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 POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF OF BOB JONES UNIVERSITY

WILLIAM BENTLEY BALL *
PHILIP J. MURREN
RICHARD E. CONNELL
KATHLEEN A. O'MALLEY
BALL & SKELLY
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731
Counsel for Petitioner

* Counsel of Record

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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MOTION OF BOB JONES UNIVERSITY FOR LEAVE TO FILE POST-ARGUMENT BRIEF

Pursuant to Rule 35.6 of the Rules of this Court, petitioner Bob Jones University moves for leave to file the attached brief. In support of this motion movant states as follows:

1. This case is one of great consequence, involving as it does, claims of racial and religious liberty, the function of taxation, the meaning of tax exemption, the separation of powers, and the implications of many prior decisions of this Court. In recognition of its significance, the Court has invited special counsel to brief and argue the case and has received a large number of *amicus* briefs.

2. Upon oral argument, three questions were raised from the bench which appear not to have been previously addressed, or addressed in necessary detail. These questions are of importance, and it would be not only needless but unfortunate were the Court to proceed to final disposition of this case in the absence of light that can be shed upon them.

Wherefor, movant respectfully requests that its motion for leave to file the attached post-argument brief be granted.

Respectfully submitted,

WILLIAM BENTLEY BALL
PHILIP J. MURREN
RICHARD E. CONNELL
KATHLEEN A. O'MALLEY

By:

WILLIAM BENTLEY BALL
Attorneys for Movant
Bob Jones University

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POST-ARGUMENT BRIEF OF BOB JONES UNIVERSITY

I. Absent Express Congressional Provision, IRS May Not Deny Recognition of Tax-Exempt Status to a Religious Organization on the Ground That the Organization Has Purposes or Practices of an Unlawful or "Socially Undesirable" Nature.

The question has been raised whether IRS could, if the petitioner University is correct in its reading of § 501 (c)(3), deny recognition of tax-exempt status to "Fagin's School For Pickpockets". The broader implied question is whether IRS is without power to deny such status to a

religious organization which pursues a practice contrary to "public policy."

1. Plainly the Congress could elect to employ the Internal Revenue Code not only as a revenue-gathering instrument but as "a sanction against wrongdoing." (*But see Commissioner v. Tellier*, 383 U. S. 687, 691 (1966).) The Code could then be utilized broadly as a supplement to criminal and civil statutes. It could even be used to discourage or penalize conduct not violative of any law but simply deemed socially undesirable. (It is under this last heading that invited *amicus* insists that the University must lose tax exemption.)

2. The Congress has made no such express provisions. And for all the reasons stated in the University's briefs, it is clear that the Congress has not put that vast power—of all imaginable powers—into the hands of IRS by implication.

3. Whether that power is implied (as *amicus* urges) or whether (as petitioner maintains) it would have to be expressed, it would seem the most elementary necessity to set out in so many words just what power or powers are being discussed. The wordings of the possible choices among the powers appended to § 501(c)(3) would be as follows:

> ". . . provided that an organization organized and operated exclusively for religious purposes has no practice which is violative of any law . . .", or,
>
> ". . . provided that an organization organized and operated exclusively for religious purposes has no practice which is violative of federal public policy [or is not socially beneficial] . . .", or,
>
> ". . . provided that an organization organized and operated exclusively for religious purposes has no

practice which discriminates on account of race[1] [or ethnicity, sex, age, or handicap]."

4. Under the holding of the Fourth Circuit, IRS is given a free hand to range limitlessly among these choices. But they are, absolutely, *legislative* choices. It is the Congress which should (and can) provide which of them shall be left to IRS—or whether the police power is best made effectual through statutes other than the Internal Revenue Code.

II. The 1959 Treasury Regulations Contradict the View That the "Charitable" Category Subsumes the Other Categories Listed in § 501(c)(3).

The University does not share the view, expressed in the Reply Brief for the United States (p. 15), that the set of regulations issued by the Treasury Department in 1959 under § 501(c)(3) should be characterized as a "nullity", since they (in the view of the United States) render the separate enumeration of exempt categories in that Section a mere exercise in redundancy. The Regulations them-

1. Racial discrimination is not, however, unique. Though the present American consensus on racial discrimination evolved from fighting a Civil War, the hard-won national policy on religious liberty has roots, reaching across the ages, in wars and persecutions, bitter and often bloody. And it would be absurd to deny IRS power also to deny tax exemption for sex discrimination—whether against females or males. *See Mississippi University for Women v. Hogan*, 102 S. Ct. 3331 (1982). The U. S. Civil Rights Commission in 1975, demanded that IRS deny tax-exempt status to educational organizations discriminating on the basis, not only of race, but of sex and indeed ethnicity. *See Proposed IRS Revenue Procedure Affecting Tax-Exemption of Private Schools, 1979: Hearings Before the Subcomm. on Oversight, Committee on Ways and Means*, 96th Cong., 1st Sess. 218 (1979) (report of U. S. Commission on Civil Rights, "The Federal Civil Rights Enforcement Effort —1974, Vol. III, To Ensure Equal Educational Opportunity").

selves contradict the view that the "charitable" category is to subsume the other listed categories. The Regulations state, in § 1.501(c)(3)-1(d)(1)(iii) thereof, that each of the enumerated purposes "is an exempt purpose in itself". Given this statement, it is apparent that the Regulations intend the term "charitable" to be a catch-all term, exempting those organizations not otherwise exempted by the specifically enumerated terms (*i.e.*, religious, scientific, etc.). Viewed this way, the redundancy which the Government fears (and which the construction of the invited *amicus* would foster) does not materialize. There is also much to commend the University's view of the Regulations: while trusts for "the advancement of religion" or for the "advancement of education" are common law charities (and therefore exempt "charitable" organizations), they are not always necessarily "religious" or "educational" in themselves (*e.g.*, a scholarship fund is not "educational" but does advance education; a fund for the purchase of church property advances religion, but is not "religious").

III. Use of the Term, "Charitable", in the Title of § 170, Does Not Make Religious Entities Exempt Only as a Species of Common Law "Charities" Under § 501 (c)(3).

It is not correct to say that the use of the term "charitable" in the title of § 170 to describe contributions made, *inter alia*, to "religious" organizations in any way indicates that the religious entities are exempt under § 501(c)(3) only as a species of "charity", and subject to all prevailing limitations imposed by the common law of charitable trusts:

First, the title of § 170 refers to "charitable, *etc.*, contributions and gifts" (emphasis supplied), indicating Congressional awareness that the term "charitable" is an

inadequate description of the types of organizations which are the subject of the Section.

Second, § 170(c) is careful to note that the term "charitable contribution" is defined precisely, and that the definition is only "for purposes of this section".

Third, the listing of the organizations in § 170(c)(2) follows precisely that contained in § 501(c)(3), enumerating "charitable" organizations separately from "religious" organizations.

Fourth, there are four other categories of organizations (not exempt from taxation under § 501(c)(3)) listed in § 170(c) to which donors may make "charitable contributions": (a) governmental entities, (b) war veterans groups, (c) domestic fraternal organizations and (d) cemetery companies. No one would seriously contend that the common law of charities comprehends all of these groups.

Respectfully submitted,

WILLIAM BENTLEY BALL
PHILIP J. MURREN
RICHARD E. CONNELL
KATHLEEN A. O'MALLEY
BALL & SKELLY
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731
Counsel for Petitioner