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

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys, law professors, and law students. Today it includes over 3,500 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in

1975 to protect and promote the freedom of Christians and others in the exercise of their religious beliefs.

The Center sees in the decision below a serious threat to religious liberty. Accordingly, the Center seeks to describe the principles that should apply to the protection of religious liberty in the context of this case. The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

ARGUMENT

The decision below, if allowed to stand, would endanger religious liberty in two ways. First, the decision expands the range of governmental interests that can override a religious conviction, by making an ill-defined concept of "public policy" paramount over religious liberty. This standard dilutes the substantive protection of free exercise. Second, the decision allows the infringement of religious liberty by administrative and judicial fiat, when Congress has yet to pass a law requiring or permitting such infringement. The decision thus abandons the procedural protection that the system of separate and balanced powers was meant to provide for religious liberty as well as all other liberties. Amicus will discuss first the substantive aspect of this case, and second the procedural aspect.

I. THE DENIAL OF TAX EXEMPT STATUS TO THE PETITIONER UNIVERSITY VIOLATES ITS FREE EXERCISE OF RELIGION.

A. THE DENIAL OF TAX EXEMPT STATUS INFRINGES UPON THE UNIVERSITY'S SINCERELY HELD RELIGIOUS BELIEF.

The unchallenged factual findings of the district court establish for purposes of this case that petitioner Bob Jones University acts on the basis of a religious conviction in excluding students who date or marry persons of a dif-

ferent race. The district court found that the University's beliefs against interracial dating and marriage are "genuine religious beliefs," which are based on the University's interpretation of the Bible. *Bob Jones University* v. *United States* 468 F. Supp. 890, 894 (D.S.C. 1978). The court found that the University was a "distinct religious organization" which screens its students to ensure that they comply with the University's religious-based rules. *Id.* at 894-95. In providing for the expulsion of students who violate the rules against interracial marriage and dating, the University engages in "the practice of its religious convictions." *Id.* at 898. The court of appeals found no error in these findings. *Bob Jones University* v. *United States,* 639 F.2d 147, 149, 153 (4th Cir. 1980). Thus for the Government to coerce the University to admit students who marry or date persons of a different race constitutes an infringement of a sincerely held religious belief.[1]

Whatever one may think of the University's beliefs,[2] any

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[1] The court of appeals intimated that even if the Government forced the University to abandon its policy, no infringement of religious belief would result, because the University would remain free to believe and teach against interracial marriage and dating. But the unchallenged factual findings of the district court establish that the University's policy on interracial dating and marriage is a matter of religious conviction. The first amendment protects not only one's religious beliefs, but one's right to act in accordance with them. Otherwise the right to believe would be of little worth. Therefore, the first amendment issue in this case cannot be avoided by the Government's suggestion that the Internal Revenue Service "did not encroach upon any activity entitled to affirmative constitutional protection." Brief for the United States, on Petitions for Writs of Certiorari, at 14.

[2] Amicus does not subscribe to or condone the University's beliefs in question here. The truth or falsity of the University's beliefs is not relevant here. *United States* v. *Ballard,* 322 U.S. 78, 87 (1944). Amicus deems this case to be crucial because diluted constitutional protection for unpopular religious beliefs dilutes protection for all religious beliefs.

religious belief which is sincerely held enjoys the protection of the free exercise clause. The first amendment guarantees not only the abstract right to believe, but the concrete right to act on one's beliefs. *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-04 (1940). Government may neither prohibit nor severely burden the exercise of one's beliefs:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Thomas v. *Review Board,* 101 S. Ct. 1425, 1432 (1981). *See Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963). The denial of tax exempt status to any private university that relies heavily on tax deductible contributions is obviously a heavy burden and severe infringement on free exercise.

B. THE GOVERNMENT HAS NOT SHOWN A COMPELLING STATE INTEREST OF THE HIGHEST ORDER.

This Court has allowed infringement of religious beliefs only when necessary to a compelling state interest "of the highest order." *Wisconsin* v. *Yoder,* 406 U.S. 205, 215 (1972). The paramount importance of freedom of religion demands that the category of compelling interests be narrowly confined within clear limits. Decisions of this Court have staked out the appropriately narrow limits of this category. Thus, the Court has allowed infringement of sincere religious beliefs when necessary to preserve the public order against a practice, polygamy, deemed "subversive of good order," *Reynolds* v. *United States,* 98 U.S. 145, 164 (1879); when necessary to raise armed forces to defend the country, *Gillette* v. *United States,* 401 U.S. 437, 462

(1971); or when necessary to prevent "harm to the physical or mental health" of children, or harm to the "public safety, peace, order, or welfare," *Wisconsin* v. *Yoder, supra,* 406 U.S. at 230. *See also Prince* v. *Massachusetts,* 321 U.S. 158, 169-70 (1944). By contrast, the Court has upheld religious liberty claims even against such a strong governmental interest as the universal education of children. *Wisconsin* v. *Yoder, supra,* 406 U.S. at 234.

The decision below expands the category of compelling interests to a dangerous extent. The earlier precedents have all involved substantial threats to public safety, order, or peace. *Sherbert* v. *Verner, supra,* 374-U.S. at 403. Only the most serious danger could possible outweigh the paramount value of preserving inviolate each person's conscience, however misguided that conscience may be in a particular case.

The "public policy" standard advanced by the Internal Revenue Service, however, substitutes a vague and easily expanded standard in place of the narrow limits set by this Court. "Public policy" goes far beyond the objective dangers to public safety and order, to include the subjective opinions of electoral majorities and policy-making elites as to what constitutes wise social policy. At the core of the first amendment is the protection of ideas and related actions that are contrary to the prevailing orthodoxy. But a "public policy" standard would allow the prevailing orthodoxy to justify regulation of dissenting ideas and actions. Thus, the "public policy" standard threatens to condone infringement of precisely those religious beliefs that may be most out of step with public opinion and therefore most in need of constitutional protection.

The present case appears difficult because the public policy at issue is so laudable. But a justifiable desire to affirm this policy must not ignore the proper standard for judging an infringement of religious liberty. The decisive point in this case is that the University's exercise of its beliefs

does not threaten public safety, order, peace, or health.

Disagreement with the University's policy should not be resolved by the infringement of a sincere religious belief. Nor should those who disagree with the University's interpretation of Scripture seek to establish their own view toward interracial marriage as the only one acceptable for tax exempt religious organizations. The University's policy is one of the costs of a pluralistic system of religious liberty. To prevent the Government from suppressing the University's policy is not to advocate Government support for discrimination, but simply to affirm the principle of constitutional protection for the free exercise of unpopular beliefs.

C. TO ELEVATE PUBLIC POLICY ABOVE RELIGIOUS LIBERTY WOULD THREATEN OTHER RELIGIOUS PRACTICES.

The decision below opens the way to denial of tax exempt status not only for schools, but also for churches whose sincerely held beliefs may discriminate against minorities. The district court found that the University was not only a school but a "distinct religious organization." 468 F. Supp. at 895. The reasoning of the court of appeals allows "public policy" to override the religious convictions of any organization, whether church or school, when those convictions require exclusion of persons according to racially discriminatory criteria. If the decision below is allowed to stand, it will simply require a pronouncement by the Internal Revenue Service to eliminate tax exempt status for all churches that exclude or expel members for interracial marriage or dating. The goal of ending racial discrimination should not be achieved at the expense of suppressing sincerely held religious beliefs and practices.

The prevention of racial discrimination is only one of a number of public policies that could come into conflict with religious convictions of churches and individual be-

lievers. Other tax exempt churches and religious groups make demands that often require their members to surrender certain constitutional rights, just as Bob Jones University requires its students to abandon for a time their constitutional right to marry someone of another race, (*Loving v. Virginia,* 388 U.S. 1, 12 (1967)). For example, the Roman Catholic Church requires those entering the priesthood or religious orders to abandon completely the constitutional right to marry, (*Zablocki* v. *Redhail,* 434 U.S. 374, 383-84 (1978). Moreover, any religious group that opposes abortion may well choose to exclude from membership any woman who exercises her "constitutional right" declared in *Roe* v. *Wade,* 410 U.S. 113, 154 (1973).

The court of appeals opinion thus invites a head-on clash of public policy against sincerely held religious convictions across a potentially broad front. Such a clash need not occur and, under the first amendment, should not occur. The clash has occurred in this case only because the court of appeals assumed that public policy automatically applies to the whole realm of society and governs the tax exempt status of private institutions, whether or not those institutions dissent from a public policy out of religious conviction. *See* 639 F.2d at 153. But the anti-discrimination policy of the fourteenth amendment applies to the sphere of *governmental* action. This anti-discrimination policy has been extended to private action for selected matters, including the sale of private housing (Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.* (1976)), the formation of contracts (42 U.S.C. § 1981), and the admission of students to schools other than "sectarian" schools (*Runyon* v. *McCrary,* 427 U.S. 160 (1976)). But this policy has not been extended to *all* private action. *See Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972).

It is a mistake to assume that a public policy automatically applies to all private conduct, especially when the conduct is mandated by religious conviction. A public policy can be applied to the most important spheres of private con-

duct, while leaving other spheres free for the exercise of dissenting views. The decision whether to extend the anti-discrimination policy to particular spheres of private conduct has been made in the past on the basis of *legislation.* Because of the sensitive interest in liberty for religious groups that dissent from prevailing public policy, we must insure that such policies are extended into the sphere of private conduct of religious institutions *only* by a deliberate act of the legislature. Such procedural considerations are essential to the security of religious liberties and are addressed in detail in the following section.

II. RELIGIOUS LIBERTY MAY NOT BE INFRINGED BY ADMINISTRATIVE OR JUDICIAL ACTION ABSENT CLEAR STATUTORY AUTHORIZATION.

Even if the elimination of racial discrimination by religious organizations were a compelling interest of the highest order, the Government cannot impose such a public policy by administrative action without clear authorization by statute. Agencies and courts may not strain to reach statutory interpretations that infringe religious liberty. On the contrary, Congress is presumed not to intend to infringe any constitutional liberty unless it expressly so provides by statute. Unless explicitly authorized by Congress, an agency's decision to infringe free exercise must therefore be struck down by this Court.

A. THE DECISION BELOW FAILED TO CONSTRUE THE GOVERNING STATUTES TO AVOID DIFFICULT CONSTITUTIONAL QUESTIONS.

It is an established principle that statutes are to be construed, if possible, to avoid constitutional difficulties:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitution-

> ality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. *Benson*, 285 U.S. 22, 62 (1932). *Accord*, *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979); *Curtis* v. *Loether*, 415 U.S. 189, 192 n.6 (1974); *Machinists* v. *Street*, 367 U.S. 740, 749-50 (1961); *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

Before an agency may regulate the exercise of a constitutionally protected right, there must be a clear expression of congressional intent to regulate that activity. *United States* v. *Robel*, 389 U.S. 258, 277 (1967) (Brennan, J., concurring); *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959); *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958). Because the rights protected by the religion clauses are such vital liberties, courts should examine with special concern any infringements of religious convictions that are not grounded upon a clear expression of congressional intent. This Court has held that, "in the absence of a clear expression of Congress' intent . . ., we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

There is no statute that revokes or denies tax exempt status for religious organizations that discriminate on the basis of race. The court of appeals rested on the Constitution's prohibition of racial discrimination (639 F.2d at 151), even though the fifth and fourteenth amendments affect only governmental discrimination, not discrimination by religious organizations. The court also spoke of a policy against "subsidizing" racial discrimination in education, *id.*; but a tax exemption is fundamentally different from a subsidy, and does not connote government sponsorship. *Walz*

v. *Tax Commission,* 397 U.S. 664, 672-75 (1970); *id.* at 690 (Brennan, J., concurring).

The court of appeals further relied on the 1866 Civil Rights Act, 42 U.S.C. § 1981, which has been held to prohibit racial discrimination in private school admission policies. *Runyon* v. *McCrary,* 427 U.S. 160 (1976). But that decision expressly refused to decide whether section 1981 can be construed to override such admission policies for religious organizations. However section 1981 may be interpreted, it does not pertain to tax exemptions or provide for denial of tax exempt status as a remedy for a violation of section 1981. Moreover, the policy protecting interracial marriage, *Loving* v. *Virginia,* 388 U.S. 1 (1967), applies only to governmental action and has never before had any effect on the tax exempt status of private organizations.

The only statute that clearly applies to the question of tax exemption for the petitioner University is 26 U.S.C. § 501(c)(3), which grants tax exempt status to any organization that is organized and operated for any of eight enumerated purposes, including religious, educational, or charitable. The district court made the undisputed finding that the University is educational and religious within the meaning of this statutory provision. Since the statute contains no qualifying terms concerning racial discrimination or any other public policy,[a] the plain terms of the statute confer tax exempt status on the University.

Section 501(c)(3) must be construed, whenever possible, to avoid infringing religious liberty. Such construction is easily achieved in this case by applying the plain words of the statute. The court below violated a governing principle of statutory construction by rejecting the constitutionally sound plain meaning of the statute in favor of a constitution-

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[a] The only additional qualifications imposed by statute are that a tax exempt organization be nonprofit and not engage substantially in efforts to influence legislation. 26 U.S.C. §§ 170, 501 (1976).

ally questionable inferential meaning. Strict statutory construction is imperative when religious liberties are at stake.

B. THE GOVERNMENT'S POSITION WOULD VEST AN AGENCY WITH UNCONSTITUTIONALLY BROAD DISCRETION TO INFRINGE A CONSTITUTIONAL RIGHT.

Even if Congress *had* given the Internal Revenue Service authority to define public policies and to deny tax exempt status to organizations that violate those policies, such a system would be unconstitutional. The doctrine against delegation of legislative power is applicable when broad administrative discretion would threaten constitutional liberties. In such instances, liberty is best protected when decisions are made by an elected body responsible to the people.

> The need for a legislative judgment is especially acute here, since it is imperative when liberty and the exercise of fundamental freedoms are involved that constitutional rights not be unduly infringed.

United States v. *Robel, supra,* 389 U.S. at 277 (Brennan, J., concurring) (citing *Cantwell* v. *Connecticut, supra,* 310 U.S. at 304). Decisions of great constitutional import—such as the infringement of a religious conviction—must not be "relegated by default to administrators." *Greene* v. *McElroy, supra,* 360 U.S. at 507.

Without any clear guidance from Congress, the Internal Revenue Service has taken upon itself to decide whether the federal policy against racial discrimination applies to religious institutions, to decide whether that policy should be implemented by means of a denial of tax exempt status, and to decide whether that policy can override religious convictions protected by the first amendment. Such a role for an agency represents the most extreme form of overbroad delegation in the most sensitive legislative area

of all. The potential for abuse and oppression in this procedural system is enormous.[4]

The delegation of legislative power to an agency without statutory guidance runs the risk of arbitrary and oppressive enforcement by administrative officials. The potential for abuse is even greater when the agency asserts that it possesses delegated authority to ascertain and apply such a vague and all-inclusive concept as "public policy." If the Government's position is allowed, the meaning of "public policy" would be resolved on an ad hoc, subjective basis by agencies and courts. *Cf. Grayned* v. *City of Rockford,* 408 U.S. 104, 108-09 (1972). This breadth of discretion would invite public officials "to determine which expressions of view will be permitted and which will not. . . ." *Cox* v. *Louisiana,* 379 U.S. 536, 557 (1965). *See Cantwell* v. *Connecticut, supra,* 310 U.S. at 305-06.

The constitutional procedure for denying tax exempt status to religious institutions that discriminate on the basis of race would be for Congress so to provide by statute. Such a statute would still have to be reviewed to see if it was justified by a compelling interest as described in Part I, *supra.* But the Government procedure in the present case cannot possibly pass constitutional muster. The court of appeals decision threatens to impose a lesser procedural standard for this religious freedom case than is applied by this Court to other cases of agency discretion to infringe constitutional liberties. The free exercise of religion demands procedural protection *at least* equal to other liberties.

The proper constitutional standards applicable to this

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[4] To the extent the Internal Revenue Service may have been forced into such a role by the decision in *Green* v. *Connally,* 330 F. Supp. 1150 (1971), *aff'd. per curiam,* 404 U.S. 997 (1971), the validity of that decision must be questioned. The district court in that case, however, did not address the issue of tax exemption for schools whose racially restrictive admissions policies are based on a sincere religious belief. *Id.* at 1169.

case are well summarized in the legislative history of the Ashbrook Amendment, Pub. L. No. 96-74, § 103, 93 Stat. 559 (1979). This amendment specifically addressed an attempt by the Internal Revenue Service to control racial policies of private schools by regulating their tax exempt status. The legislative history persuasively confirms the analysis set forth herein. The House Committee Report states:

> On August 22, 1978 and on February 9, 1979, the Internal Revenue Service issued proposed revenue procedure relating to the tax exempt status of private schools. At present the legislative oversight committees of both the House and Senate are considering these proposals. This Committee, too, is concerned about the Internal Revenue Service issuing revenue procedures in an area where legislation may be more appropriate. The responsibility of the Internal Revenue Service is to enforce the tax laws. The purpose of the Internal Revenue Service revenue procedures ought to be to clarify these laws, not to expand them. The issue of tax exempt status of private schools is a matter of far reaching social significance and the Service ought to issue revenue procedures in this area only when the legislative intent is fairly explicit. The Appropriations Committee is unsure that the proposed revenue procedures issued by the Service are the proper expression of that legislative intent. The Committee believes that the Service ought not issue these revenue procedures until the appropriate legislative committees have had a chance to evaluate them and make the determination that the proposed revenue procedures are a proper expression of the tax laws.

H. R. Rep. No. 248, 96th Cong., 1st Sess. 14-15, (1979).

Congressman Ashbrook, the sponsor of the Amendment, stated:

> For the administrative branch to create such a policy without direction from Congress is a violation of the doctrine of the separation of powers.
>
> * * * *

> So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS or any other branch of the Federal Government to seek denial of tax-exempt status. . . .
>
> Such policy determinations, when made without the action of Congress, become dangerous encroachments upon congressional authority. *Although the Tax Code has often been termed to be an instrument of social policy, it properly becomes such only upon action or lack of action by the Congress.*

Cong. Record, 96th Cong., 1st Sess. H5879-80 (daily edition, July 13, 1979) (emphasis added).

Thus, the denial of tax exempt status by the Internal Revenue Service constitutes administrative action in an area of constitutional rights in which the Congress, not the agency, has the power and the duty to act. Furthermore, the Congress has demonstrated on record an intention to act to resolve the conflict through the legislative process. In these circumstances, to uphold the action of the Internal Revenue Service would be to authorize a breach of the principle of the separation of powers.

CONCLUSION

For the protection of religious liberty from both the substantive and the procedural threats posed by the decision below, amicus respectfully requests this Court to reverse the decision of the court of appeals.

Respectfully submitted,

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