No. 81-3

IN THE

Supreme Court of the United States

October Term, 1981

BOB JONES UNIVERSITY,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF OF CONGRESSMAN TRENT LOTT AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

I.

Representative Trent Lott hereby respectfully moves for leave to file the attached brief Amicus Curiae in this case. The consent of the attorney for the Respondent has been obtained, and a copy of his letter of consent is submitted herewith. The Solicitor General, on behalf of the United States, has refused to provide a letter of consent because of a general policy of not consentng to the filing of such briefs by members of Congress.

II.

The interest of Amicus in this matter is twofold: first, in furtherance of his own interest as a United States Representative, in seeing that the Executive Branch is not permitted to depart from the law as laid down by Congress; second, on behalf of his constituents who are actively engaged in enterprises, the tax exempt status of which would be threatened by an adverse decision in this case. In his own behalf, Amicus has voted on several occasions for the Ashbrook Amendment to successive Treasury appropriations, as is explained more fully in the brief submitted herewith. While the action of the Internal Revenue Service in this case does not explicitly conflict with that Amendment, it does conflict with the terms of 26 U.S.C. 501 (c) (3) and demonstrates the Service's disdain for later Congressional expressions regarding the import of that section. On behalf of his constituents, Amicus would show that there are many religious schools in his district which are threatened by the Service with loss of their tax exempt status pursuant to Court order in *Green v. Regan*, No. 1355-69 (D.D.C.), in which none of them were made

parties. Those constituents have been denied the right of intervention in that case and have requested Amicus to make all possible efforts on their behalf to make their position on the issues herein known to this Court and to all other authorities.

III.

Neither of the parties in this case can adequately present the issues of concern to Amicus. The Solicitor General disputes Amicus's interpretation of the law. Bob Jones University neither comes under the threat of *Green v. Regan* nor the protection of the Ashbrook Amendment, and therefore has no need to present those issues to the Court in detail.

Respectfully submitted this, the_____day of November, 1981.

_____

TRENT LOTT, Pro Se

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Cases:

Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957) 16

Bob Jones University v. Simon, 416 U.S. 725 (1974) 14, (n.1)

Bob Jones University v. United States, 468 F. Supp. 890 (D.S.C. 1978), *rev'd* 639 F.2d 147 (4th Cir. 1980) 1

Brown v. Dade Christian Schools, 556 F.2d 310 (5th cir. 1977), *cert. denied*, 434 U.S. 1063 (1978) . . . . . (n. 9)

Coit v. Green, 404 U.S. 997 (1971) . . . . . 2 (n. 1)

Commissioner v. Heininger, 320 U.S. 467 (1943) 7, 16, 17

Commissioner v. Tellier, 383 U.S. 687 (1966) . 16

Green v. Connally, 330 F.Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971) 2, 3, 11

Green v. Regan, No. 1355-69 (D.D.C.) 5

Hanover Bank v. Commissioner, 369 U.S. 672 (1962) 8

Jarecki v. G. D. Searle & Co., 367 U.S. 303 (1961) 10

Lilly v. Commissioner, 343 U.S. 90 (1952) . . 17

Malat v. Riddell, 383 U.S. 569 (1966) 8

McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963) 15 (n.8.)

Moose Lodge v. Irvis, 407 U.S. 163 (1972) . . . 18

NLRB v. Catholic Bishop, 440 U.S. 490 (1979). 6, 14

National Life & Accident Insurance Co. v. United States, 524 F.2d 559 (6th Cir. 1975) 8

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 7, 18

Runyon v. McCrary, 427 U.S. 160 (1976) . . (n. 9)

St. Martin Evangelical Lutheran Church v. South Dakota, 101 S.Ct. 2142 (1981) . 7,11

Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) 10

Skidmore v. Swift & Co., 323 U.S. 134 (1944) . 11

Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958) 16, 17

United States v. Deluxe Cleaners & Laundry, Inc., 511 F.2d 926 (4th Cir. 1975) 8

United States v. Rutherford, 442 U.S. 544 (1979) 15

Vroon v. Templin, 278 F.2d 345 (4th Cir. 1960). 8

Walz v. Tax Commission, 397 U.S. 664 (1970). 17, 19

Wright v. Miller, 480 F.Supp. 790 (D.D.C. 1979), *rev'd sub nom. Wright v. Regan*, No. 80-1124 (D.C. Cir. June 18, 1981), *cert. pet'n filed*, No. 81-757 (Oct. 20, 1981) . . . . . 4 (n. 3)

Constitution, statutes, and rules

United States Constitution:
First Amendment 14, 18

Pub. L. No. 96-74, Section 103, 93 Stat. 559 (1979) . . . . . 4, 6, 12 (n. 7)

26 U.S.C. 501 (c) (3) 1, 6, 12, 20

26 C.F.R. 1.501 (c) (3)-1 (d) (1) (1980) . . 1, 2, 6, 11
I.T. 1800, II-2 C.B. 151 (1923) 2
Rev. Rul. 71-447, 2 C.B. 230 (1971) . . 3, 11 (n. 9)
Rev. Proc. 75-50, 1975-2 C.B. 587 . . . 3, 6, 11, 13

Miscellaneous:

127 Cong. Rec. 4
S. Rep. No. 97-192 4
H.R. Rep. No. 1860 9
Proposed Rev. Proc. 4830-01, 43 Fed. Reg. 37, 296 (1978) 3

TABLE OF CONTENTS

Introduction 1

Summary of argument 6

Argument 7

I. The statute is plain and unambiguous on its face, and it is therefore impermissible to resort to legislative history to amplify its terms 7

II. The conclusion of the Internal Revenue Service is not entitled to deference because it is inconsistent with earlier practice and has led to adverse Congressional action 11

III. A court may not conclude that Congress intended to place a burden upon religious institutions unless it has done so in plain and unambiguous terms 14

IV. There is no basis for implying a public policy exception to the plain and unambiguous language of the statute 16

Conclusion 21

Introduction

That Bob Jones University is an educational and religious institution is uncontested in this case. The district court found that the University "is dedicated to the teaching and propagation of its religious beliefs," and a "primary fundamentalist conviction of the [University] is that the Scriptures forbid interracial dating and marriage." Bob Jones University v. United States, 468 F.Supp. 890, 894 (D.S.C. 1978). The Fourth Circuit accepted the lower court's findings: Bob Jones University "is a religious institution in its own right, as well as an educational one." Bob Jones University v. United States, 639 F.2d. 147, 149 (4th Cir. 1980).

Section 501 (c) (3) of the Internal Revenue Code, 26 U.S.C. 501 (c) (3), lists types of organizations exempted from taxation:

> (3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.

Prior to 1970, the Internal Revenue Service interpreted that provision literally and exempted all organizations meeting any one of the Congressional critieria. The IRS regulation lists the statutory exemptions and provides that as "*each* of the purposes . . . is an *exempt purpose in itself*, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes." 26 C.F.R. 1.501 (c) (3)-1 (d) (1) (iii) (1980) (emphasis added). The purposes are "religious,

charitable, scientific, testing for public safety, literary, educational, or prevention of cruelty to children or animals." 26 C.F.R. 1.501 (c) (3)-1 (d) (1) (i) (1980). As either a religious or educational institution, then, the University was exempted from taxation.

Until very recently Section 501 (c) (3) was interpreted to mean what it plainly stated; he IRS regulations repeated this plain meaning. Early IRS rulings also interpreted literally an earlier version of the statute:

> It seems obvious that the intent (of Congress) must have been to use the word "charitable" . . . in its more restricted and common meaning and not to include either religious, scientific, literary, educational, civic, or social welfare organizations. Otherwise, the word "charitable" would have been used by itself as an all-inclusive term, for in its broadest sense it includes all of the specific purposes enumerated. That the word "charitable" was used in a restricted sense is also shown from its position in the section. The language is "religious, charitable, scientific, literary, or educational."

I.T. 1800, II-2 C.B. 151, 152 (1923). The controversy in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971),[1] however, led the IRS to reconsider its statutory interpretation.

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[1]The decision of the three-judge district court was affirmed in *Coit v. Green*, 404 U.S. (1971) (per curiam). Nevertheless, in a later decision the Court noted that *Coit* had no precedential value because no adversarial controversy remained when the case reached the Court. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 740 n. 11 (1974).

The *Green* case involved a lawsuit by black parents of Mississippi public school children to enjoin Treasury officials from according tax-exempt status and deductibility of contributions to Mississippi private schools which practice racial discrimination. Circuit Judge Leventhal, writing for a three-judge district court, granted the injunction against all Mississippi private schools. The IRS was ordered to revoke tax exemptions of all schools unable to show nondiscrimination in the manner established by the court. 330 F. Supp. at 1179-80.

The IRS did not wait for the culmination of the litigation but adopted the plaintiffs' position. In Revenue Ruling 71-447, 2 C.B. 230 (1971), the Service concluded that "a school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501 (c) (3) of the Code and in other relevant Federal statutes and accordingly does not qualify as an organization exempt from Federal income tax." *Id.* at 231. Revenue Procedure 75-50, 1975-2 C.B. 587, incorporated this ruling and set forth requirements which private schools must meet to prove nondiscrimination and thereby regain their tax exemptions.[2] These requirements were taken from the *Green* opinion.

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[2]The Revenue Procedure is too long and detailed to quote here. Basically, it specifies the manner in which a private school must publicize its nondiscriminatory policies, and requires each school to keep records showing the racial composition, examples of advertising, and documentation of nondiscrimination in financial aid awards.

The *Green* holding is not directly relevant to this case: it applied only to *Mississippi private*—not religious—schools, and recently in *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979), the district court refused to extend the *Green* holding nationwide.[3] The IRS has made *Green* a part of the present case because its justification for the revocation of Bob Jones University's tax exemption rests on *Green*.

Despite the limited holding in *Green*, the Service proceeded to promulgate new exemptions standards. Again, Revenue Procedure 75-50 extended *Green* to private schools nationwide. Proposed Revenue Procedure 4830-01, 43 Fed. Reg. 37,296 (1978), extended the presumption of discrimination and consequent loss of tax-exempt status to private *religious* schools.

At this point, Congress reacted surely and swiftly to block implementation of the latest chapter of tax law according to the Service. The Ashbrook Amendment to the Treasury Appropriations, P.L. 96-74, 93 Stat. 559, 103 (1979), denies federal funds for the implementation of any regulation denying tax exemptions to private schools unless the regulation was effective before August 22, 1978. This Amendment and its relevance to this case will be discussed in full but it is sufficient to note here that

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[3]As will be discussed below, the District Court the next year ordered more stringent requirements applied to Mississippi alone. Thereafter, the Court of Appeals reversed the *Wright* decision and instructed the District Court to reconsider its position. *Wright v. Regan*, No. 80-1124 (D.C. Cir. June 18, 1981), *cert. pet'n filed*, No. 81-757 (Oct. 20 1981). The Court Appeals held that plaintiffs had standing and that a court could fashion a remedy. The Court, however, did not order any specific relief.

this Congressional declaration was virtually ignored in the Fourth Circuit's decision in *Bob Jones University.*

The Ashbrook Amendment led to a reopening of the Mississippi litgation, now known as Green v. Regan, No. 1355-69 (D.D.C.). Two orders were issued by the District Court in 1980 requiring the IRS to apply the essentials of its 1978 proposals to Mississippi schools. The IRS failed to appeal the order, but Congress has begun to take action to block its enforcement. On July 30, 1981, the House amended the Ashbrook Amendment by a vote of 337 to 83 to block the use of funds to enforce any "court order" applying rules not in effect prior to August 22, 1978. 127 *Cong. Rec.* H5392-98 (daily ed. July 30, 1981). The Senate Appropriations Committee has adopted the same language, *S Rep. No.* 97-192, 97th Cong. 1st Sess. 66 (1981), and the bill is presently awaiting action in the Senate. If enacted, it will create an unprecedented constitutional clash as the Legislative Branch denies funds to the Executive Brance to carry out activities ordered by the Judicial Branch.

There are still several ways in which this clash can be averted. The District Court has now permitted a Mississippi church school for the first time to intervene in the case to protect its own interests. The District Court may yet be persuaded on any of several grounds to set its order aside. This Court may act to avert the conflict by its decision in this case. While the revocation of the University's exemption antedates the Ashbrook Amendment and is not controlled by it, this Court should be aware of the serious consequences of a decision upholding the Service's view of the statute. The Court can avoid those consequences by applying in this case the simple and traditional rules of statutory construction which will lead to a fair reading of the law and, incidentally, to relief for the schools and schoolchildren of Mississippi.

SUMMARY OF ARGUMENT

When a Congresional enactment is clear and unambiguous on its face, it should be enforced by the courts according to its specific terms. *St. Martin Evangelical Lutheran Church v. South Dakota,* 101 S.Ct. 2142 (1981). There is no need to resort to legislative history in such a case. Here, the statute plainly exempts from taxation any institution "organized and operated exclusively for religious, charitable, . . . or educational purposes". 26 U.S.C. 501 (c) (3). Internal Revenue Service regulations which are still in force provide that "each of the purposes . . . is an exempt purpose in itself," 26 C.F.R. 1.501 (c) (3)-1 (d) (1) (iii), and long-standing regulations are entitled to great weight in judicial constructions. Neither the statute nor the regulations place any qualifications or restriction on the absolute exemption granted by the statute.

The more recent IRS policy embodied in Revenue Procedure 75-50 is not entitled to judicial deference. It conflicts with established regulations, and it results, not from an independent examination by the IRS, but from an unreviewed decision by a lower court. When the IRS attempted to embody its new policy in regulations, Congress acted affirmatively to block the use of funds to continue that process. This action is not conclusive evidence of the intent of the Congress which enacted the statute but it does indicate that Congress has no faith in the ability of the IRS to interpret this statute. The IRS deserves no more deference from this Court.

Whenever Congress intends to impose burdens upon a religious organization, it ought to say so in plain and unambiguous terms. *NLRB v. Catholic Bishop,* 440 U.S. 490 (1979). The courts will not lightly assume that Congress intended to alter the traditional status of religious institutions. In this

instance, it is quite plain that Congress intended to relieve all religious organizations, without exception, from the burden of taxation.

The Court of Appeals erred in implying an exception to the plain language of this statute on the grounds of public policy. Most public policy exceptions in the field of tax law have come in the area of business deductions. A deduction is disallowed on such grounds only when its allowance "would frustrate sharply defined national or state policies proscribing particular types of conduct." *Commissioner v. Heininger*, 320 U.S. 467, 473 (1943). The Court of Appeals was unable to cite any explicit federal enactment which would be frustrated or even hampered by the allowance of the exemption in this case. While racial discrimination by private parties has been prohibited in many cases, it has not been banned altogether. Indeed, it is even permissible for the government to discriminate in some cases. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Thus, there is no "sharply defined" public policy that could limit the explicit words of the statute.

ARGUMENT

I. The statute is plain and unambiguous on its face, and it is therefore impermissible to resort to legislative history to amplify its terms.

This principle was most recently articulated in *St. Martin Evangelical Lutheran Church v. South Dakota*, 101 S. Ct. 2142 (1981). The Secretary of Labor had determined that a recent amendment to the Federal Unemployment Tax Act rendered nonprofit church schools subject to the tax. The Court refused to follow the Secretary's interpretation, even though the legislative history was ambiguous. Such indefinite

Congressional expressions "cannot negate plain statutory language and cannot work a repeal or amendment by implication." *Id.* at 2151. Justice Stevens was even more explicit in his concurring opinion:

> When the Court is confronted with the task of construing legislation of this character, there is special force to the rule that the plain statutory language should control and that resort to legislative history is appropriate only when the statute itself is ambiguous.

Id. at 2153.

It challenges the imagination to ponder how Congress could have legislated any less ambiguously than 501 (c) (3), and the Court cannot assume that Congress failed to say what it intended. Moreover, the Court is not at liberty to add to or alter the words of the statute "to effect a purpose which does not appear on the face of the statute." *Hanover Bank v. Commissioner*, 369 U.S. 672, 687 (1962) (Court refused to close a tax loophole). Even the Fourth Circuit heretofore adhered to these principles; that court held that it is not permissible to " 'surmise . . . what the Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated.' " *United States v. Deluxe Cleaners and Laundry, Inc.*, 511 F.2d 926, 929 (4th Cir. 1975) (quoting *Vroon v. Templin*, 278 F.2nd 345, 348-49 (4th Cir. 1960). *Accord, National Life and Accident Insurance Co. v. United States*, 524 F.2d 559, 560 (6th Cir. 1975) ("it is [the] function [of the courts and the Commissioner] to give the natural and plain meaning effect to statutes as passed by Congress.").

There are occasions when a departure from the statute's literal meaning is indicated by the statute itself or where it is necessary to effect the legislative purpose. *Malat v. Riddell*, 383 U.S. 569, 571-72 (1966).

The Fourth Circuit in *Bob Jones University* held that this was such an occasion. In support of its statutory construction, the court cited a portion of a committee report which accompanied the Revenue Bill of 1938:

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.

H.R. No. 1860, 75th Cong., 3d Sess. 19 (1938). The court concluded that an organization practicing racial discrimination cannot promote the general welfare and therefore, tax exemption should not be allowed. The sentence following the quoted language states that the United States "derives no such benefit from gifts to foreign institutions." The entire paragraph concerns only the Code's limit of deductibility to contributions made to domestic institutions. This Committee report neither implies nor states that the Code should not be construed literally. Furthermore, none of the 1938 legislative history contains even a subtle implication that the IRS should depart from a Code provision's literal meaning. It is crystal clear that the Committee was merely describing the purpose behind the statute; it was not delegating to the IRS the authority to make independent *ad hoc* determinations of whether an organization exempted by the statute in fact serves the general welfare.

Congress intended that Section 501 (c) (3) of the Internal Revenue Code would be interpreted to mean what it states. The Court has "no power to change deliberate choices of legislative policy that Congress had made within its constitutional powers. Where

congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent." *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, 215 (1962). Congress deliberately chose to exempt from taxation *all* religious organizations regardless of their beliefs, a choice within the Congress's constitutional powers. The Court therefore is compelled to effectuate this policy decision.

The Court of Appeals rejected the statute's unambiguous meaning in favor of a strained interpretation "which renders one part a mere redundancy." *Jarecki v. G. D. Searle & Co.,* 367 U.S. 303, 307 (1961). There the Court construed an *ambiguous* statute to effectuate all provisions. In Section 501 (c) (3), Congress listed "charitable" as one type of tax-exempt organization among seven others. If all organizations must be charitable, the inclusion of "charitable" is unnecessary. The Fourth Circuit here ignored clear provisions and construed the statute to render this provision merely repetitive.

The statutory interpretation urged on this Court cannot stand without an absurd result. If all organizations must be "charitable," then all must qualify as "religious," "educational," "scientific," and "for the prevention of cruelty to animals." Surely no reasonable person believes that Congress intended this result; that is why "or"—not "and"—was used in the statute. An organization which serves only one of the enumerated purposes is entitled to a tax exemption. That Bob Jones University is a religious and educational organization under Section 501 (c) (3) is uncontested.[4] Therefore, the lower court's holding must be reversed.

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[4]See p. 1 *supra.*

II. The conclusion of the Internal Revenue Service is not entitled to deference because it is inconsistent with earlier practice and has led to adverse Congressional action.

Until 1971, the IRS construed the statute literally;[5] but 501 (c) (3) was not amended to change the longstanding interpretation. The IRS itself initiated the policy at issue in the process of litigating *Green v. Connally*, an unreviewed court decision[6] which was, in any event, expressly limited to Mississippi schools.

In Revenue Ruling 71-447 the IRS ruled for the first time, "A private school that does not have a racially nondiscriminatory policy as to students does not qualify for exemption." 2 C.B. 230 (1971). Four years later, this position was incorporated in Revenue Procedure 75-50, 1975-2 C.B. 587. This is the expert determination to which the IRS suggests this Court should defer.

Only last Term, this Court stated the proper standard of skepticism to be applied to agency action in such a case. "The amount of deference due an administrative agency's interpretation of a statute, however, 'will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)." *St. Martin Evangelical Lutheran Church*, 101 S.Ct. at 2148-49, n.13. The IRS position in this matter cannot pass such a test.

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[5]The IRS has not even amended its own regulations to accord with is new interpretation. Pp. (1-2) *supra*.

[6]See note 1 *supra*.

In the first place, the position is inconsistent with IRS regulations in effect even today. The IRS argues that any organization must qualify as a charity under the common law to obtain the exemption. However, regulations still provide that "each of the purposes specified . . . is an exempt purpose in itself." An organization need not be educational *and* charitable or religious *and* charitable. Under the regulation or the statute, it is sufficient to be one or the other.

The implication by the IRS of an exemption based upon public policy, as will be argued in Point IV below, is completely inconsistent with the case law. Earlier cases involve criminal or prohibited acts, but the IRS itself believed that "the operation of private schools on a discriminatory basis is not prohibited by Federal statutory law." Its action therefore partakes of an arbitrary imposition of will, rather than a considered analysis of the law.

The circumstances surrounding the formulation of the policy hardly display "thoroughness . . . in its consideration." It emerged, not in the context of a dispassionate review by IRS officials, but as an attempt to assuage plaintiffs in ongoing litigation. As a result, no controversy remained when the case finally reached this Court. See *Bob Jones University v. Simon,* 416 U.S. 725, 740 n.11 (1974). Certainly, had this Court been able to reach the merits of the original case the Service's litigating ploy would have carried little weight against an interested taxpayer. Here we have such a party that has been trying ever since to present this issue to this Court for review. The University is entitled to have the statute construed on its own merits without undue reference to an agency interpretation based upon a single unreviewed decision of a lower court.

Finally, the IRS did not even pay lip service to the intent of the Congress which passed this statute. Had

there been a single word in the legislative history to support the new construction, surely it would have been brought forward. It was not, because no such evidence exists. The IRS mentioned in passing other civil rights laws passed by other Congresses, but those shed no light on the original Congressional intent. To the extent they are at all relevant, they pale into insignificance beside another Congressional action related directly to this problem.

The attachment of the Ashbrook Amendment to successive Treasury appropriations demonstrates Congress's complete lack of confidence in the Service's action in this area.[7] The Amendment bars the use of funds to deny tax-exempt status to any school on the basis of any rule not in effect prior to August 22, 1978. This provision does not bar this proceeding against the University because it is based upon Revenue Procedure 75-50, which had been in effect for three years before the passage of the Amendment.

It would be a mistake, however, to think that Congress has somehow given its approval to all IRS procedures in effect before August 22, 1978. It cannot be said with certainty from the face of the Amendment whether Congress was satisfied with Revenue Procedure 75-50 or would have preferred that the IRS return to some earlier practice, perhaps the

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[7] "Sec. 103. None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501 (c) (3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978." Ashbrook Amendment to the Treasury Appropriations, P.L. 96-74, 93 Stat. 559, 103 (1979).

one embodied in the regulations that are even now in effect. The only conclusion that is irrefutable is that congress did not trust the IRS to change those procedures further. The Congress has in effect taken the further development of the law completely out of the hands of the IRS. There is no reason that this Court should have any more confidence in the Service's ability to construe this statute than does the Congress. An agency that has drawn such an unprecedented rebuke from Congress is hardly entitled to deference here. This Court should therefore construe the statute on its face, without reference to the unsupported opinion of an agency whose competence in this field has been thoroughly discredited.

III. A court may not conclude that Congress intended to place a burden upon religious institutions unless it has done so in plain and unambiguous terms.

To hold that this religious institution is subject to tax because of its interracial dating policies would clearly raise grave First Amendment questions. This Court has repeatedly construed statutes whenever possible to avoid such questions. The Court has recently made clear that whenever a burden is to be placed upon a religious institution, " 'the affirmative intention of the Congress clearly expressed' " must be apparent. *NLRB v. Catholic Bishop,* 440 U.S. 490, 501 (1979), *quoting Benz v. Compania Naviera Hidalgo,* 353 U.S. 138, 147 (1957).

In the *Catholic Bishop* case, with no express Congressional authorization, the National Labor Relations Board distinguised between "completely religious" organizations and those "merely religiously associated" and claimed jurisdiction over the latter. *Id.,* at 459. The Board's distinction provided no

workable guide, and the Court held it not entitled to exercise such unbridled discretion in the absence of a Congressional mandate. The Court denied the Board jurisdiction over any religious institution.[8]

It is important to note that the Court so held on the basis that there was no evidence that Congress had ever considered the problems posed by religious institutions. *Id.*, at 504. The absence of such consideration was sufficient to leave such institutions uncovered. In this case, if Congress had merely referred to "charitable" organizations without reference to religion, *Catholic Bishop* might still lead to the conclusion that religious institutions should be deemed exempt. Here, however, Congress explicitly considered religious institutions, and explicitly provided that they should be exempt. Had Congress intended there to be any exception to that explicit provision, it could certainly have said so.

A contrary ruling would dangerously expand the authority of the IRS to interfere in church affairs. The decision of the Court of Appeals certainly tends in that direction. *Cf. United States v. Rutherford*, 442 U.S. 544, 557 (1979) (the reasoning behind the lower

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[8]*McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963), presents an analogous circumstance. The NLRB asserted jurisdiction over ships owned by foreign subsidiaries of American companies. Each ship flew under a foreign flag with foreign crew and maintained other contacts with the nation of its flag. The Court held that the Board had no jurisdiction in the absence of an affirmative Congressional expression. Foreign relations, like religion, is a "delicate field" and only Congress could make such a policy decision. *Id.* at 22-23.

court's statutory interpretation "cannot be so readily confined."). Racial discrimination is not the only area where public policy might come into contact with religion. The IRS might next decide to deny exemptions to churches that refuse to ordain women, just as the Church of Jesus Christ, Latter Day Saints, once denied the priesthood to blacks. In either case, the imposition of a tax should be based upon clear Congressional intent and not the whim of IRS officials.

IV. There is no basis for implying a public policy exception to the plain and unambiguous language of the statute.

Concededly, certain precedent supports the proposition that tax deductions and, by analogy, exemptions, which violate public policy will be denied. This is a narrow exception: "the mere fact that an expenditure bears a remote relation to an illegal act does not make it nondeductible." *Commissioner v. Heininger*, 320 U.S. 467, 474 (1943). The *Heininger* Court allowed the taxpayer to deduct as business expenses attorney fees incurred in defending a business-related criminal prosecution. The government admitted that the tax laws' purpose was not to penalize illegal business. Nevertheless, the government now advocates penalizing Bob Jones University for its uncontestedly genuine religious beliefs.

A trucking company's speeding ticket expenses were held nondeductible as business expenses in *Tank Truck Rentals v. Commissioner*, 356 U S. 30 (1958). The "frustration of state policy" was "most complete and direct" because "the expenditure for which deduction is sought is itself prohibited by statute." *Id.*, at 35. The Court expanded this test of nondeductibility in *Commissioner v. Tellier*, 383 U.S.

687, 694 (1966). *When Congress has been silent,* a type of deduction typically allowed will be denied

> [o]nly where the allowance . . . would "frustrate sharply defined national or state policies proscribing particular types of conduct" . . . *Commissioner v. Heininger,* 320 U.S., at 473. Further, the "policies frustrated must be national or state policies evidenced by some *governmental* declaration of them." *Lilly v. Commissioner,* 343 U.S. [90] at 97 [(1952)]. (Emphasis added by Court.) Finally, the "test of nondeductibility always is the severity and immediacy of the frustration resulting from allowance of the deduction." *Tank Truck Rentals v. Commissioner, 356 U.S. 30, 35.*

Tellier, 383 U.S. at 694 (legal expenses incurred in unsuccessful criminal defense deductible; the crime was related to taxpayer's business).

There is a general policy against most forms of racial discrimination, but this exemption does not work a complete and direct frustration of any such sharply defined and governmentally declared state or federal policy.

First, "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Walz v. Tax Commission,* 397 U.S. 664, 675 (1970). Moreover, the nexus in *Tank Truck Rentals* between the deduction and the illegality was much tighter than is the case here. In *Tank Truck Rentals,* the deduction was really a direct benefit from the illegality; in the absence of the crime, there would have been no expense to deduct. Bob Jones University, on the other hand, does not enjoy its exemption because of its

racial policies, but because it is an educational and religious organization.

Moreover, racial discrimination does not always violate public policy. Schools are allowed to practice racial discrimination in admissions in the interest of diversity. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). An institution's right to pursue diversity is not constitutionally protected, but its right to practice its religion is protected by the First Amendment. If racial discrimination in the interest of diversity does not violate public policy, then surely discrimination in the practice of religion is no violation.

The difficulties in ascertaining "public policy" when no illegal act is involved led the Court to limit the *Tank Truck Rentals* public policy exception to situations where the tax benefit directly results from an illegal act. *Heininger, supra*, at 474. No formulation of "public policy" can accomodate the holdings of the court below and *Moose Lodge v. Irvis*, 407 U.S. 163 (1972). Neither Moose Lodge's nor Bob Jones University's discriminatory practices are illegal in themselves.[9] Only is the government supports the

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[9]But see *Runyon v. McCrary*, 427 U.S. 160 (1976). It remains unclear whether 42 U.S.C. s 1981 prohibits racial discrimination by religious schools, as demonstrated by the welter of opinions in *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). It should be remembered that at the time the IRS formulated its policy, it was under the opinion that racial discrimination by religious schools and all private schools was perfectly legal. Rev. Rul. 71-447, 2 C.B. 230 (1971).

discrimination is it illegal, but *Walz* held that a tax exemption does not constitute support of the exempt organization. Of course, the state action doctrine and public policy concepts are not synonymous. Nevertheless, if the state's discretionary granting of a qualified privilege to a segregated club does not offend the laws or the Constitution, on what grounds can it be said that the general grant of a tax exemption to religious and educational institutions—one of which happens to forbid interracial dating as part of its sincere religious belief—violates public policy?

This indicates that there are no real standards which the IRS can apply to determine which otherwise tax-exempt organizations violate public policy. To imply some sort of undefined public policy exception to Section 501 (c) (3) would provide the IRS with an inherently destructive weapon—the power to tax. Any exempt organization violating the Service's notion of public policy will be taxed, and the organization will be forced to litigate a definitive explication of public policy.

Ad hoc determinations by unelected bureaucrats in matters as fundamental to our governmental structure as the First Amendment separation of church and state violate all principles of our representative democracy. It is up to the Congress—the elected representatives of the people—to formulate public policy and to determine whom to tax. The role of the IRS is simply to collect taxes from those Congress has subjected to the burden of taxation. This Court cannot allow the IRS so blatantly to usurp Congressional prerogatives.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fourth Circuit must be reversed.

Respectfully submitted,

REPRESENTATIVE
TRENT LOTT
Pro Se

CERTIFICATE

I, the undersigned, proceeding *pro se*, do hereby certify that I have this day mailed a true and correct copy of the foregoing Brief of Representative Trent Lott Amicus Curiae to the following:

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So certified this_____day of November, 1981.

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