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

REPLY BRIEF FOR PETITIONER BOB JONES UNIVERSITY

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In accord with Rule 28.1, Bob Jones University states that it is a corporation which has no parent company or subsidiary (except wholly owned subsidiaries).

INTRODUCTORY STATEMENT

The invited *amicus curiae* (hereinafter "*amicus*") seriously miscasts the record facts herein [1] and attempts to shape this case as one solely involving race, to the exclusion of the federal public policy respecting religious liberty.

I. What the Record Establishes.

No claim has been made by the Government or by *amicus*, that any mistake was committed by the trial court in its findings. In that court, not the slightest question was raised as to the credibility of any witness for Bob Jones University. Judge Chapman expressed full credence in the testimony of those witnesses and went on to make the findings of fact set forth in his opinion. These were not disturbed by the Court of Appeals. The dissenting opinion of Judge Widener described the trial court's findings of fact as "extensive and correct" and noted that "even the majority does not claim that they are clearly erroneous." P. A19.[2] The Government admitted that the University's dating and marriage regulations are based upon its *religious* beliefs and practices. P. A43. The brief of *amicus* ignores the findings and substitutes an imagined view of the facts to conform to the claims of its argument. In its Preliminary Statement (Br. A., 1-5) and elsewhere (*e.g.*, Br. A., 41-43), it presents two major errors of fact which require correction at the outset:

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1. The findings of fact by a trial court may not be set aside unless clearly erroneous. *Branti v. Finkel*, 445 U. S. 507, 512 n. 6 (1980); *see also* FED. R. CIV. P. 52(a).

2. The signal "P." refers to the Petition for Certiorari of Bob Jones University; the signal "Br. A." refers to Brief of [invited] *Amicus Curiae*; "Br. B. J." refers to the Brief for Petitioner Bob Jones University; and "J. A.", unless otherwise noted, refers to the Joint Appendix in No. 81-3.

1. *The University is not racially discriminatory.* *Amicus* states that Bob Jones University engages in "racially discriminatory practices" (Br. A., 2), specifically: "It continues to deny admission to persons who marry or date outside their race and to enforce other racially discriminatory rules." *Ibid.*

But nothing in the record supports the view that any person is denied admission to the University, or to any program or activity within it, on account of race. No complainant is before this Court or any other court making such contention. The record lays bare the University's reason for its policy: its religious doctrinal conviction, held since the University's founding in 1927, that, as the trial court found, and the Court of Appeals affirmed, "*the Scriptures forbid interracial dating and marriage*" (P. A43, P. A4 (emphasis supplied)); further, that this belief was the *sole* reason for the 1971-1975 policy[3] of the University which then accepted married blacks, but not unmarried blacks, as students. P. A4. A radio address sponsored by the University in 1960—a decade prior to any threat to the University by IRS (J. A. A95-A117)—discloses the University's beliefs: (a) in the brotherhood of *all* persons "born again" in Christ (J. A.

3. At that time this Court had not held that private schools, religious or otherwise, were prohibited from barring admission to students on account of race. This Court has never held that a religious institution which, for religious reasons, bars such admissions, acts unlawfully. Nor has it ruled that a religious institution may not observe religiously based interracial dating and marriage regulations. Thus at no point in the history of this litigation has the University acted contrary to decisions of this Court. In May, 1975, the University adopted a completely open admissions policy. *Amicus* attempts to limit this case to the period prior thereto. Br. A., 2. This limitation is specious: a) even were the case limited to the period for which IRS has counterclaimed (1971-1975), the University's open admissions policy became operative before the close of that period; b) from 1976 forward, IRS has refrained from making assessments against the University only upon the latter's stipulation preserving IRS's rights pending the outcome of this case.

A101-A102, A114); (b) that "No race is inferior in the will of God. If a race is in the will of God, it is not inferior. It is a superior race" (J. A. A100); (c) that God forbids interracial marriage. J. A. A113.[4] Particular attention of the Court is respectfully here called to the testimony at trial of Dr. Bob Jones, III, the President of the University. J. A. A64-A83. The record is bare of any evidence that the University's pre-1975 policies or post-1975 policies have been motivated other than by Scriptural belief.[5] That a religious belief is unpopular, or that a religion is held to only by a small minority, are, of course, utterly irrelevant considerations. *Cf. Cantwell v. Connecticut*, 310 U. S. 296, 310 (1940); *Larson v. Valente*, 102 S. Ct. 1673, 1683 (1982). And where a school, in these days of "liberated" youth, zealously imposes as severe and comprehensive a code of Puritan-like conduct upon students as the University's Dating Parlor or Dress Regulations (J. A. A155-158, 168-170), whose aim is plainly to mold the student totally to religious goals, it is not surprising that the institution should attract students and staff principally from its own faith community[6] and tend to reflect the racial composition of that community. J. A. A24-A25.[7]

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4. The University's marriage policy is not comparable to the state-enforced statute reviewed in *Loving v. Virginia*, 388 U. S. 1 (1967), which was rooted in concepts of white supremacy and bigotry. *Id.* at 12.

5. Contrary to the slur appearing in *amicus'* brief. Br. A., 41, n. 41.

6. In which respect the University is not dissimilar to myriad religious congregations in the nation—Jewish, Amish, African Methodist Episcopal, the Roman Catholic canonically "national" (*i.e.*, Polish, Slovak, Italian, etc.) parishes.

7. A great many applicants are referred by former students or friends of the University (J. A. A76), also by clergymen or other religious persons with whom the University is familiar. J. A. A77.

2. *The University is pervasively religious.* *Amicus* contends (Br. A., 40-44) that, because the University offers instruction in mathematics, literature, business education, etc., it is not exclusively a religious organization (or an organization devoted to achieving wholly religious goals by presenting all subjects according to religious norms, and infused with religious values). This is utterly erroneous, being contradicted by the evidence and by the specific findings of the trial court (P. A42-A45), which the Court of Appeals did not dispute. The University is a pervasively religious institution (Br. B. J., 4, 23-25) [8] which would not exist except for its religious mission. J. A. A263. The fact that the intervening Catholic, Lutheran, Hebrew and Presbyterian schools in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), provided general education did not render them "secular." *Amicus'* contention is similar to that made by NLRB, in the cases involving Catholic schools: that because they taught "secular" subjects they were not "completely religious"—a concept thoroughly rejected by the courts. *Catholic Bishop of Chicago v. NLRB*, 559 F. 2d 1112, 1120-1122 (7th Cir. 1977), (and, on review here, *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 498-503 (1979)). *Amicus* is likewise in error when suggesting (Br. A., 9, 67) that an institution, to be "religious", must be a "church or seminary" and cannot be "a school providing accredited secular education at all levels." *See Lemon v. Kurtzman*, *supra*, at 616; *Tilton v. Richardson*, 403 U. S. 672, 685-686 (1971); *Meek v. Pittenger*, 421 U. S. 349, 366 (1975).

The two foregoing points but serve again to emphasize that the ultimate issue in this case is one of *religious civil rights*, that is:

Whether government may require that the exercise of a proved, long-held and sincerely held religious belief, by an institution

8. *Amicus'* burden in seeking to overset the record on this point is great indeed. *Washington Ethical Society v. District of Columbia*, 249 F. 2d 127, 129 (D. C. Cir. 1959, Burger, J.).

—which is private, not governmental, and not a "state action" entity

—which is pervasively religious and would not exist except for its religious mission

—which does not discriminate on account of race

—of which no person complains as the alleged victim of such discrimination

—which receives no governmental subsidy

—which is not charged with violation of any law

—which poses no threat to public safety, health, peace or order,

shall, on the ground of conflict with "federal public policy", result in the denial of its tax-exempt status (with the possibly fatal harm which that may entail) unless the institution abandons observance of that article of its faith.

II. The Federal Public Policy of Religious Freedom.

The brief of *amicus* is constructed upon the central theme of the Fourth Circuit's opinion, that the controlling principle in this case is federal "public policy, rooted in our Constitution, condemning racial discrimination . . ." P. A8-A9.[9] Certainly there exists a national consensus against racial discrimination, as well as constitutional provisions and federal and state statutes penalizing such treatment of persons on account of race. Nothing in the record discloses any hostility on the part of Bob Jones University to that consensus or to those laws.

If "federal public policy" is deemed to be of such great weight and effect as to control the interpretation of enactments of Congress (*Green, supra* at 1161), even to the extent of supplying substantive provisions thereof

9. Based in turn upon *Green v. Connally*, 330 F. Supp. 1150 (D. D. C. 1971), *aff'd. per curiam sub nom.* Coit v. Green, 404 U. S. 997 (1971), which essayed that "federal public policy" is derived from historical events, constitutional provisions and Supreme Court decisions. *Id.* at 1163.

which the Congress had failed to put into words, then assuredly the more important, venerable and universally popular a given "federal public policy" is, the more controlling its weight in the interpretive process. On the basis of the supposition of *amicus* and *Green* that "the ultimate criterion for determination whether such schools are eligible under . . . the Code rests . . . on . . . Federal policy" (*ibid.*), *the federal public policy respecting religious liberty and "equal rights of conscience"* [10] necessitates the determination that the Congress always intends its enactments to accommodate and protect, not destroy, religious liberty. Under that principle, "[s]trict or narrow construction of a statutory exemption for religious organizations is not favored" (*Larson, supra*, at 1682), and the Code can only properly be interpreted as to permit Bob Jones University to observe its challenged religious policy without loss of tax-exempt status.

The "transcendent value" of religious liberty has roots reaching beyond the past few decades or the past century. It was established in American society long before the Civil War. Its various sources, on this soil, include Roger Williams, with his plea against "an uniformity of Religion to be inacted and informed in any Civill state",[11] and William Penn with his "Holy Experiment", of an American asylum for the persecuted where "every Person . . . shall have and enjoy the Free Possession of his or her faith . . . in such way and manner As every Person shall in conscience believe is most acceptable to God. . . ." [12]

The long struggle for religious liberty in Europe, and, on this soil, especially against governmentally imposed

10. The phrase is that of Madison. See Madison, *Proposals to the Congress for a Bill of Rights, 1799.* 1 ANNALS OF CONG., 431-432 (Dales and Seaton, ed. 1799).

11. Quoted in M. S. BATES, RELIGIOUS LIBERTY, 427 (1945).

12. Quoted in C. E. OLMSTEAD, HISTORY OF RELIGION IN THE UNITED STATES, 115 (1960).

conformity to state goals,[13] culminated in the national Constitution which gave the premier place in the charter of liberties to the Religious Clauses of the First Amendment. Constitutions of all the states contain specific protections of religious liberty.[14] Numerous enactments of the Congress, including civil rights acts,[15] protect religious liberty.

This national consensus has not been one of mere toleration, wherein religion may be exercised solely within tolerances completely congruent with, or convenient to, the secular interests of the state at a particular moment—or indeed its philosophy.[16] Nor has it seen religious exercise as a mere secular value, but an independent value, antecedent to the rights of the state except in the most extreme and limited cases.[17]

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13. See generally, I A. P. STOKES, CHURCH AND STATE IN THE UNITED STATES, 65-483 (1950). *See also Associated Press v. NLRB*, 301 U. S. 103, 135 (1937); *Olmstead v. United States*, 277 U. S. 438, 479 (1928) (Brandeis, J., dissenting).

14. See generally, C. ANTIEAU, P. CARROLL and T. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS (1965).

15. See, *e.g.*, Civil Rights Act of 1866, 42 U. S. C. § 1982 (as implemented by Exec. Order No. 11063, 27 Fed. Reg. 11527, further amended by Exec. Order No. 12259, 46 Fed. Reg. 12533); Civil Rights Act of 1964, 42 U. S. C. §§ 2000a, 2000-1.

16. Under which view religion is confined "to the sacristy". *See* J. C. MURRAY, THE PROBLEM OF RELIGIOUS FREEDOM, 37 (1965). *And see* D. F. Kelly, *What Makes Churches Tax Exempt?*, 128 CONG. REC. E4004 (daily ed. August 20, 1982) (Reprint).

17. See discussion *infra* at 27-30, and Brief For Petitioner Bob Jones University, 28-29.

ARGUMENT

For convenience of the Court, petitioner's reply will track the points of argument of the invited *amicus* as they numerically appear in his brief.

I. The Challenged IRS Ruling as a "Necessary Result of Fundamental Developments in Statutory and Constitutional Law". (Br. A., 11-16).

To the contrary:

1. While *amicus'* brief describes at length the history of the national consensus which has emerged against racial discrimination, quotes important language from the cases, and repeats (as its central contention) what the Fourth Circuit said of *Green v. Connally, supra*, it does nothing to overcome the fact that *Green* dealt with no challenges raised by religious claimants or under the Religion Clauses of the First Amendment. *See* Br. B. J., 17-21. Moreover, no statute is cited by *amicus*, or can be, of which, insofar as religious institutions are concerned, the IRS ruling is a "necessary result".

2. It is misleading to the Court to say, as does *amicus*, that *Green v. Connally* "should not now be overruled." Br. A., 16. No one in this litigation seeks its overruling.[18] It has been petitioner's very contention that Judge Leventhal, in the underlying opinion by him in that litigation, expressly declined to consider any issues pertaining to religious bodies.[19] The *amicus* fails to meet that contention.

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18. *Green* is plainly inapplicable. However, as the University argues in its principal brief, should *Green* be deemed applicable herein, its rationale is without sound foundation.

19. *Amicus* admits that "no religious schools were before the court in *Green v. Connally*" (Br. A., 43, n. 43), but implies that, nevertheless, any claims which Bob Jones University may have were disposed of through Judge Leventhal's dictum regarding schools "claiming divine inspiration for racial segregation." *Ibid.* Judge Leventhal in fact stated: "We are not now called upon to consider

3. *Amicus* seeks to convey the impression that IRS was powerless "against this background" (of *Green* and other decisions) to do other than to proceed to deny tax exemption to racially discriminatory schools in July, 1970 (Br. A., 14)—that is, in effect, to take the law into its own hands. As is crystal clear from a reading of *amicus'* brief (pp. 1 to 14), IRS from that date forward acted without Congressional authority and solely on the basis of extraneous legal developments.[20]

II. Congressional Intent. (Br. A., 17-44).

Nothing better illustrates the fact that the Congress never intended the construction of the statutes for which *amicus'* brief contends than the prolixity of its effort to supply what is missing in what the Congress said. The 39-page rationalization (Br. A., 18-57), with an accumulation of some 364 references, but serves to put into bold relief the fact that the Congress was always well able to have expressed the intention attributed to it by *amicus*, and that it can do so today or tomorrow—but that it never yet has done so. *Amicus* at best supplies a merely plausible justification for an unlawful self-delegation of legislative powers by the IRS or for a hoped-for equally unlawful assumption of such powers by the judiciary. To this end *amicus* advances four points:

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19. (Cont'd.)

the hypothetical inquiry whether tax-exemption or tax-deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion." *Green*, *supra*, at 1169.

20. Senator Moynihan, then a member of the Nixon Administration, and heavily involved in the decision to reverse the IRS policy in July, 1970, has admitted that the decision had not been based upon statutory grounds. *Legislation to Deny Tax Exemption to Racially Discriminatory Private Schools: Hearings Before the Senate Committee on Finance*, 97th Cong. 2nd Sess., 238 (Feb. 1, 1982).

A. Origins of §§ 501(c)(3) and 170. (Br. A., 18-24).

Amicus contends that sources outside the Internal Revenue Code, both here and abroad, were followed by Congress in choosing the categories of organizations it intended to exempt from federal income taxation, and that most notable among these sources was that formulation of the types of common law charitable trusts found in the English case of *Commissioners v. Pemsel*, [1891] A. C. 531, 583.

To the contrary:

1. While *amicus* provides a detailed description of the English law of charitable trusts, the *Pemsel* case and various state statutes, from all this the indispensable evidence is missing: *any* expression by the Congress, in enacting § 501(c)(3), that it had chosen to adopt the English law of charitable trusts or to inject the doctrine of the *Pemsel* case into the American federal law of tax exemption.

2. *Amicus* is correct, that tradition is an important source in ascertaining legislative intent, but equally important is whose tradition shall be looked to. Beneficently though much English tradition has been regarded on this soil, the English church-state relationship was a part of English tradition firmly rejected by America (*see Everson v. Board of Education*, 330 U. S. 1, 8 (1947); *Engel v. Vitale*, 370 U. S. 421, 427-428, 431 (1962)) and constitutionally unassimilable here today. *See* D. C. M. YARDLEY, INTRODUCTION TO BRITISH CONSTITUTIONAL LAW (1964), 96-98; E. C. S. WADE & A. W. BRADLEY, CONSTITUTIONAL LAW (7th ed., 1965), 478, 480.

3. *Amicus* succeeds only in demonstrating the coincidental use of "charitable" in *Pemsel* and § 501(c)(3). But *amicus* must demonstrate much more than a mere coincidence of terms to establish a cause-and-effect link between a foreign case which is not part of the received common law of this country and the intention of Congress to reach a result which subordinates religious entities to

the many and varied requirements of the common law respecting charities. *See NLRB v. Catholic Bishop of Chicago, supra*, at 506.

4. *Amicus* points to certain references made by members of Congress to the English income tax statute when Congress enacted the Tariff Act of 1894. He fails to point out, however, that numerous references were also made to the income tax laws of many other nations.[21] Furthermore, none of the references by Congressmen to the English income tax statute were to its provisions respecting tax exemptions, or particularly to tax exemptions for religious institutions. Rather the discussion of the English law was merely part of a general discussion of the acceptability of income tax laws as fiscal measures.[22]

5. The law of charitable trusts cannot be engrafted wholesale upon religious organizations.[23] Most religious organizations are not trusts at all. Noticeably, *amicus* cites no case wherein a religious body has been subjected to sanctions under the common law of charities on the specific ground that its religious practices have not comported with "public policy".

B. The Legislative History. (Br. A., 24-28).

Amicus next contends that since certain Congressmen have employed the term "charitable" broadly in connection with certain provisions of the Internal Revenue Code, and since certain other legislative and non-legislative materials speak of deductibility of contributions to organizations which provide "social benefits", these statements indicate the settled intent of Congress to apply the "public policy" corollary to the common law of charitable trusts to all organizations which are exempt from federal income tax.

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21. 26 CONG. REC. 584-588 (1894).

22. 26 CONG. REC. 1609-1614 (1894).

23. *See* Oaks, *Trust Doctrines in Church Controversies*, 1981 B. Y. U. L. REV. 805.

To the contrary:

1. It is settled by the decisions of this Court that the legislative history of an enactment is a guide to the interpretation of a statute only when that statute is ambiguous or unclear. In all other cases, Congress is presumed to intend exactly what the clear language of its enactments provide.[24] None of the material cited by the *amicus* in any way demonstrates that Congress intended all exempt organizations to conform to the common law of charitable trusts. *Amicus* makes reference only to certain very loose descriptive remarks of individual legislators[25] who cannot remotely be understood to be discussing a grave subject involving the direct extraction from religious bodies of their stewardship funds.

2. The principle advocated by *amicus*, that tax exemption may flow only to those religious organizations which "tend to promote the well-doing and well-being of social man" (Br. A., 28), poses the most obvious danger to religious bodies. Were IRS to apply that principle, it would become arbiter of the social utility of religious activities and religious entities themselves—a religious censor, in effect. Nor can tax exemption for religious organizations be made dependent upon the "financial burden which they remove from government". Br. A., 38. Rather, religious organizations are exempt from income tax as an expression of government "neutrality" (*Committee for Public Education v. Nyquist*, 413 U. S. 756, 792 (1973)), and as a way of minimizing "involvement and entanglement between Church and State". *Id.* at 793.[26]

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24. *TVA v. Hill*, 437 U. S. 153, 184 n. 29 and 187 n. 33 (1978); *Rubin v. United States*, 449 U. S. 424, 430 (1981).

25. None of these remarks by the various legislators are entitled to the weight ascribed to them by *amicus*. *See Chrysler Corp. v. Brown*, 441 U. S. 281, 311 (1979).

26. *See also* Reiling, *Federal Taxation: What Is A Charitable Organization?*, 44 A. B. A. J. 525, 595 (1958).

C. Judicial and Administrative Construction. (Br. A., 28-34).

Amicus further contends that the Congress, in 1954 and again in 1969, adopted judicial and administrative holdings to the effect that "charitable", as used in § 501(c)(3), is a broad generic term, embracing "religious" and "educational" entities within it.

To the contrary:

1. This Court has never held that every aspect of the common law of charities is to be imposed upon religious organizations exempt from income taxation under § 501 (c)(3), nor has any decision of this Court in any way indicated that religious entities are exempt from taxation solely because they are "charities", rather than because they are religious entities and are therefore guaranteed freedom from government control. In fact, no court other than the Fourth Circuit has so held.

2. The linchpin of *amicus'* entire argument with respect to administrative interpretation of the exemption provisions is his reference (Br. A., 30), to a 1924 IRS Solicitor's Opinion dealing with the deductibility of charitable bequests under the estate tax law. *Amicus'* argument, so constructed, must fail: a) the Solicitor's Opinion dealt with the definition of the term "charitable" for estate tax deduction purposes only, in the absence of any Treasury Regulations on the point; b) the Solicitor's Opinion appears in an Internal Revenue Bulletin, the cover page of which expressly disclaims any definitive force for the ruling;[27] c) *amicus* criticizes the University's reliance on a 1923 ruling of the Income Tax Unit of IRS (I. T. 1800, II-2 C. B. 151), and, while this ruling is sub-

27. "SPECIAL ATTENTION is directed to the cautionary notice on this page that published rulings of the Bureau do not have the force and effect of Treasury decisions and that they are applicable only to the facts presented in the published case." III-1 C. B. (January-June 1924).

ject to the same disclaimer as the 1924 Solicitor's Opinion, the 1923 ruling of the Income Tax Unit is fully backed by the Treasury Regulations in force and effect at that time. *See Helvering v. New York Trust Company*, 292 U. S. 455 (1934); d) at the time the 1924 Solicitor's Opinion was issued, and thereafter until 1959, the Treasury Regulations interpreting the tax exemption provisions of the Code continued to define "charitable" as a narrow term relating only to "relief of the poor". Br. B. J., 15-16.

3. The denial by IRS of tax exemption to a discriminatory recreational facility in 1967 does not stand, as *amicus* contends (Br. A., 32), for the broad principle that all exempt organizations must be racially nondiscriminatory. The Service was very careful to limit its ruling to "charitable" organizations, which do not serve a "public" purpose because certain members of a community are excluded from a community recreational facility. Rev. Rul. 67-325, 1967-2 C. B. 113.

D. The Language of the Code. (Br. A., 35-46).

Amicus asserts that the language of the Code supports the conclusion that Congress has decreed that exempt organizations must also be "charitable" in the common law sense. In support of this proposition, *amicus* has attempted to show that Congress' use of the disjunctive "or" in § 501(c)(3) of the Code is without significance, and that Congress actually did not intend that each purpose listed there should constitute a distinct basis for exemption.

To the contrary:

1. *Amicus* cites cases in which courts have held that the word "or" does not invariably have a single meaning, and is, on occasion, construed to mean "and", but has ignored the basic rule that the word "or" indicates that the terms connected by it are to be given separate mean-

ings. *Reiter v. Sonotone Corp.*, 442 U. S. 330, 339 (1979).[28] Moreover, even if "and" were substituted for "or" in § 501(c)(3), "charitable" organizations would not thereby be elevated to a position of preeminence over the other listed categories of exempt organizations. If Congress had intended to establish that preeminence, it would have chosen the formulation: "religious, educational . . . or other charitable purposes."

2. *Amicus* has "assume[d]" (Br. A., 37) that Congress listed the various types of exempt purposes in § 501(c)(3) merely as a means of illustrating types of "charitable" organizations, and further claims that various Code headings, as well as the doctrine of *noscitur a sociis*, support this interpretation. Rather, Congress must be presumed to have chosen its words with care. *Federal Bureau of Investigation v. Abramson*, 102 S. Ct. 2054, 2065-66 (1982) (O'Connor, J., dissenting). Code headings may be used as an aid to statutory interpretation, but a basic canon of construction dictates that titles and headings cannot be used to limit the plain meaning of the text. *United States v. Minker*, 350 U. S. 179, 185 (1956). Resort to the general headings of various other Code sections to alter the specific and precise language of § 501(c)(3) is a misuse of tools of statutory construction which are designed to resolve, rather than create, ambiguity. *Russell Motor Car Co. v. United States*, 261 U. S. 514 (1923); *Brotherhood of Railroad Trainmen v. Baltimore and Ohio Railroad Co.*, 331 U. S. 519, 528-29 (1946). The rule of *noscitur a sociis* furnishes no basis for varying the chosen language of Congress. While it is true that the meaning of a word (and, consequently, the intent of a legislature) may be ascertained by the context in which that word appears, the rule is applicable only to particular words which are unclear or uncertain in meaning. *Russell Motor Car Co., supra*, at 519.

28. *See also FCC v. Pacifica Foundation*, 438 U. S. 726, 740 (1978).

3. Rather than being merely a "brittle grammatical construction" of the exemption statute, the view that § 501(c)(3) cannot be read to nullify the distinctive nature of religious organizations by making them a mere sub-species of "charitable" organization is one which (unlike *amicus'* construction): a) does not alter or add extraneous requirements to the language of Congress; b) avoids a reading of § 501(c)(3) which would restrict or "narrow" the scope of the religious exemption (*see Larson v. Valente, supra*, at 1682); and c) fully respects this Court's admonition that religious entities are not to be subjected to governmentally imposed burdens absent the "affirmative intention of the Congress clearly expressed." *NLRB v. Catholic Bishop, supra*, at 506.

4. *Amicus'* prayed-for construction is contradicted by the Treasury Regulations which treat each category listed in § 501(c)(3) as "an exempt purpose in itself". Treas. Reg. 1.501(c)(3)-1(d)(1)(iii), T. D. 6391 (June 25, 1959). These Regulations, and not *amicus'* interpretation of § 501(c)(3), are entitled to deference. *National Muffler Dealers Association v. U. S.*, 440 U. S. 472, 476-477 (1979).

5. *Amicus* having failed in all respects to import ambiguity into the statute, the language actually chosen by Congress must "be regarded as conclusive." *Bread Political Action Committee v. F. E. C.*, 102 S. Ct. 1235, 1237 (1982).[29]

III. "Federal Public Policy". (Br. A., 15-16, 44-48).

Amicus contends that revocation of the University's tax-exempt status is necessitated by "federal public policy", a requirement allegedly contained in § 501(c)(3), though not written there. In support thereof, he relies principally upon four decisions of this Court.

29. To conclude, as does *amicus* (Br. A., 24), that *NLRB v. Amax Coal Company*, 453 U. S. 322, 329 (1981), means that Congress intended to exempt religious organizations only as a sub-species of "charities" is, for all of the foregoing reasons, a heavy overdraft on the authority of that case.

To the contrary:

1. The Supreme Court decisions cited by *amicus*[30] all deal solely with § 162(a) ("ordinary and necessary . . . expenses paid or incurred . . . in carrying on any trade or business"). In no decision has this Court suggested that the "public policy" exception in the business expense deduction cases be engrafted on the entire Code—one more substantive provision of immeasurable impact which the elected representatives of the people somehow failed to put into print.[31]

2. No decision of this Court supports the parlay of the "public policy" concept in *Tank Truck* into the "public policy" concept employed in *Green*, by the Fourth Circuit, and by *amicus*. The unanimous Tellier court stated that "the federal income tax is a tax on net income, not a sanction against wrongdoing." *Tellier*, *supra*, at 691. But it is precisely as a sanction against alleged wrongdoing (social "wrongdoing", that is—not law violation) that *amicus* wants Bob Jones University taxed. The University is not a law violator.[32] "Public policy" in *Tank Truck* plainly

30. *Commissioner v. Tellier*, 383 U. S. 687 (1966); *Hoover Motor Express Co. v. United States*, 356 U. S. 38 (1958); *Tank Truck Rentals, Inc. v. Commissioner*, 356 U. S. 30 (1958); and *Textile Mills Securities Corp. v. Commissioner*, 314 U. S. 326 (1941).

31. Even within the confines of § 162(a) situations, the Court, in *Tellier*, stated that "where the Congress has been wholly silent, it is only under extremely limited circumstances that the Court has countenanced exceptions to the *Sullivan*, *Lilly* and *Heininger* [*i.e.*, business expense deductibility] decisions." *Tellier*, *supra*, at 693-694.

32. *Amicus* raises the specter of a tax-exempt "Fagin's school for pickpockets" as a consequence of failure to apply a "public policy" limitation upon "educational" institutions. Br. A., 40, n. 40. The allusion is neither apt nor credible: a) the University exists for religious purposes—none of which purposes is the violation of criminal law; b) any organization whose existence is unlawful *in se* would

referred to avoidance of rewarding violation of weight laws where the reward would be made *on account of* that violation. "Public policy" (in that very limited sense) cannot be levitated into "national public policy" on racial discrimination, world hunger, energy defense, environment or any other such spacious areas of concern.[33]

3. As though realizing how untenable the misappropriation of *Tank Truck* may appear when seen for what it is, *amicus* attempts to hedge it by stressing that the policy against racial discrimination in education is unique (Br. A., 47), and that there are "ample safeguards" against IRS abuse. *Id.*, n. 47. But religious liberty in education is no less unique (*Pierce v. Society of Sisters*, 268 U. S. 510, 535 (1925)), and once the wild card of "federal public policy" (in the *Green* sense) is slipped into the national tax statute, there is no way to confine the results. As to the "safeguards" of being forced to litigate, or to get the Congress to move, these are dangerous and burdensome substitutes for the one true "safeguard": the clear exemption which is presently the express will of Congress.

IV. Congressional Ratification of IRS Policies. (Br. A., 48-57).

Amicus insists that the Congress has adopted "the IRS decision" (or "the IRS position") against racial discrimination through failure of the Congress to overturn those policies, and enactment of legislation subsequent to 1970 relating to exempt organizations.

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32. (Cont'd.)
seek exemption only at grave peril. Disclosing its existence to a public agency would simply invite prosecution.

33. "[I]t is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which these expressions are used." *Zenith Radio Corp. v. United States*, 437 U. S. 443, 462 (1978), quoting *Cohens v. Virgina*, 19 U. S. (6 Wheat.) 264, 399 (1821).

To the contrary:

1. In his entire argument on ratification, *amicus* fails to prove the one thing which would settle all argument: ratification. The reason is plain: there has been none.

2. *Amicus* is therefore principally put to arguing a negative: that the failure by Congress to disturb an administrative construction of a statute indicates Congressional adoption of that construction. His reliance on *Haig v. Agee*, 453 U. S. 280 (1981), *CBS, Inc. v. FCC*, 453 U. S. 367 (1981), and *United States v. Rutherford*, 442 U. S. 544 (1979) is misplaced. *Haig* involved a statute (the Passport Act of 1926), a particular section of which (22 U. S. C. § 211(a)) was a grant of "broad rule-making authority" to the Secretary of State. The question was whether, under the language of that section, the Secretary could continue a century-old policy of revoking passports on national security grounds. That statutory section was wholly unlike § 501(c)(3) which is not a broad grant of rule-making power, but a list of categories of exempt organizations. The fact that § 211(a) of the Passport Act invites and indeed necessitates administrative rule-making is no argument that the specificity of the provisions of § 501(c)(3) may be disregarded according to administrative preferences.[34] *CBS, Inc.*, did not turn upon Congressional acquiescence in administrative interpretation of an enactment. The Court, while acknowledging the importance of agency interpretations, noted that the agency construction therein merely "comports with the statute's language and legislative history." *Id.* at 384-385. The determinative point in *CBS, Inc.* was plainly the fact that "the language

34. The construction in *Haig* had been in existence for more than 100 years and had survived various reenactments of the same statute by the Congress. Moreover, *Haig* involved the uniquely important area of "foreign policy and national security" (*id.* at 291), and did not involve a type of statute (*i.e.*, criminal) which required "strict construction against the government". *Ibid.* The instant case, involving tax laws and religious freedoms, undoubtedly calls for strict construction. *Larson, supra*, at 1682.

employed by Congress" was "unambiguous" on its face. *Id.* at 377. In no sense does *CBS, Inc.* support *amicus'* assertion that the unambiguous language of § 501(c)(3) must now be construed according to *Green* in view of a supposed Congressional acquiescence in a temporary construction by IRS, not held by IRS before 1970 and not held by IRS today.[35] *Rutherford* involved a statute whose language the Court called "plain" (*Rutherford, supra,* at 554) but onto which it was argued that an exception be engrafted (allowance of distribution of Laetrile, in interstate commerce, for the terminally ill). Paying proper deference to the FDA's long-standing position that Congress had made no such exception, Justice Marshall, for the Court, expressed an admonition highly relevant here:

> "Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy."

Id. at 555.

3. *Amicus* omits any reference to this Court's recent decision in *Aaron v. SEC*, 446 U. S. 680 (1980). There, in spite of the fact that the SEC had directly informed Congress on two separate occasions of the administrative interpretation there at issue, and despite Congress' having thereafter made significant amendments to the securities laws, the Court refused to find Congressional endorsement from its mere silence:

> "[S]ince the legislative consideration of those statutes was addressed principally to matters other than at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a con-

35. By contrast, the statute reviewed in *CBS, Inc.* had never been the subject of a series of differing interpretations by the administrative agency.

struction of § 10(b) so clearly at odds with its plain meaning and legislative history."

Id. at 694, n. 11.

4. The brief of *amicus* fails in its effort to establish that Congress has, by any affirmative act, ratified the construction of § 501(c)(3) adopted by the IRS in 1970. No general reenactment of § 501(c)(3) has occurred, nor has the exemption for religious or educational institutions been altered in any way. The one reference to the *Green* decision, in conjunction with any Congressional enactment,[36] was completely neutral, and serves as no basis for interpreting the intent of the Congress which enacted the Internal Revenue Code of 1954.[37] *See* Br. B. J., 16, n. 15. The silence of Congress therefore does not bespeak adoption of the 1970 IRS policy.

5. *Amicus* attempts to explain as inadvertence on the part of the Court the statement of this Court in *Bob Jones University v. Simon*, 416 U. S. 725, 740, n. 11 (1974) which deprived its summary affirmance in *Green* of precedential weight. Br. A., 56, n. 59. Nevertheless, from that point forward, Congress was on notice that the United States Supreme Court did not consider that *Green* had settled the issue. Consequently, when, in 1976, Congress added § 7428 to the Code (P. L. 94-455) in response to this Court's holding in *Simon*, *supra*, it did so with full knowledge of that fact.

6. None of the remarks by the principal sponsors of the Ashbrook-Dornan Amendments in any way lends substance to the contention that Congress affirmatively ratified the *Green* holding. At most, those few Congressmen's remarks indicate that they were trying to avoid legislat-

36. S. REP. No. 1318, 94th Cong., 2nd Sess. (1976).

37. It is the intent of the 1954 Congress which here controls. *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979).

ing substantively in the context of an appropriations measure.[38]

7. Several actions in the current Congress indicate that it does not agree that a racial nondiscrimination clause is contained in § 501(c)(3). Congressman Trent Lott, the Minority Whip, has filed an *amicus* brief in this case, contesting the implication. Several Senators have indicated that they would welcome the guidance of this Court on the issue.[39] And on September 16, 1982, the Senate Finance Committee voted to amend the tuition tax credit provisions of H. R. 1635, by adopting, by a vote of 17-0, the following language:

> "SEC. 6. EFFECTIVE DATE; SPECIAL RULE. (a) Certification Required.—
>
> "The amendments made by this Act shall not take effect until the Attorney General certifies to the Secretary of the Treasury that, pursuant to
>
> (1) an Act of Congress, which has been enacted, or
>
> (2) a final decision of the United States Supreme Court,
>
> the Internal Revenue Code of 1954 prohibits the granting of tax exemption under section 501(a) by reason of section 501(c)(3) to private educational institutions maintaining a racially discriminatory policy or practice as to students."

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38. A principal spokesman on behalf of the amendments did, however, state:

> "All of this controversy has continued despite the fact that the IRS lacks a single sentence of statutory authority for its actions."

127 CONG. REC. H5396 (daily ed. July 30, 1981) (Remarks of Congressman Philip Crane).

39. *See* remarks of Senator Danforth, *Legislation to Deny Tax Exemption to Racially Discriminatory Private Schools: Hearings Before the Senate Committee on Finance*, 97th Cong., 2nd Sess. (Feb. 1, 1982), p. 236; remarks of Senator Grassley, *id.* at 243; remarks of Senator Dole, *id.* at 283; statement of Senator Symms, *id.* at 4.

This statement definitively manifests the mind of the Senate Finance Committee that the Congress has not ratified the *Green* construction of § 501(c)(3).[40]

V. The Fifth Amendment Question. (Br. A., 57-62).

Amicus argues that the recognition by IRS of tax-exempt status for the University would be violative of the equal protection component of the Fifth Amendment because the tax exemption would constitute the "subsidizing" of racial discrimination. This contention *amicus* bases principally upon *Norwood v. Harrison*, 413 U. S. 455 (1973).

To the contrary:

1. At the philosophic level: The fact of not being taxed does not make one the recipient of a subsidy. *Amicus'* whole argument hangs upon a facile three-stage conversion of the term, "tax exemption", into "tax benefits", into "subsidy". (From there on, it is easy to free-wheel about "diverting funds", getting "matching grants", etc. (Br. A., 59).)[41] Sound foundation for *amicus'* proposition does not exist, and if it did, the results would be preposterous. Were Bob Jones University not taxed, it would not be "subsidized" but merely an organization not compelled to divert to the government precious funds entrusted to its stewardship solely for the religious purposes sought to be realized by its religious followers.[42]

40. S. Con. Res. 59, 97th Cong., 2d Sess. (1982), which would have expressly ratified the IRS policy, retroactive to 1970, has attracted the support of barely more than one-fourth of the members of the Senate. Similar measures in the House have attracted substantially less support. *See*, H. R. Res. 318, 97th Cong., 2d Sess. (1982); H. R. Con. Res. 245, 97th Cong., 2d Sess. (1982); H. R. Con. Res. 246, 97th Cong., 2d Sess. (1982); H. R. 5378, 97th Cong., 2d Sess. (1982).

41. This danger has been well perceived by Professor Bittker. *See*, Bittker, *Churches, Taxes and the Constitution*, 78 YALE L. J. 1285, 1290-1291 (1969).

42. Not remotely does the § 170 deduction "provide even greater financial aid" (Br. A., 59) than tax exemption, nor (like exemption)

2. *Norwood*, the centerpiece of *amicus'* Fifth Amendment contention, is not in point, as comparison with the instant case at once reveals. In *Norwood* no claim under the Religion Clauses was raised; they are the heart of the University's claim here. *Norwood* did not involve tax exemption or tax deductibility; this case concerns nothing else. In *Norwood* the beneficiaries of the "tangible" and direct "assistance" were racially discriminatory schools; Bob Jones University is racially non-discriminatory.

3. To establish a discriminatory legislative purpose, there must be a showing that the enactment was made "at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group." *Personnel Administrator v. Feeney*, 442 U. S. 256, 279-280 (1979). Nothing can be clearer than the absolute absence of any such motivation from § 501(c)(3)'s text or history. The statute is racially "neutral". Unable to show otherwise, *amicus* contends that no discriminatory Congressional purpose need here be shown. His one cited authority for that proposition is *Norwood*. But in *Norwood*, the Court laid down no hard rule on intent and engaged in no discussion thereof parallel to its extensive explorations in subsequent cases.[43] And *Norwood* arose in the context of Southern

42. (Cont'd.)
any "aid" (in the "subsidy" sense) at all. While the Court, in *Walz*, could properly describe tax exemption as an "indirect economic benefit", tax deductibility, in two ways, is obviously even more indirect. The "benefit" runs primarily to the donor taxpayer (and only up to a certain fraction of his contributions, 26 U. S. C. § 170(b)), not to the donee organization. And, § 170 simply opens up an *option* to the donor taxpayer to donate or not to donate to one or some of myriad organizations. In the whole world of potential donors, it is possible that none may choose to contribute to any organization, and the donor's own filter of choice may exclude any particular organization.

43. *Washington v. Davis*, 426 U. S. 229, 239-248 (1976); *Feeney, supra*, at 279-280; *General Building Contractors v. Pennsylvania*, 102 S. Ct. 3141, 3146-3153 (1982).

"massive resistance" programs of the 1960's purposefully designed to frustrate desegregation (*see Flagg Brothers, Inc. v. Brooks*, 436 U. S. 149, 163 (1978)), with which the Court had been involved for more than a decade. A major feature thereof was Mississippi's expansion of its textbook loan program to accommodate schools "already . . . adjudged by . . . United States Courts as racially segregated and which have been formed for the purpose of providing white students with an alternative to racially integrated, non-discriminatory public schools." *Norwood v. Harrison*, 340 F. Supp. 1003, 1005 (N. D. Miss. 1972). The particular thrust of the action was against "racially segregated schools, established in Mississippi since 1964 . . ." *Id.* at 1010; *Norwood v. Harrison*, 382 F. Supp. 921, 924-925 (N. D. Miss. 1974).

4. Nothing which *amicus* adds, in his further contentions respecting the supposed "subsidy", overcomes the conclusion that no "subsidy" here exists. *Amicus* cites to *Bob Jones University v. Simon, supra*, at 729-730, wherein this Court recited the obvious fact that revocation of a § 501(c)(3) ruling letter and removal from the Cumulative List "is likely to result in serious damage". The University, in its principal brief herein, has gone even farther and described revocation as resulting in "severe and possibly fatal" harm to the institution. Br. B. J., 29. But that fact no more renders tax-exempt status a "subsidy" than would the fact of a fatal blow being dealt a person imply that the person, in his previous state of normal health, had somehow been the recipient of a boon, grant or benefit conferred by the subsequent assailant.

5. *Amicus*, at pages 59-61 of his brief, unaccountably represents the position of the University to be: that, because some forms of governmental aid (including tax exemption) are *religiously* "neutral", therefore the University is entitled to the governmental "aid" of tax exemption. That, of course, is a straw man, easy for *amicus* to demolish. That is not remotely the position of the University, and it is noteworthy that *amicus* cites no

portion of its brief which so contends. *Amicus* (Br. A., 61) states that *Norwood's* citation to *Committee for Public Education v. Nyquist,* 413 U. S. 756 (1973), "is of particular significance". *Nyquist,* indeed, is of particular significance: Justice Powell, writing for the Court, made it clear that the tax reimbursement program for parents there at issue "... does not have the elements of a genuine tax deduction, such as for charitable contributions." *Id.* at 790, n. 49. But more significant was the *Nyquist* Court's characterization of the religious tax exemption previously upheld in *Walz*:

> "To be sure, the exemption of church property from taxation conferred a benefit, albeit an indirect and incidental one. *Yet, that 'aid' was a product not of any purpose or intent to support or subsidize,* but of a fiscal arrangement designed to minimize involvement and entanglement between Church and State." *Id.* at 793. (Emphasis supplied).

Tax exemption for religious entities thus stands on a unique constitutional footing which precludes its being considered "subsidy" in any context.

6. *Amicus,* in insisting that tax exemption is "subsidy", "financial assistance" (in the "subsidy" sense), a diversion of "funds", etc., conceives that the principle for which he thus contends could be tidily limited to this case. To the contrary, the principle would be boundless in its significance and chaotic ultimately for all § 501(c)(3) organizations. If tax exemption of a religious organization is a "subsidy", then all religious organizations (including all churches) in the nation must be deemed governmentally subsidized.[44] Discrimination against aliens

44. "Does the tax-exempt status of the Catholic Church make 'every American taxpayer a forced contributor' to the Church? One supposes the First Amendment would forbid tax exemptions for all religious institutions if this logic held true. But that is not what most people think, and the Supreme Court emphatically endorsed this conventional wisdom in its 1970 decision, *Walz v. Tax Com-*

(*Plyler v. Doe*, 102 S. Ct. 2382 (1982)), illegitimates (*Trimble v. Gordon*, 430 U. S. 762 (1977)), or on account of sex (*Mississippi University for Women v. Hogan*, 102 S. Ct. 3331 (1982)) have also been held violative of equal protection. Potential violations of equal rights of other "insular and discrete minorities"—religious, the aged, the handicapped—abound.[45]

The Fifth Amendment claim of *amicus* is entirely without substance.

VI. The Effect of the Religion Clauses. (Br. A., 63-69).

Amicus, in response to the University's stated constitutional position under the Religion Clauses (Br. B. J., 23-34), contends that tax exemption is "subsidy", that the University is not really a religious institution, that only an "indirect and insignificant" burden is placed on religious practice by denial of the University's tax-exempt status, that any governmental interest is sufficient to justify injury to religious exercise, and that no religious preference results from taxing the religious institution which cannot recant doctrine and practice to conform to governmental policy, but exempting those which do conform.[46]

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44. (Cont'd.)
missioner . . . No doubt tax exemptions are very helpful to the church; yet the Court still held that tax exemptions are not (in constitutional terms) a subsidy, but a means of avoiding 'excessive entanglement' between church and state." Rabkin, *Behind The Tax-Exempt Schools Debate*, 68 THE PUBLIC INTEREST 21, 24 (1982).

45. Indeed, if *amicus'* supposition is correct, that government may not "subsidize" activities which unlawfully discriminate, then actions by exempt organizations violative of anti-discrimination *statutes* must also result in loss of exemption. *See, e.g.*, Rehabilitation Act of 1973, § 504, 29 U. S. C. § 794; Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621, *et seq.*

46. *Amicus* fails to make answer to the University's arguments on entanglement (Br. B. J., 33-34) or on due process. Br. B. J., 34-35.

To the contrary:

1. The Court is respectfully referred to prior discussion herein (pp. 23-26) as to the "subsidy" question and the fact that the University is a religious ministry.

2. Nothing could be farther from the truth than *amicus'* assertion that the statute, as interpreted by the Fourth Circuit, "at most imposes only an indirect and insignificant burden upon religious practice." Br. A. 64, n. 67.[47] *Amicus'* point is that the University is free to "practice" its religious convictions on marriage (Br. A., 63-64) but must suffer the irreparable harm attendant upon loss of its tax-exempt status if it does so.[48] *Amicus'* analogy to *Braunfeld v. Brown*, 366 U. S. 599 (1961), is not apt. In *Braunfeld* no religious practice of the Orthodox Jews was the focus of a claim of penalty; rather the law impeded a secular practice (selling goods). An analogy would exist if, in that case, state law had denied tax-exempt status to an Orthodox synagogue because it conducted worship on Saturdays.

3. *Amicus* ignores the test laid down by this Court in *Sherbert v. Verner*, 374 U. S. 398, 403 (1963), respecting the validity of governmental action challenged as violating Free Exercise rights, and infers that any mere "governmental interest" suffices as justification for such action. Br. A. 63, 65. If that were so, then *any* statute, challenged as being in conflict with religious liberty, would prevail, since every statute must be presumed to serve a "govern-

47. *Amicus* belies his own assertion by his insistence throughout his brief that tax-exemption constitutes a direct and significant benefit. Br. A., *passim*.

48. Such a penalty would be far more devasting in its impact than would result from any remedy authorized in a § 1981 action in a proceeding brought by actual complainants having standing. And the penalty to donors of the University of loss of deductibility of contributions would not similarly attach to contributions made by a donor, or to taxes paid by a taxpayer, to a racially segregative public school system under §§ 170(c)(1) and 164 of the Code.

mental interest", and most, in fact, do. *United States v. Lee,* 102 S. Ct. 1051 (1982), in no way overruled the *Sherbert* requirement of proof of a "compelling state interest" to justify a particular imposition upon religious liberty or *Sherbert's* further requirement respecting "least restrictive means". Nor is *Lee* comparable. There the followers of a religious sect entered into a wholly commercial activity and, on religious grounds, sought relief from payment of Social Security taxes. The University's activity is religious, not commercial. In *Lee* the Court was able to show in detail how the relief sought from payment of Social Security taxes would have undermined the soundness of a program supporting 36 million citizens (*id.* at 1055) and threatened the functioning of the national tax system. *Id.* at 1059. By contrast, no showing was made by the Fourth Circuit, or by *amicus,* of any concrete governmental interest which would be threatened by the University's pursuit of its always-held doctrine on marriage while having tax-exempt status.

4. If the University were, in fact, in actual violation of any statute, alternative means less restrictive of the University's religious liberties than denial of its tax-exempt status would be available under those statutes. Certainly the Internal Revenue Code was not designed to supplement or supplant provisions of the Civil Rights Act, or of any other civil or criminal statute which, in one way or another, may regulate private religious institutions. It does great violence to the concept of ordered liberty that *the whole life of the institution, including its every aspect and activity,* is mortally threatened on the basis of but a single policy which it pursues, and in ignorance of its positive contributions to 5,000 young people per year.

5. On the issue of religious preference raised by the University, *amicus* cites the familiar principle stated in *McGowan v. Maryland,* 366 U. S. 420 (1961), that a statute's disparate impact among religions is permissible where caused merely by the statute's happening to co-

incide with the beliefs of some of them. Br. A. 67. Here, however, one religious body, among all § 501(c)(3) religious organizations, is denied tax-exempt status precisely because of its adherence to a particular religiously dictated practice. § 501(c)(3) has the effect, under *amicus'* reading thereof, of causing those religious groups whose theology is compatible with that reading to avoid being taxed while causing those whose theology is not thus compatible to be subjected to tax. If it be established principle that every religious body must "be equally at liberty to exercise and propagate its beliefs" *Larson v. Valente, supra*, at 1683, then it is clear that Bob Jones University, if held subject to taxation, would be unconstitutionally disadvantaged relatively to conforming § 501 (c)(3) religious bodies.

CONCLUSION

For all of the foregoing reasons, as well as for the reasons stated in Brief For Petitioner, Bob Jones University, it is respectfully requested that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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