposes, such disbursement does *not* make the interest on the *remainder* of the funds taxable to the trustee. *See Herbert* v. *Commissioner*, 377 F.2d 65, 70 (9th Cir. 1967). Yet the defendant here was accorded far harsher treatment than if the assets had been entrusted to him for political purposes, for the trial court's instruction to the jury that "[t]here is no trust if the person who receives the money is free to use it for his own benefit" (T.6586) implicitly singled out the defendant for un-

favorable treatment because of the specifically *religious* purpose of the trust in question; and the court's instruction effectively abrogated the settled principle that churches may properly pay the living expenses of their leaders or ministers so as to allow them to pursue their religious calling. *See, e.g.*, *Morey* v. *Riddell*, 205 F. Supp. 918, 921 (S.D. Cal. 1962). Indeed, the trial court elsewhere acknowledged that to be the rule! (*See* T.6588.)

C. Using Religious Belief And Loyalty To Establish Guilt By Religious Association And Bias By Religious Conviction Likewise Discriminates Against Religion.

In denying defendant's post-trial motions for relief, the trial court said it had "played the case" as though "the theology of the church had nothing to do with the tax charges." (S.24.) The violation of fundamental principles of religious freedom would have been severe indeed if the court's only error had been to permit the government to try this religious leader, as the government put it, "just as [it would have tried] any high ranking business executive." (S.125.) *See* Part I(A) *supra*. But the violation of First Amendment rights here was rendered even more egregious by the trial court's rulings allowing the government to use this defendant's religion *against* him, while forbidding the defendant at critical junctures to use his religion in his *defense*.

Thus, the prosecution was allowed to invoke the defendant's role as leader of his church to show that a church witness could be expected to lie for the defendant and therefore could properly be distrusted by the jury. Church witnesses called by the government, as well as those called by the defense, were repeatedly asked whether they "loved" the defendant (T.2652 (Burgess)); whether they were "good followers" of the defendant (T.3371 (Werner)); whether they had heard the defendant instruct church members to be "obedient" to him (T.4008 (Tully)); whether they regarded the defendant as their "true

parent" (T.5676 (Choi)); and whether they viewed the defendant as their "master." (T.5784 (Kim).)

The government frankly acknowledged that it was invoking the defendant's "special" relationship with his followers (T.5677) precisely to "impeach the credibility of these witnesses and show the bias and show the motive." (T.5719.) The government conceded that its purpose was to indicate to the jury "from the fact of the [witness's] respect [for the defendant,] and the fact of [the defendant's religious] statement[s] [regarding loyalty,] that the witness would follow that, no matter what [he or] she said on the stand." (T.5726.)[17]

Likewise, lacking direct proof of any personal responsibility by defendant for certain actions by others, the government was allowed to use the fact that the defendant is the spiritual leader of his church to support an inference that those involved in all of the actions in question in this case—from the filing of tax forms, to creating "backdated" documents, to testifying before the grand jury—necessarily took their direction from the defendant personally.

Thus, the trial court acknowledged that "everybody . . . assumed that the church was acting under [the defendant's] direction . . . and that the members of the church were in fact [the defendant's] agents." (T.2450.) Although reluctant at first to admit the government's evidence on the basis of that "assumption" (*id.*), the court finally acceded to the proposition

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[17] As the defendant notes in his brief, the jury was not only encouraged to disbelieve church witnesses on the basis of their "special" relationship to the defendant, but was exposed over defense objection generally to prejudicial religious references to the defendant and his faith—references plainly introduced to nurture deep-seated fears in the minds of the jurors that the defendant was, as supposed, skilled in mind control, brainwashing his young followers into carrying out his will.

that the actions of the defendant's followers might automatically be regarded as being on behalf of "the master's church." (T.3220.)

Having been permitted to expose the jury repeatedly to references to Reverend Moon's central role in his religious movement, and the loyalty he supposedly commanded from his followers, the government, on the basis of these prejudicial references, in summation likened the instant case to "a lot of white collar criminal cases," with a defendant "who [has] others do a lot of things for [him] so [he] can sort of lay in the background." (T.6179). "As with all these cases," the government alleged,

> most of the action then that you see is done by others, aides, associates, sometimes in those cases the man in the background never slips up. Never let's [*sic*] his hands be seen controlling the strings. (T.6180).[18]

In spite of the prejudicial effect with which the government was permitted to use evidence of the defendant's role in the church and of his relationship to his followers, when—as discussed in Part I-A(2) *supra*—the defendant sought to *explain* his role in the church, and to offer religious explanations for his own conduct and for the use of his own name, he was denied a full and fair opportunity to do so. The evidentiary Catch-22 in which the defendant was thereby caught manifestly violated basic principles of religious freedom as well as elementary fairness.

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[18] On the basis of the evidence as to the defendant's place in his religious movement, the government further told the jury, in summation, that the arguments of the defense were not to be believed, "no matter how skillful, no matter how sympathetic, no matter how sincere," for such arguments were "based entirely on a handful of witnesses who would do anything, say anything, including falsifying documents, including lying under oath before a grand jury and, as I will talk to you later, [lie] before you right from that witness stand, to help [the defendant]." (T.6443.) The government asked the jury to consider whether the witnesses in the case "who are controlled" by the defendant could be trusted to have testified truthfully. (T.6498.)

CONCLUSION

Amici's alarm at the injustice in this case arises from the complete disregard in the trial court of Reverend Moon's First and Fifth Amendment Rights. No particular sympathy for the defendant in this case, and no agreement with his faith, is required to feel grave distress at the resulting breach of religious liberty. The government's use below of defendant's religion—exploiting its unpopularity, and precluding the defendant at key junctures from asserting defenses based on the practices and teachings of his religion—severely threatens the rights of *all* religious groups. Accordingly, for this and for all of the foregoing reasons, *amici* urge this Court to remand this cause for retrial before a court where defendant's religious explanations of his conduct can be fully and fairly presented.

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