No.

IN THE

Supreme Court of the United States

October Term, 1980

BOB JONES UNIVERSITY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

A non-tax-funded pervasively religious institution which had been recognized as tax-exempt under § 501 (c)(3) of the Internal Revenue Code holds a primary religious conviction that interracial dating and marriage are contrary to Scripture. On the grounds that § 501 (c)(3) allows tax-exempt status solely to organizations which are "charitable" in the common law sense, and that the institution's policy implementing that religious belief violates "public policy", the IRS revoked its recognition of the institution's tax-exempt status.

1. Did the Congress, in § 501(c)(3), require that an organization, regardless of whether it is organized and operated exclusively for religious purposes, nonetheless be "charitable" in the common law sense?

2. Did revocation of recognition of the institution's tax-exempt status violate rights of the institution protected by the Free Exercise Clause of the First Amendment?

3. Did the requirement of IRS, that, to be tax-exempt, a religious organization must stay in step with "expressed federal policy", as defined by IRS, violate the Establishment Clause of the First Amendment?

4. Did denial by IRS of tax-exempt status to the institution deprive it of liberty and property without due process of law contrary to the Fifth Amendment?

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 30, 1980 (as corrected January 19, 1981).

1. The caption of the Court of Appeals opinion lists three cases, No. 79-1215 (*Bob Jones University v. United States of America*), No. 79-1216 (*Bob Jones University v. United States of America*), and No. 79-1293 (*Bob Jones University v. W. Michael Blumenthal, Secretary of the Treasury and Jerome Kurtz, Commissioner of Internal Revenue*). The first was the Government's appeal from the District Court's order of December 26, 1978; the second, its appeal from the District Court's order of February 28, 1979, protecting a document sought as evidence; the third, from the District Court's order of May 14, 1979, requiring, pursuant to its order of December 26, 1978, restoration of Bob Jones University as an organization exempt from taxation. The petitioner here has combined these cases in a single caption.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, which appears as Appendix A hereto, is reported at 639 F. 2d 147 (1980). The dissenting opinion in that court appears as Appendix B. The opinion of the United States District Court for the District of South Carolina, Greenville Division, appealed from in No. 79-1215 in the Court of Appeals, and which appears as Appendix C hereto, is reported at 468 F. Supp. 890 (1978). The Opinion of the United States District Court for the District of South Carolina, Greenville Division, appealed from in No. 79-1293 in the Court of Appeals, and which appears as Appendix D hereto, is unreported.

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the Fourth Circuit on December 30, 1980. A petition for rehearing was denied April 8, 1981. The jurisdiction of this Court is invoked under Title 28 of the United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

U. S. Constitution, Amendment V:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."

Internal Revenue Code:

"*Sec. 501. Exemption from tax on corporations, certain trusts, etc.*

"(a) *Exemption from taxation.*—An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle. . . .

* * *

"(c) *List of exempt organizations.*—The following organizations are referred to in subsection (a):

* * *

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

"*Sec. 3306. Definitions.*

"(c) *Employment.*—For purposes of this chapter, the term 'employment' means . . . (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, . . . except—

* * *

"(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);"

STATEMENT OF THE CASE

Petitioner, Bob Jones University,[2] brought this action against the United States, pursuant to 28 U. S. C. § 1346, to recover $21.00 which it had paid in taxes under the Federal Unemployment Tax Act. The Government counterclaimed for approximately $490,000.00 in unemployment taxes, plus interest, allegedly due it on returns filed by the University for the years 1971 through 1975.

At issue was the revocation by the Internal Revenue Service of its recognition of the status of the University as an exempt organization under § 501(c)(3) of the Internal Revenue Code. The revocation resulted from the University's enforcement of its religious teachings concerning interracial marriage.[3] IRS contended that § 501 (c)(3) exempts only organizations which are "charitable" in nature (and that whether the University was religious in purpose and character was irrelevant); that an organization which violates federal policy may not be considered to be charitable in nature; that the University's policy on interracial marriage violated federal public policy. The District Court, both on statutory and First Amendment grounds, held that the Government was without authority to revoke its recognition of the tax-exempt status of the University. The Court of Appeals reversed, holding that the Internal Revenue Service had statutory authority for

2. 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).

3. Prior to September, 1971, that enforcement took the form of barring admission of black students. (I Appendix in Court of Appeals, Nos. 79-1215 and 79-1216, 91). After that date married black students were admitted, and, since May, 1975, a completely open admissions policy has been in effect. Restrictions on interracial dating and marriage among students continue to exist.

its action and that that action did not violate First Amendment rights of the University. Judge Widener, of the Court of Appeals, dissented.[4]

The trial court, noting that the University accepts no financial support from local, state or federal government (468 F. Supp. at 894), made findings of fact with respect to (a) the University's religious character and (b) its related religious beliefs on dating and marriage.

The trial court found the University's religious character to be pervasive and central to its existence:

> "The plaintiff [University] is dedicated to the teaching and propagation of its fundamentalist religious beliefs. Everything taught at plaintiff is taught according to the Bible . . . . The cornerstone of plaintiff institution is Christian religious indoctrination, not isolated academics."
> *Id.* at 894.

Nearly half of the University's 5,000 students are studying for the ministry or otherwise preparing for Christian service. *Ibid.* Prayer is an enjoined and constant practice among the student body. *Ibid.* Every teacher is required to be a "born again" Christian who must testify to a saving experience with Jesus Christ. Every teacher must consider his or her mission at the University to be the training of

4. Back of this litigation lies the litigation considered by this Court in *Bob Jones University v. Simon*, 416 U. S. 725 (1974), wherein the Court had held that the Anti-Injunction Act (26 U. S. C. § 7421(a)) prohibited the University from obtaining judicial review, through an injunction action, of revocation by IRS of the University's tax-exempt status. There the Court had suggested that a proper procedure for the University to gain judicial review would be to pay ". . . an installment of FICA and FUTA taxes, exhaust the Service's internal refund procedures, and then bring suit for the refund." *Id.* at 746.

Christian character. *Ibid.* Students are screened as to their religious beliefs, and a multitude of religious disciplinary rules address "almost every facet of a student's life." *Ibid.* Worldly amusements, such as dancing, use of tobacco, movie-going, and listening to jazz or rock music are prohibited. *Ibid.*

The Court of Appeals did not dispute these findings.

With respect to the second area of findings, the University's policy regarding dating and marriage, the trial court found:

> "A primary fundamentalist conviction of the plaintiff is that the Scriptures forbid interracial dating and marriage. Detailed testimony was presented at trial elucidating the Biblical foundation for these beliefs. The Court finds that the defendant [the Government] has admitted that plaintiff's [the University's] beliefs against interracial dating and marriage are genuine religious beliefs." *Ibid.*

The Court of Appeals did not dispute this finding, but rather affirmed it:

> "Bob Jones University believes that the Scriptures forbid interracial marriage and dating." 639 F. 2d at 149.

The decision of the Court of Appeals was based upon four conclusions of law:

1. That the district court's reading of the separate references, in Section 501(c)(3), to eight different types of organizations which are entitled to tax-exempt treatment ("religious", "charitable", "scientific", etc.) was "simplistic", in that the three-judge court in *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),

had reasoned that the listed eight types of organizations were *all* required to meet the common law definition of "charitable". 639 F. 2d at 151. Thus it was of no significance that the University had been found, as a matter of fact, to be "religious".

2. That the University could not qualify as a "charitable" organization if it violated "public policy". The University violated public policy by its enforcement of its beliefs relating to marriage "specifically, the government policy against subsidizing racial discrimination in education, public or private." *Ibid.* This policy the court found to be "formalized" in several IRS rulings (Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158). *Id.* at 150.

3. That, assuming that the revocation of the University's tax-exempt status did to an extent impinge upon the University's freedom to practice religion, "[t]he government's interest in eliminating all forms of racial discrimination is compelling." *Id.* at 153. Thus its action did not violate the Free Exercise Clause.

4. That, due to the compelling state interest in enforcement of nondiscrimination, the government's action did not create Establishment Clause violation by advancing those religions which would "stay in step" with the "expressed federal policy" of nondiscrimination. Further, since the only inquiry which government would make of the University would be "whether the institution maintains racially neutral policies", no excessive entanglements would be created. *Id.* at 154-155.

The dissenting opinion, pointing to the district court's findings respecting the religious nature of the University, as well as to language of this Court in *Bob Jones University*

v. Simon, 416 U. S. 725, 734 (1974),[5] concluded that "Bob Jones University is a religious organization" and stated:

> "We are dealing in this case not with the right of the government to interfere in the internal affairs of a school operated by a church, but with the internal affairs of the church itself. There is no difference in this case between the government's right to take away Bob Jones' tax exemption and the government's right to take away the exemption of a church which has a rule of its internal doctrine or discipline based on race, although this church may not operate a school at all." 639 F. 2d at 156.

The dissent stated that the majority, the IRS, and the district court in *Green v. Connally*, had misconstrued Section 501(c)(3) by insisting that all the eight types of organizations listed therein be common law "charitable" organizations. *Id.* at 156, 157, 158. Instead Congress, by employing the common technique of legislating in the disjunctive,[6] provided that each of the eight classes be tax-exempt. Since the University falls within one of these classes ("religious"), it is exempt, and IRS cannot take away the exemption granted by Congress. The dissent denied that tax exemption to an institution constitutes "subsidizing" it (*ibid.*), and concluded that the public policy of the nation favoring freedom of religion may not be made subordinate to a public policy against discrimination on account of race in private, non-tax-funded religious institutions. *Id.* at 158-164.

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5. "The university is devoted to the teaching and propagation of its fundamentalist religious beliefs."

6. "Each of these [the eight types of organizations] is a distinct and separate category. By the rules of statutory construction as well as common sense, the word 'or' must be read after each of the listed categories." *Id.* at 157.

REASONS FOR GRANTING THE WRIT

I. The Case Presents Important Questions of Federal Law Not Yet Settled by This Court

As the dissenting opinion correctly states, "This is a case of first impression so far as the Supreme Court is concerned . . ." 639 F. 2d at 158. The questions of federal law involved in this case are of national importance:

1. The Court of Appeals has misconstrued that act of Congress (Section 501(c)(3)) on which depends the tax exemption of every organization organized exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster international amateur sports competition, or for the prevention of cruelty to children or animals. All, according to that court, must meet the common law definition of "charitable" (*id.* at 151), despite the fact that the term, "charitable", appears as a separate category of exempt organization in Section 501(c)(3). This is plain error, in that the words of the statute, interpreted in their ordinary, everyday sense (*Malat v. Riddell*, 383 U. S. 569, 571 (1966)), show that the Congress did not impose such a limitation or confer upon the Secretary of the Treasury any power to devise such a limitation.[7] The relevant statutory history supports no such construction,[8] but indeed militates against it.[9]

7. Where substantial constitutional issues under the Religion Clauses of the First Amendment arise by virtue of the extension, to religious institutions, of a federal statutory requirement, this Court has held that the extension must not be left to implication, but instead must be "clearly and affirmatively expressed" by the Congress. *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979).

8. The Court of Appeals at page 151 states: "The legislative history of § 501(c)(3) verifies the exemption's foundation in public policy". The court then cites as its authority "H. R. Rep. No. 1820,

2. All religious institutions in the United States are potentially threatened by a rule of law such as the Fourth Circuit has pronounced which would cause the protective barrier of their tax exemption to be breached because of their failure to conform to "public policy". This adverse effect is here accentuated by the fact that the "public policy" in question is without legislative definition; what it means and whether there is conformity to that meaning is left to the unlimited discretion of the Internal Revenue Service. 639 F. 2d at 149-150. While this rule of law as applied by the Fourth Circuit in the premises violates petitioner's religious liberty, and rights to due process of law, it also, by its "lacking in 'terms susceptible of objective measurement'," becomes "a highly efficient in terrorem mechanism" for inducing conformity of churches and other religious bodies to the will of governmental administrators.

8. (Cont'd.)

75th Cong. 3d Sess. 19 (1939)", from which it quotes at length. The reference is utterly erroneous. The actual House Report in which the quotation is found is No. 1860, not 1820. The year of the Report was 1938 not 1939. The Report did not deal at all with charitable *exemptions* but with charitable *deductions*, the quoted language relating to Section 23(q) of the Revenue Act of 1938 (which was incorporated into Section 170 of the Internal Revenue Code) and not to Section 501(c)(3) (or Section 101 of the 1938 Revenue Act) which dealt with charitable exemption.

9. As IRS itself flatly stated in I. T. 1800, II-2 C. B. 151 (1923): "It seems obvious that the intent must have been to use the word 'charitable' in Section 236(b) [the precursor of Section 501(c)(3)] in its more restricted and common meaning and not to include either religious, scientific, literary, educational, civic or social welfare organizations. Otherwise, the word "charitable" would have been used by itself as an all-inclusive term, for in its broadest sense it includes all of the specific purposes enumerated. That the word "charitable" was used in a restricted sense is also shown from its position in the section. The language is "religious, charitable, scientific, literary, or educational. . . ."

Keyishian v. Board of Regents of New York, 385 U. S. 589, 604, 601 (1967).

3. The Court of Appeals broadly holds, as a matter of law, that there is a compelling governmental interest in "eliminating all forms of racial discrimination in education" even though that would collide with the exercise of religious liberty. 639 F. 2d at 153. The Supreme Court has never so held. The question is one of obvious importance. On the basis of this ill-defined public policy, IRS has, for example, sought to impose on religious schools a widely noted Revenue Procedure whereby tax exemption would be denied to such schools solely on the basis of racial criteria and without regard to religious criteria. PROPOSED REVENUE PROCEDURE ON PRIVATE TAX-EXEMPT SCHOOLS, 43 Fed. Reg. 37296 (1978). Thereunder a religious school (*e.g.*, Old Order Amish or Orthodox Jewish) would be presumed racially discriminatory (and hence not tax-exempt) even though it could not, for the clearest *religious* reasons, engage in recruiting or staffing solely on the basis of race and without regard to the most binding obligations of faith.

II. The Decision Below Is in Conflict With Applicable Principles Established by This Court

While, as a case of first impression, the decision below does not represent a direct conflict with a particular decision of the Supreme Court, it states principles which ignore, or are opposed to, basic principles which this Court has established in its previous decisions:

1. The Court of Appeals treats *Green v. Connally*, *supra*, as the fundamental justification for the power of IRS to deny recognition of tax-exempt status to a religious organization which is deemed to violate "public policy".[10]

10. While the Supreme Court summarily affirmed the district court's decision *sub nom. Coit v. Green*, *supra*, it later explained

Green,[11] as interpreted by the Court of Appeals and by IRS, makes the religious nature of an organization irrelevant where its tax exemption is challenged, since the sole question is whether it is "charitable" (and accordingly in step with "public policy"). Under that view, it is also therefore irrelevant that the denial of tax exemption would cripple a religious ministry, render the existence of a religious institution impossible, or give rise to Establishment Clause problems. Yet this Court has held religious liberty to be a "preferred" freedom, *Murdock v. Pennsylvania*, 319 U. S. 105, 115 (1943), and free religious exercise a "transcendent value". *Norwood v. Harrison*, 413 U. S. 455, 469 (1973). The Court of Appeals' reading of Section 501(c)(3), by ignoring the special constitutional character of a religious organization and classifying it as a common law "charitable" organization, would render irrelevant the Supreme Court's decisions laying down controlling principles under the Free Exercise Clause. Substituted would be merely the single determination: Has the organization violated "public policy"?

Further, this Court has held that legislation which gives preference to one religion over another, *School District of Abington Township v. Schempp*, 374 U. S. 203, 216 (1963), or which has the effect of vitiating government neutrality in matters of religious theory, doctrine or practice, *Epperson v. Arkansas*, 393 U. S. 97, 103-104 (1968), or which excessively entangles religion and government,

10. (Cont'd.)

in *Bob Jones University v. Simon*, 416 U. S. 725, 740, n. 11 (1974), that that affirmance lacked precedential weight because no adversarial controversy remained in *Green* by the time the case reached this Court.

11. No religious entities were parties in *Green*, and no issues under the Religion Clauses of the First Amendment were raised or litigated in that case.

Lemon v. Kurtzman, 403 U. S. 602 (1971), violates the Establishment Clause. If government is allowed to prescribe a minimum floor of acceptable church doctrine—that is, the absence of certain disfavored religious beliefs—by use of the mechanism of taxation of those churches which hold and practice contrary beliefs, then the command of the Establishment Clause that no doctrine be preferred by government, and that government not be "hostile to any religion", *Epperson, supra,* at 104, has been set aside, without the approval of this Court. Too, there was no adequate examination by the Court of Appeals of the special problem of the entanglements between government and religion which the IRS requirement that a church "maintain" a nondiscrimination policy necessarily entails. The IRS does not intend that a church merely *state* such a policy, it intends that a church *practice* such a policy. It is the government surveillance of the practice of nondiscrimination which "entangles the state in details of administration", *Lemon, supra,* at 615, and involves government and religion in "administrative relationships for enforcement of statutory or administrative standards", *id.* at 621, thereby breaching the Establishment Clause prohibition against excessive church-state entanglement.

2. The Court of Appeals not only ignores principles enunciated by the Supreme Court; it contradicts them. This Court has found a compelling governmental interest justifying denial of religious liberty in only a handful of cases (*e.g., Reynolds v. United States,* 98 U. S. 145 (1879), *Jacobson v. Massachusetts,* 197 U. S. 11 (1905), *Prince v. Commonwealth of Massachusetts,* 321 U. S. 158 (1944)). The broad proposition now given by the Fourth Circuit, that anything labelable as "racial discrimination" automatically overrides the right and duty to live by clearly established religious principle, has been, until the decision below, unheard of and would render meaningless the test

for Free Exercise violation so clearly stated in *Sherbert v. Verner*, 374 U. S. 398, 406 (1963), and *Wisconsin v. Yoder*, 406 U. S. 205, 215 (1972). Under that proposition, an institution which would not exist except for its religious mission, and which is a pervasively religious organization (*e.g.*, a school which is Orthodox Jewish, Mennonite, Roman Catholic, Seventh-day Adventist or fundamentalist Christian) could virtually be denied existence on account of refusal, necessitated by a commitment to the primacy of religious considerations, to admit students on the basis solely of racial criteria.

The Court of Appeals has also contradicted principles enunciated by the Supreme Court in the latter's Establishment Clause decisions. The thesis of the Court of Appeals is that, in the matter of race, religions *are* required to "stay in step with expressed federal policy", even though ordinarily "[t]he Establishment Clause protects against such intrusion." 639 F.2d at 154. This is said to be because "the Establishment Clause does not prevent government from enforcing its most fundamental and societal values by means of a uniform policy, neutrally applied." In other words, national policy, as given in the Establishment Clause, must always yield to whatever is administratively determined to be "federal policy". That is so, even though the result is to accord tax exemption only to those religions which are willing to conform to the will of government agents who define "federal policy", but to deny tax-exempt status to the religious organization which is doctrinally disabled to conform. This plainly contradicts principles explicated by the Supreme Court condemning "compulsory unification of opinion",[12] upholding the right to maintain religious beliefs despised by others,[13] and

12. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641 (1943).

13. *United States v. Ballard*, 322 U. S. 78, 87 (1944).

invalidating governmental action which pressures religious bodies to conform their organization or polity to governmental prescriptions.[14]

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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14. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U. S. 696-709 (1976).

APPENDIX A

Opinion of the United States Court of Appeals for the Fourth Circuit

United States Court of Appeals,
Fourth Circuit.

Nos. 79-1215, 79-1216 and 79-1293.

BOB JONES UNIVERSITY,
Appellee,

v.

UNITED STATES of America,
Appellant.

BOB JONES UNIVERSITY,
Appellee,

v.

UNITED STATES of America,
Appellant.

BOB JONES UNIVERSITY,
Appellee,

v.

W. Michael BLUMENTHAL, Secretary of the Treasury and Jerome Kurtz, Commissioner of Internal Revenue,
Appellants.

Argued March 3, 1980.
Decided Dec. 30, 1980.
As Corrected Jan. 19, 1981.

Leonard J. Henzke, Jr., Tax Div., Dept. of Justice, Washington, D. C. (M. Carr Ferguson, Asst. Atty. Gen., Washington, D. C., Thomas E. Lydon, U. S. Atty., Colum-

bia, S. C., Gilbert E. Andrews, Tax Div., Dept. of Justice, Washington, D. C., on brief) for appellant.

Wesley M. Walker, Greenville, S. C. (J. D. Todd, Jr., O. Jack Taylor, Jr., Natalma M. McKnew, Leatherwood, Walker, Todd & Mann, Greenville, S. C., John C. Stophel, Stophel, Caldwell & Heggie, Chattanooga, Tenn., on brief) for appellee.

Before WIDENER and HALL, *Circuit Judges;* and MERHIGE*, *District Judge.*

K. K. HALL, *Circuit Judge:*

Bob Jones University conducts "an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures. . . ."[1] Its religious teachings include a strict prohibition against interracial dating and marriage. The admissions and disciplinary policies used

* Honorable Robert R. Merhige, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

1. As stated in its Preamble, and contained in its Certificate of Incorporation:

> The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures, combating all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel, unqualifiedly affirming and teaching the inspiration of the Bible (both Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the Cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the Grace of God.

to enforce this belief have resulted in the loss of the University's tax exempt status, which we are now asked to review.

Bob Jones University [taxpayer] brought this action to recover Twenty-One Dollars which it paid in 1975 under the Federal Unemployment Tax Act [FUTA].[2] The government counterclaimed for FUTA taxes for the taxable years 1971 through 1975 in the amount of $489,675.59, plus interest. The district court concluded, on both statutory and constitutional grounds, that the IRS was without authority to revoke the University's tax-exempt status. *Bob Jones University v. United States*, 468 F. Supp. 890 (D. S. C. 1978). We reverse.

I.

A. *The University and its Racial Policies*

Bob Jones University was founded in Florida in 1927. It moved to Greenville, South Carolina in 1940 and has been incorporated there as an eleemosynary institution since 1952. Taxpayer is not affiliated with any religious denomination, but maintains a fundamentalist orientation in its educational approach. It is a religious institution in its own right, as well as an educational one.

Taxpayer accepts students from kindergarten through college and graduate school. It enrolls about five thousand students and offers some fifty accredited degrees, in addition to its nondegree Institute of Christian Service. All courses, however, are taught according to Biblical Scripture. Teachers are required to be "born again"

2. In an earlier action, filed in 1971, taxpayer attempted to enjoin the IRS from revoking its tax exempt status. In *Bob Jones University v. Simon*, 416 U. S. 725, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974), the Supreme Court held that the Anti-Injunction Act of the Internal Revenue Code, 26 U. S. C. § 7421(a), prohibited such an action, but suggested the procedure employed here. *Id.* at 746, 94 S. Ct. at 2050.

Christians; students are screened as to their religious beliefs and their conduct is strictly regulated.

Bob Jones University believes that the Scriptures forbid interracial marriage and dating. Prior to 1971, it completely excluded blacks. From 1971 to May, 1975, taxpayer accepted no applications from unmarried black students, with the exception, since 1973, of staff members who had been at the University four years or longer. Following this court's decision in *McCrary v. Runyon*, 515 F. 2d 1082 (4th Cir. 1975) (reh. den. May 29, 1975), *aff'd* 427 U. S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), prohibiting racial exclusion from private schools, taxpayer revised its policy. After May 29, 1975, unmarried blacks were permitted to enroll, but a disciplinary rule was added to prevent racial intermarriage and dating.

There is to be no interracial dating

1. Students who are partners in an interracial marriage will be expelled.
2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
3. Students who date outside their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.

B. *The IRS' non-discrimination policy*

Prior to 1970, the Internal Revenue Service extended tax exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3) to all private schools, regardless of racial policy. In 1970, however, black Mississippi parents and children obtained a prelimi-

nary injunction prohibiting the IRS, *pendente lite*, from according tax-exempt status to private schools in Mississippi which discriminated on the basis of race. *Green v. Kennedy*, 309 F. Supp. 1127 (D. D. C. 1970). The IRS later announced nationally that it would no longer allow charitable contributions and deductions, 26 U. S. C. § 170 (c)(2), and tax exempt status, § 501(c)(3), to racially discriminatory schools, including church-related schools.

On June 30, 1971, the three judge district court in *Green* ruled that the issuance of tax exempt status to racially discriminatory private schools was illegal, and issued a permanent injunction enjoining the Commissioner of Internal Revenue from approving tax exempt status to any school in Mississippi that does not publicly maintain a policy of nondiscrimination. *Green v. Connally*, 330 F. Supp. 1150 (D. D. C. 1971). That decision was affirmed by the Supreme Court in *Coit v. Green*, 404 U. S. 997, 92 S. Ct. 564, 30 L. Ed. 2d 550 (1971) (per curiam).

Following the *Green* decision, the Service formalized the nondiscrimination policy in several rulings. Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834. The 1972 procedures were superseded in 1975 by Rev. Proc. 75-50, 1975-2 Cum. Bull. 587, *see also* Rev. Rul. 75-231, 1975-1 Cum. Bull. 158 (nondiscrimination requirement for church operated schools). Revenue Procedure 75-50 provides that in order to qualify under section 501(c)(3), a private school must be able to show that all of its programs and facilities are operated in a nondiscriminatory manner.[3]

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3. In 1979, Congress passed the Treasury, Postal Service and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559.

That Act provides,

§ 103. None of the Funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, . . . which would cause the loss of tax

Bob Jones University is subject to the Revenue procedures prohibiting racial discrimination in private schools. The University is an educational institution as well as a religious one. *See* 26 C. F. R. § 1.501(c)(3)-1(d)(3) (educational defined), and the rulings and procedures promulgated by the Service apply to all private schools. We decline to create an exception for religion-based schools where the Service has made none.

We, therefore, must address two questions. Does the IRS have the statutory authority to deny tax exempt status to Bob Jones University because of its racial policies and, if so, does the denial contravene the First Amendment to the Constitution of the United States?

II.

Statutory Authority for the Nondiscrimination Condition

The district court found that the University was entitled to the section 501(c)(3) exemption because "its primary purpose is religious and it exists as a religious

3. (Cont'd.)

exempt status to private, religious, or church operated schools under § 501(c)(3) of the Internal Revenue Code of 1954 *unless in effect prior to August 22, 1978.*

(emphasis added). Section 615 of the Act specifically prohibited funding of two proposed revenue procedures, 3830-01-M (44 Fed. Reg. 9451, Feb. 13, 1979) and 4830-01 (43 Fed. Reg. 37296, Aug. 22, 1978).

The effect of the Appropriations Act is clearly prospective and has no effect on the policy as enforced in this case. *See also* 125 Cong. Rec. H 5879, 5882 (daily ed. July 13, 1979) (Rep. Ashbrooke). Rather, it places a moratorium on new procedures, including the proposed procedures cited in section 615. The provision is discussed more comprehensively in Note, *The Judicial Role in Attacking Racial Discrimination in Tax Exempt Private Schools*, 93 Harv. L. Rev. 378 (1979).

institution." 468 F. Supp. at 897. The court reasoned that since the statute and the regulations enumerate seven distinct tax exempt purposes, one of which is "religious," *see* 26 C. F. R. § 1.501(c)(3)-(d)(1)(iii), the exemption must be granted once it has been established as a fact that the institution fits one of those enumerated categories.

This simplistic reading of the statute, however, tears section 501(c)(3) from its roots. In *Green v. Connally*, 330 F. Supp. 1150 (D. D. C. 1971), *aff'd per curiam sub nom. Coit v. Green*, 404 U. S. 997, 92 S. Ct. 564, 30 L. Ed. 2d 550 (1971), a three judge district court held "[t]he code must be construed and applied in consonance with the federal public policy against support for racial segregation of schools, public and private." 330 F. Supp. at 1163.[4] Accordingly, it upheld the application of the IRS's nondiscrimination condition to private schools in Mississippi which practiced racial discrimination.[5]

In that persuasive and scholarly opinion, Judge Leventhal viewed section 501(c)(3) against its background in the law of charitable trusts, concluding that to be eligible under that section, an institution must be "charitable" in the broad common law sense,[6] and therefore must not

4. In *Bob Jones University v. Simon*, *supra*, 416 U.S. at 740 n. 11, 94 S. Ct. at 2047 n. 11, the Supreme Court indicated that its affirmance of *Green* lacks the precedential weight of a case involving a truly adversary appeal to that court. We think the reasoning of the three judge court below, however, is persuasive and not without precedential weight.

5. In *Goldboro Christian Schools v. United States*, 436 F. Supp. 1314 (E. D. N. C. 1977), the IRS nondiscrimination condition was upheld when applied to a religiously based private school which excluded blacks.

6. This view finds additional support in the statutory framework itself: Section 170 of the Code, the companion provision to 501(c)(3), places the separately enumerated purposes in that section under the broad heading of "charitable" and permits de-

violate public policy. *Green, supra,* 330 F. Supp. at 1156-60.

The legislative history of § 501(c)(3) verifies the exempton's foundation in public policy.

> The exemption from taxation of money and property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from other public funds, *and by the benefits resulting from the promotion of the general welfare.* H. R. Rep. No. 1820, 75th Cong. 3d Sess. 19 (1939). (emphasis added)

Accordingly, it is appropriate that the Service interpreted section 501(c(3) in a manner that reflects its purpose and history. Moreover, as the *Green* court noted, tax benefits such as deductions and exclusions generally are subject to limitation on public policy grounds. In *Tank Truck Rentals v. Commissioner,* 356 U. S. 30, 78 S. Ct. 507, 2 L. Ed. 2d 562 (1958), the Court upheld the service in disallowing the deduction of fines paid for violations of highway weight limits under the "ordinary and necessary" business expense provision of the Code, 26 U. S. C. § 162. The allowance of the claimed deduction, the Court held, would frustrate the purpose of the State weight law by diluting the punishment imposed. The court held that the expense could not be deemed a "necessity" if allowing the deduction would frustrate "sharply defined" public policy. 356 U. S. at 33, 78 S. Ct. at 509.

Bob Jones University's racial policies violated the clearly defined public policy, rooted in our Constitution,

6. (Cont'd.)

duction of contributions made to organizations serving those purposes, 26 U. S. C. § 170(c)(2)(B).

condemning racial discrimination and, more specifically, the government policy against subsidizing racial discrimination in education, public or private.

Bob Jones' pre-May 1975 policy excluding unmarried black students violated public policy by subjecting black persons to restrictions which were not imposed on whites. In *Runyon v. McCrary*, 427 U. S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1975), the Supreme Court held, in a non-religious setting, that the equal right to contract provision, 42 U. S. C. § 1981, prohibits racial discrimination in non-public school admission policies. Similiar considerations apply in a religious setting. In *Bob Jones University v. Roudebush*, 529 F. 2d 514 (4th Cir. 1979) *affirming Bob Jones University v. Johnson*, 396 F. Supp. 597 (D. S. C. 1974), we upheld the denial of Veterans Administration assistance to Bob Jones University and its students under Title VI of the Civil Rights Act, 42 U. S. C. § 2000d et seq., because of this policy of excluding unmarried blacks. *See also Norwood v. Harrison*, 413 U. S. 455, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973).

The University's post-May 1975 policy applies equally to both black and white students; nevertheless, it too constitutes racial discrimination. The discrimination on the basis of racial affiliation or companionship is a form of racial discrimination is clear from Equal Protection cases such as *Loving v. Virginia*, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (law prohibiting interracial marriage unconstitutional) and *McLaughlin v. Florida*, 379 U. S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964) (interracial cohabitation law invalid), as well as § 1981 decisions, *see Tillman v. Wheaton Haven Recreational Association*, 410 U. S. 431, 93 S. Ct. 1090, 35 L. Ed. 2d 403 (1973) (white club member expelled for bringing black guests); *Faraca v. Clements*, 506 F. 2d 956 (5th Cir. 1975) *cert. denied*

422 U. S. 1006, 95 S. Ct. 2627, 45 L. Ed. 2d 669 (1976) (white man denied employment because wife was black).

We think the Service acted within its statutory authority in revoking Bob Jones University's tax exempt status because of these policies.

The University asserts, however, that this situation is special because its racial policies are grounded in sincere religious faith and therefore immutable; with or without the exemption it will maintain its present policy. The district court agreed, finding that the relationship between the exemption and the frustration of public policy against discrimination was too remote to bring the case within the narrow *Tank Truck* exception to deductibility. 468 F. Supp. at 903-04.

This argument misses the mark for two reasons. First, we are not here confronted with a computational provision designed "to tax earnings and profits less expenses and losses." *Tank Truck, supra*, 356 U. S. at 33, 78 S. Ct. at 509. Unlike section 162, section 501(c)(3) is rooted in public policy considerations wholly apart from the "broad basic policy of taxing 'net, not * * * gross, income.'" *Id.* (citations omitted) The public policy limitation, therefore, need not be so narrowly applied.

Second, the nondiscrimination policy assures that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race. *Cf. Norwood v. Harrison, supra.*[7] The fact that the

7. The grant of tax exempt status to any institution necessarily confers upon it a kind of monetary benefit and constitutes a form of government support. *Walz v. Tax Commission*, 397 U. S. 664, 674-75, 90 S. Ct. 1409, 1414, 25 L. Ed. 2d 697 (1970). The Supreme Court in *Walz* held that a state property tax exemption for religious organizations evidenced a neutrality toward religion, and the level of government support conferred by the exemption was within permissible limits in light of the fact that "either course, taxation . . .

religious belief is sincere, and the policy immutable in this case does not obviate the need for a prophylactic rule to prevent such support.

III.

The First Amendment

Our approval of the government's interpretation of § 501(c)(3) brings us to the question whether application of the nondiscrimination policy to Bob Jones University violates the Free Exercise and Establishment clauses of the First Amendment.

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7. (Cont'd.)

or exemption, occasions some degree of involvement with religion." *Id.* at 674, 90 S. Ct. at 1414. Indirect aid in the form of tax benefits may, in other circumstances, constitute state aid to religion in violation of the Establishment Clause. *Committee For Public Education and Religious Liberty v. Nyquist*, 413 U. S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973) ("tax credit" to parents sending children to religious school). The basic tax exemption in this case is, on its face, more like that upheld in *Walz*, but the government "neutrality" advanced when such exemptions are granted takes on another aspect when the tax benefit goes to a religion-based school which practices, for whatever reason, racial discrimination.

The Constitution commands that government not provide any form of tangible assistance to schools which discriminate on the basis of race. *Norwood v. Harrison*, 413 U. S. 455, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973). In *Norwood* the Court remarked that the permissible scope of assistance to racially discriminatory private schools is even narrower than that permitted under the establishment clause—the Constitution is less tolerant of "neutral support" when the underlying effect is to subsidize racial inequality or segregation.

This is not to say that the tax benefit turns the University's policy into government action for Equal Protection Clause purposes. We do think, however, that government must "steer clear" of affording significant tax support to educational institutions that practice racial discrimination.

A. *The Free Exercise Clause*

The University contends that the IRS's nondiscrimination policy violates its right to freely practice its religion because it is forced to give up a valuable government benefit in order to practice its religious beliefs. Assuming that the revocation of § 501(c)(3) status does impinge upon the University's practice to some extent, *see Sherbert v. Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1962), the question remains one of balancing—giving due consideration to the weight of the interests asserted by the government and the extent and nature of the burden on the religious practice and the religion as a whole. *See, Wisconsin v. Yoder*, 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). *See also*, Note, *1981 after Runyon v. McCrary: The Free Exercise Right of Private Sectarian Schools to Deny Admission to Blacks on Account of Race*, 1977 Duke L. J. 1219, 1240-1266.

The government interest in eliminating all forms of racial discrimination in education is compelling. *See, e.g., Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). It extends to private action as well as public, *Runyon v. McCrary*, 427 U. S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1975), and has a special vitality where the integration of public schools has made private education attractive to those who would try to turn back the clock.

Government must "steer clear" of any expression of support for racial discrimination in education. *See Norwood v. Harrison, supra*, 413 U. S. at 467, 98 S. Ct. at 2811.

In *Bob Jones University v. Roudebush*, 529 F. 2d 514 (4th Cir. 1979) (per curiam), *affirming Bob Jones University v. Johnson*, 396 F. Supp. 597 (D. S. C. 1974), we recognized that the government interest in eliminating all racial discrimination in education was sufficiently com-

pelling to justify denial, under Title VI of the Civil Rights Act, of Veterans Administration [V.A.] benefits to Bob Jones University and its students. The policy involved in that case was the same religiously based pre-1965 policy involved here: the denial of admission to unmarried blacks. The district court rejected the University's Free Exercise claim, stating:

> It is clear that the Free Exercise Clause cannot be invoked to justify exemption from a law of general applicability grounded on a compelling state interest.

396 F. Supp. at 607; we affirmed.

In *Goldsboro Christian Schools v. United States*, 436 F. Supp. 1314 (D. S. C. 1977), the government's policy of denying tax exempt status to private racially discriminatory schools survived Establishment Clause challenge by a school that excluded blacks because of its religious proscription of racial intermarriage. *See also Green v. Connally, supra*, 330 F. Supp. at 1169; *Brown v. Dade Christian Schools*, 556 F. 2d 310, 314-24 (5th Cir. 1977) (concurring opinion of Judge Goldberg).

The government interest in this case is compelling, when applied to the post-May 1975 policy of strict limitations on racial companionship as well as to the pre-May 1965 policy of excluding unmarried blacks. As discussed in part II, *supra*, the clear federal policy against racial discrimination applies to all forms of racial discrimination —governmental or private, absolute or conditional, contractual or associational.

In contrast, the government's rule would not prohibit the University from adhering to its policy.[8] Abandonment

8. A law which penalizes a person indirectly for practicing his belief may violate the Free Exercise Clause, *Sherbert v. Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). The indirect nature of the "penalty" is, however, a factor to be considered in the balance.

of the policy would not prevent the University from teaching the Scriptural doctrine of nonmiscegenation. Nor is any individual student at Bob Jones University forced to personally violate his beliefs; no student is forced to date or marry outside of his race. We think these factors tip the balance in favor of the Services' nondiscrimination doctrine. *See generally*, Note, *Section 1981 after Runyon v. McCrary: The Free Exercise Right of Sectarian Schools to Deny Admission To Blacks on Account of Race*, 1977 Duke L. J. 1219; *Racial Exclusion by Religious Schools, Brown v. Dade Christian Schools, Inc.*, 91 Harv. L. Rev. 879 (1978). Comment, *The Tax Exempt Status of Sectarian Educational Institutions That Discriminate on the Basis of Race*, 65 Iowa L. Rev. 258 (1979).

B. *The Establishment Clause*

The nondiscrimination policy also passes muster under the Establishment Clause. The Establishment Clause requires that a law reflect a secular legislative purpose, have a primary effect that neither advances nor inhibits religion, and avoid excessive entanglement with religion. *Committee for Public Education and Religious Liberty v. Regan*, 444 U. S. 646, 100 S. Ct. 840, 846, 63 L. Ed. 2d 94 (1980); *Committee for Public Education v. Nyquist*, 413 U. S. 756, 773, 93 S. Ct. 2955, 2965, 37 L. Ed. 2d 948 (1973); *Tilton v. Richardson*, 403 U. S. 672, 678, 91 S. Ct. 2091, 2095, 29 L. Ed. 2d 790 (1971). The secular purpose of the rulings in question is unassailable. Taxpayer asserts, however, that the result is both the unconstitutional advancement of certain religions and government excessive entanglement in religious practices.

The district court perceived an Establishment Clause conflict created by the government's denial of tax exemption to religions which would not "stay in step" with ex-

pressed federal policy. Thus, it held "the application of the law in the manner which defendant construes it, results in government favoring those churches that adhere to federal policy, more specifically, in this case, those churches whose religious beliefs do not forbid interracial marriage." 468 F. Supp. at 900.

We agree that the Government must maintain an attitude of neutrality toward all religions. *Gillette v. United States*, 401 U. S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971); *Walz v. Tax Commission of New York*, 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).[9] But certain governmental interests are so compelling that conflicting religious practices must yield in their favor. Thus the court has upheld statutes prohibiting polygamy, *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244 (1878), or sale of religious materials by minors, *Prince v. Massachusetts*, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), even though they "favor" religions that do not engage in such practices. In *Braunfield v. Brown*, 366 U. S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), the Court upheld Sunday closing laws, which made the practice of orthodox Jewish merchants' beliefs more expensive "because of the strong state interest in providing one uniform day of rest for all workers." Again, certain religions were "favored," but the First Amendment was not violated.

We respect the district court's concern that religions not be required always to "stay in step with expressed federal policy." The Establishment Clause protects against such intrusion. *Walz*, *supra* 397 U. S. at 674, 90 S. Ct. at 1414. But the principle of neutrality embodied in the Establishment Clause does not prevent government

9. *Walz* upheld that New York property tax exemptions for religious organizations, for properties used solely for religious worship, did not violate the Establishment Clause. The *Walz* opinion permits such exemptions but does not require them.

from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied. *See Gillette, supra.*

Finally, the government's rulings do not create the kind of excessive entanglement with religion recently avoided in *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U. S. 490, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979). In *Catholic Bishop*, the Supreme Court held that the National Labor Relations Act did not require Roman Catholic religious schools to permit their lay teachers to hold representation elections, and rejected NLRB jurisdiction over alleged unfair labor practices involving such schools. The Court noted that to hold otherwise would present a significant risk that the First Amendment would be infringed. *Id.*, 99 S. Ct. at 1320. First, it would often require inquiry into the good faith of the position asserted by the clergy administrators and by the school's religious mission. Second, the Board would be called upon to decide what are "terms and conditions of employment"—an inquiry that would involve the Board in "nearly *everything that goes on in the schools.*" *Id.* (emphasis added).

In contrast, the scope of government involvement in this case is much narrower; the only inquiry is whether the school maintains racially neutral policies. And, the uniform application of the rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief. *Compare, Brown v. Dade Christian Schools, supra.* The provision in question involves minimum intrusion into the operation of the school while serving important government interests.[10]

10. Taxation itself involves some degree of government involvement, but some degree of involvement is inevitable whether the tax exemption is granted or denied. *Walz, supra*, 397 U. S. at

IV.

In conclusion, we hold that the revocation of Bob Jones University's tax exempt status violates neither the statutory mandate of section 501(c)(3) of the Internal Revenue Code nor the First Amendment to the Constitution of the United States. The judgment of the district court is reversed with instructions to dismiss the University's claim for refund of 1975 FUTA taxes, and to reinstate the government's claim for the years 1971 to 1975 and enter appropriate judgment thereon for defendant.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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10. (Cont'd.)

674-675, 90 S. Ct. at 1414. We do not think the administration of tax laws or the "hazard of churches supporting government" violate the "excessive entanglement" prong of the Establishment Clause.

APPENDIX B

Dissenting Opinion of the United States Court of Appeals for the Fourth Circuit

WIDENER, *Circuit Judge*, dissenting:

I respectfully dissent.

While I agree with the result obtained by, and much of the opinion of, the district court, I would decide the case in a somewhat different setting, and I disagree in large extent with the analysis of the majority as well as its result.

To begin with, Bob Jones, which antedates by decades the decision in *Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), is a "fundamentalist religious organization." *Bob Jones University v. Connally*, 472 F. 2d 903, 904 (4th Cir. 1973). That has been held in this circuit when the same question now before us was before the court in a tax injunction case, and is confirmed by the extensive and correct findings of fact of the district court which are summarized just below.

> "Plaintiff is not an educational appendage of a recognized church that may allude in its educational processes to the beliefs of the parent religious order. Instead, the organizational source of plaintiff's religious beliefs is the university. The convictions of plaintiff's faith do not merely guide its curriculum but, more importantly, dictate for it the truth therein. Bob Jones University cannot be termed a sectarian school, for it composes its own religious order.
>
> "The Court finds that plaintiff's primary purpose is religious and that it exists as a religious organization. The institution also serves educational purposes. The Court further finds that during the year 1975 plaintiff

> religious organization was organized and operated exclusively for religious and educational purposes." 468 F. Supp. 890 at 895.

Indeed, the Supreme Court in affirming *Bob Jones University v. Connally*, supra, stated "The university is devoted to the teaching and propagation of its fundamentalist religious beliefs." *Bob Jones University v. Simon*, 416 U. S. 725, 734, 94 S. Ct. 2038, 2044, 40 L. Ed. 2d 496 (1974).

Accepting the foregoing findings of the district court as correct, and even the majority does not claim they are clearly erroneous, and the previous findings of this court and the Supreme Court, as we must, that Bob Jones University is a religious organization, we are dealing in this case not with the right of the government to interfere in the internal affairs of a school operated by a church, but with the internal affairs of the church itself. There is no difference in this case between the government's right to take away Bob Jones' tax exemption and the government's right to take away the exemption of a church which has a rule of its internal doctrine or discipline based on race, although that church may not operate a school at all. In this opinion, I speak not to the abstract wisdom or rightness of such a rule, but to the right of a church to enforce that rule, although it may be repugnant to most of the population, if the rule is a part of its religious doctrine or discipline. The district court found and the government acknowledges that the rule against interracial dating and marriage is a genuine religious belief.

In the case before us, we are immediately dealing only with whether or not Bob Jones' rule forbidding interracial dating and marriage may be enforced without losing its tax exemption.

Briefly, I think the majority, as well as the Internal Revenue Service and the court in *Green v. Connally*, 330

F. Supp. 1150 (D. D. C. 1971) (three-judge court), affirmed per curiam *sub nom. Coit v. Green,* 404 U. S. 997, 92 S. Ct. 564, 30 L. Ed. 2d 550 (1971), misconstrued 26 U. S. C. § 501(c)(3).[1] I would construe § 501(c)(3) to grant Bob Jones University, its exemption for "religious" purposes. That being true, there is no reason to test the grant of an exemption for educational purposes, because the exemption for religious purposes has not only the protection of the First Amendment, but its authorization. *Walz v. Tax Commission,* 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), especially pp. 677-680, 90 S. Ct. pp. 1415-1517.

To say that there is a *direct* conflict between Bob Jones' First Amendment rights to operate free from government interference and the Fifth Amendment prohibitions against lending financial aid to institutions which practice discrimination, see *Norwood v. Harrison,* 413 U. S. 455, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973), is also not correct in this case. That is so because *Walz* also held that "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the State." p. 675, 90 S. Ct. p. 1414. If it be argued that the holding of *Walz* as to sponsorship was decided in the context of the establishment clause and thus is not applicable here, that holding has been reinforced in *Moose Lodge No. 107 v. Irvis,* 407 U. S. 163, 92 S. Ct. 1965, 32

1. In *Bob Jones University v. Simon,* 416 U. S. 725, 740, n. 11, 94 S. Ct. 2038, 2047, n. 11, 40 L. Ed. 2d 496 (1974), the Court indicated that its affirmance of *Green* lacked the precedential weight of a case involving a truly adversary controversy since the Internal Revenue Service adopted the plaintiff's position during the course of the litigation. In view of *Simon,* I do not consider the circuit bound by *Green* when the question is presented, as here, in adversarial context.

L. Ed. 2d 627 (1972), and *Flagg Bros., Inc. v. Brooks*, 436 U. S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978). In *Moose Lodge* the court reversed a district court which had canceled the liquor license of Moose Lodge because it refused to serve a drink to a black guest of a member. Its constitution and bylaws limited membership to white males, and the policy and practice was to permit only Caucasian guests on lodge premises. The Court refused to find State action although the club operated with a license from the State of Pennsylvania and the operation of the club was regulated in some particulars by the State. It held that ". . . the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policy of Moose Lodge to make the latter 'State action' within the ambit of the equal protection clause of the Fourteenth Amendment." p. 177, 98 S. Ct. p. 1744. The Court had previously stated that it had ". . . never held, of course, that discrimination by an otherwise private entity would be violative of the equal protection clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to State regulation in any degree whatsoever." p. 173, 98 S. Ct. p. 1742. In *Flagg Bros.*, the Court declined to find State action in a warehouseman's proposed sale of goods as permitted by the New York Uniform Commercial Code. The Court ". . . rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement'". pp. 164-165, 98 S. Ct. pp. 1737-1738.

Because I feel Bob Jones is entitled to its religious exemption, the only question left is whether the religious exemption, granted by statute, may be revoked by the Revenue Service on the grounds that it is not in accord

with public policy. See *Tank Truck Rentals, Inc. v. Commissioner*, 356 U. S. 30, 78 S. Ct. 507, 2 L. Ed. 2d 562 (1958). Such questions as the extent of the protection offered Bob Jones by the First Amendment and the extent of the Fifth Amendment prohibition against aiding educational facilities which are not racially integrated come into play as they are expressions of public policy. The question which I cannot avoid, try as I have done to do so, is whether the admitted public policy of the nation favoring freedom of religion as expressed in the First Amendment is to be limited by a public policy assuring ". . . that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race."[2] pp. 152-153. I do not find it necessary to deal with an absolute rule that a church may enforce with impunity any rule of its internal doctrine or discipline, no matter how repugnant, to illustrate by way of exaggeration human sacrifice, for that does not exist here. I think it of more than passing interest, however, that discrimination against women on account of their sex exists in many churches. And the same may be said of racial discrimination, probably to less extent. Yet the churches involved are among the oldest and largest of the Christian faiths in this country. The IRS, however, has not chosen to attack the problem from that angle so as to get it settled for the whole country. Rather, it chose a small, isolated, religious organization, not affiliated with a larger denomination and combined with a school, which espouses a concededly unpopular belief that many think unwise and immoral. Thus, it tries its test case here.

I think it is this court's reading of the statute, and not the district court's, that "tears section 501(c)(3) from its roots." That section's enumeration of exempt purposes is

2. For the purpose of this opinion, I assume that such a policy exists as phrased by the majority.

clear and unambiguous. Organizations are exempt which are "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." Each of these is a distinct and separate category. By the rules of statutory construction as well as common sense, the word "or" must be read after each of the listed categories. Even the regulations of the IRS are equally unambiguous and follow the construction I think is dictated by the plain words of the statute. 26 C. F. R. § 1.501(c)(3)-1(d)(1)(i) provides an organization may be exempt "if it is organized and operated exclusively for *one or more of the following purposes:*

(a) Religious,

(b) Charitable,

(c) Scientific,

(d) Testing for public safety,

(e) Literary,

(f) Educational, or

(g) Prevention of cruelty to children or animals." (Italics added.)

The regulations also state that "Since *each* of the purposes specified in subdivision (i) of this subparagraph *is an exempt purpose in itself,* an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes." 26 C. F. R. § 1.501(c)(3)-1(d)(1)(iii). (Italics added.) All that is necessary, according to both the statute and the regulations promulgated under it is that an organization be organized and operated exclusively for one of the named purposes.

The word "charitable" appears in section 501(c)(3) merely as one of the adjectives modifying "purposes."

"Charitable" is not used in a generic sense, and is not used as descriptive of the listing of exempt organizations. Rather, "charitable" is itself listed between "religious" and "scientific." It may be, and probably is, because "charitable" is a flexible term, the meaning of which changes to fit a changing society, that Congress specifically exempted certain types of organizations whether or not they qualify as common law charities. See Neuberger & Crumplar, "Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration," 48 *Fordham L. Rev.* 229, 239-40 (1979). But regardless of the reason, the simple fact is that Congress has enumerated certain exempt purposes, including "charitable," "religious," and "educational." It did not grant exemptions by reference to the law of charitable trusts.

Congress, by statute, has provided that certain classes or organizations shall be tax exempt. The district court found as a fact that plaintiff falls within one of those classes. Since that finding is not disturbed, the plaintiff is statutorily entitled to be tax exempt. Neither the IRS nor this court has the power to take away a benefit granted by Congress. The Commissioner may not add a restriction to a statute which is not there, *Commissioner v. Acker*, 361 U. S. 87, 80 S. Ct. 144, 4 L. Ed. 2d 127 (1959); nor may he deprive a taxpayer of a benefit conferred by statute, *Brooks v. United States*, 473 F. 2d 829, 832 (6th Cir. 1973). "The Courts and the Commissioner do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather, it is their function to give the natural and plain meaning effect to statutes as passed by Congress." *National Life and Accident Ins. Co. v. United States*, 524 F. 2d 559, 560 (6th Cir. 1975).

This is a case of first impression so far as the Supreme Court is concerned, as well as the Courts of Appeals. The

real issue I think to be decided, as I have indicated before in this opinion, is whether the public policy favoring freedom of religion as expressed in the First Amendment is to be limited by public policy described by the majority as one meaning that Americans will not provide indirect support for any educational organization that discriminates on the basis of race. To put the question even more properly, may the two policies exist side by side, or is each so rigid that it will not accommodate the other? Assuming that the policy against discrimination on account of race is as broad as stated by the majority, I think it is not so rigid that religious organizations, although they may discriminate, may not exist in the same society. For it is the very existence of the religious organization at stake here, the power to tax involving the power to destroy. *M'Culloch v. The State of Maryland*, 4 Wheat. 316, 431, 4 L. Ed. 579, 607 (1819).

In ascertaining what is the public policy of the nation, the Supreme Court has instructed us which are the proper matters to consider in *Twin City Company v. Harding Glass Company*, 283 U. S. 353, 51 S. Ct. 476, 75 L. Ed. 1112 (1931):

> "In determining whether the contract here in question contravenes the public policy of Arkansas, the Constitution, laws, and judicial decisions of that State and as well the applicable principles of the common law are to be considered. Primarily, it is for the lawmakers to determine the public policy of the State." 283 U. S. at 357, 51 S. Ct. at 477.

Because there is no federal common law which applies to the question at hand, we must consider the Constitution, laws, and judicial decisions of the United States. Primarily, we must consider the Acts of Congress.

Those sections of the federal Constitution having application are the First Amendment, of course, and as well the Fourteenth and Fifth Amendments. We consider the First Amendment for its guarantee of religious freedom; the Fourteenth for its guarantee of equal protection of the laws; and the Fifth Amendment as it imposes on the national government under its due process clause the same limits, so far as racial segregation goes in public facilities, as are imposed on the States under the equal protection clause of the Fourteenth Amendment. *Bolling v. Sharpe,* 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

The extent of protection of the First Amendment to religious organizations needs little exposition. It has been called "the transcendent value" in *Norwood v. Harrison,* 413 U. S. 455, 469, 93 S. Ct. 2804, 2812, 37 L. Ed. 2d 723 (1972); and "high 'in the scale of our national values' " in *NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490, 501, 99 S. Ct. 1313, 1319, 59 L. E. 2d 533 (1979). And everyone knows the saying, the firstest of the First. In all events, I contend that, with rare exceptions, the freedom of speech, assembly, the press, and religion have always occupied so high a place in the life of the nation that it cannot be doubted that the strongest possible public policy considerations support them. The Fourteenth Amendment also occupies a large place in the scheme of things. Under it *Brown v. The Board of Education,* 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), was decided with its familiar holding that classification on account of race in the assignment of children to public schools was a violation of the amendment. And that holding has been extended, as we all know, into all fields of State action. Under *Bolling,* supra, the holding of *Brown* is extended to actions by the federal government. There is no doubt, then, that there is a public policy favoring freedom of religion and also no doubt that there is a public policy in opposition to dis-

crimination in matters involving State action. But unless something else appears, nothing has been shown to indicate to me that the two policies may not exist side by side. There is no reason I know of that the policy favoring nondiscrimination is so strong that it will not admit the existence of a religious organization which does in fact discriminate.

Various statutes of the United States touch on the subject, although none control it directly. Contrary to the majority, I feel that those statutes which throw light on the question are worthy of examination, for, as the Court has said, it is primarily for Congress to determine the public policy of the nation.

Besides the tax exemption statute immediately involved, the various Civil Rights Acts should be considered, as well as the Ashbrook Amendment.

The Civil Rights Act of 1964 outlawed most forms of racial discrimination in this country. Those provisions of the statute relating to employment and public accommodations are probably the most familiar. But that statute did not provide against discrimination in religious organizations, and, indeed, in 42 U. S. C. § 2000a(e) the statute exempted from the public accommodations title "a private club or other establishment not in fact open to the public." Further, 42 U. S. C. § 2000e-1 exempted from the equal employment title of that Civil Rights Act a religious corporation or association "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities." In 1972 Congress amended the equal employment title of the statute to require an employer to reasonably accommodate employees' religious practices if such accommodation does not result in undue hardship on the conduct of the employer's business. 42 U. S. C. § 2000e(j).

42 U. S. C. § 1981, a part of the post-Civil War Civil Rights Acts has been construed in *Johnson v. Railway Express Agency,* 421 U. S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975), to prohibit discrimination in private employment; and in *Runyon v. McCrary,* 427 U. S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), to prohibit racial discrimination in admission requirements to private secular schools. The statute itself provides, so far as pertinent here, that all persons shall have the same right in every State to make and enforce contracts as is enjoyed by white citizens. *Runyon,* however, specifically did not decide the question of admission to religious schools. 427 U. S. at 167, 96 S. Ct. at 2592.

The Ashbrook Amendment, P. L. 96-74, 93 Stat. 559, § 103, is the most recent expression of Congressional policy touching the question at hand. That amendment to the Appropriations Act provides that none of the funds made available shall be used to carry out any rule, policy, or procedure which would cause the loss of tax exempt status to private religious or church operated schools under § 501 (c)(3) unless in effect prior to August 22, 1978. While the amendment itself is prospective in operation as the majority points out, to say that it has no effect on public policy, I think, is simply wrong. It would be equally as wrong, for example, to say the Civil Rights acts have no place in ascertaining the public policy of the nation just because they are not squarely on point. And the same may be said of the exemptions therefrom. The majority, for example, finds support in 42 U. S. C. § 1981, which I freely admit has a bearing on the case. But if the Ashbrook Amendment has no effect on policy because prospective only, then neither does § 1981 because the rule we are immediately concerned with does not come within its literal terms.

Not only is the Ashbrook Amendment the most recent expression of Congress, it is the only expression of Con-

gress I know of on the question immediately at hand. It is the law of the land, and it has said in unmistakable terms that the IRS is prohibited from doing precisely what it has done here commencing with August 22, 1978. Were it not for its prospective operation, it would bind us here. So, it is worthwhile to look briefly at the legislative history of the Ashbrook Amendment. The House Committee Report provides in part as follows:

> The relevant House Committee report states:
>
> On August 22, 1978 and February 9, 1978, the Internal Revenue Service proposed a 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 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.

House Committee on Appropriations, H. R. Rep. No. 96-248, 96th Cong. 1st Sess., at 14-15.

And Congressman Ashbrook, the sponsor of the Amendment, stated in the Congressional Record, 96th Cong. 1st Sess. No. 12, June 25-July 13, 1979, at H 5879-80, as follows:

> For the administrative branch to create such a policy without direction from Congress is a violation of the doctrine of the separation of powers.
>
> . . . .
>
> The Nation's churches and their schools should be free to function without regard to local neighborhood minority mixes or arbitrary "affrmative action" (sic) quota plans. Such Federal overreaching is a violation of the constitutional separation of church and State. Churches and their schools should be free to function without Federal harassment. Citizens should be able to exercise their religious freedom without meddling by the Federal bureaucracy. . . . The IRS has no authority to create public policy.
>
> . . . .
>
> 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. . . .
>
> For the IRS to select private schools as targets of its own substantive evaluation and tax exemption

> denial, while leaving unhampered tax-exempt organizations which practice or promote witchcraft, homosexuality, abortion, lesbianism, and euthanasia leaves this Member confused as to the objectives of those who would make this agency into a powerful instrument to selectively implement social policy. . . .
>
> For an agency to permit itself to be guided by pressures of pending legal action, other Federal agencies, outside pressure groups, or changes in an administration is to confuse its own role as tax collector with that of legislator, jurist, or policymaker. There exists but a single responsibility which is proper for the Internal Revenue Service: To serve as tax collector. It is the responsibility of Congress to conduct oversight over this agency to prevent transgressions into legislative authority.

Cong. Rec., 96th Cong. 1st Sess., No. 12, June 25, to July 13, 1979, at H 5879-80.

The cases which I think touch most directly on the question are to large extent a discussion of the constitutional provisions and statutes I have mentioned, and as they are expressions of public policy in the field, I will discuss them as I think they apply in the ascertainment of what is the public policy of the nation with respect to the question now before us.

As I have before pointed out, the Supreme Court has consistently held that the place of First Amendment values in our national order of things is somewhere between transcendent and high. That is emphasized by such cases as *Presbyterian Church v. Hull Church*, 393 U. S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969), in which the Court held, in a dispute over church property but which was decided as a question of church doctrine, that the State of Georgia, even through its court system had no

right under the First Amendment to resolve "underlying controversies of religious doctrine." The Court said "Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." 393 U. S. at 450, 89 S. Ct. at 606. Thus, if the courts are forbidden to intrude even to the extent of deciding what is the doctrine of a church, that shows the considerable immunity that church doctrine has from judicial or executive inquiry, much less necessary approval. In *NLRB v. Catholic Bishop of Chicago*, supra, the Court held that the National Labor Relations Board could not compel four parochial schools to bargain collectively with a lay teachers union. Although the teachers were within the literal terms of the labor act, the court held that the danger of serious constitutional questions, a conflict between the labor act and the First Amendment, was so great that it construed the labor act to exclude the teachers. Again, in *Wisconsin v. Yoder*, 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 15 (1972), the Court held that those members of the Old Order Amish religion could not be required under compulsory school attendance laws to send their children to school beyond the eighth grade because such violated their religious doctrine.

These cases decided under the First Amendment are sufficient to show the extent of protection offered to religious doctrine and that to overcome this protection requires a considerable showing of a compelling state interest.

Along a different line, the Court held in *Reynolds v. United States*, 8 Otto 145, 98 U. S. 145, 25 L. Ed. 244 (1879), that the Mormon religious doctrine of taking more

than one wife was not sufficient to exempt a conviction under a bigamy statute enacted by Congress which made bigamy a felony punishable by imprisonment not to exceed five years, as well as a fine. And, in *Prince v. Massachusetts*, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), the Court upheld a fine of the custodian of a child 9 years of age for violating the child labor laws of Massachusetts in that she permitted the child to work in offering for sale publications of Jehovahs Witnesses, the selling of which was a part of the doctrine of the church. In *Reynolds*, the Court considered that religious liberty could not go so far as to "break out into overt acts against peace and good order." 8 Otto at 163, 98 U. S. at 163, 25 L. Ed. at 249. In *Prince*, the Court considered the right of a State to regulate family life to the extent that it protects the welfare of children. Neither of those considerations is present here. Bob Jones has committed no felony, and a State's right to protect the welfare of its children is simply not in the case. Also not in this case is any expression of public policy manifested by a State statute, criminal or otherwise. Neither does a federal statute directly control the subject at hand. Accordingly, while *Reynolds* and *Prince* should be considered in ascertaining what public policy to apply here, they should not be controlling.

Freedom of association also enters into consideration in this case. E.g. *NAACP v. Alabama*, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). It must be remembered that no one is compelled to go to Bob Jones University. Entrance there is entirely voluntary. It has not and cannot be shown that Bob Jones competes in any significant way with the public schools. Cf. *Norwood* as construed in *Flagg Bros.*, 436 U. S. at p. 163, 98 S. Ct. at p. 1737. As the Supreme Court has said in *Bob Jones University v. Simon*, 416 U. S. 725, 735, 94 S. Ct. 2038, 2045, 40 L. Ed. 2d 496 (1974), "Students and faculty are

screened for adherence to certain religious precepts and may be expelled or dismissed for lack of allegiance to them." Thus, if the action of the government in granting an exemption to Bob Jones is enough state action to be considered state aid, then the action of the IRS itself in revoking the exemption on public policy grounds is itself "subject to the closest scrutiny." *NAACP v. Alabama,* at p. 461, 78 S. Ct. at p. 1171. I acknowledge that the First Amendment right of freedom of association was mentioned by the Court in *Norwood*, which stated that, when manifested by private discrimination, it had never been accorded affirmative constitutional protection accorded the Religious Clauses. And the Court further implied that high on the list of priorities as freedom of association in schools may be, it was not so high as the values inherent in the free exercise clause, 413 U. S. at pp. 469-470, 93 S. Ct. pp. 2812-2813. Thus, if Bob Jones were only a school, it might be argued that *Norwood* should control this case providing that tax exemption is equated to free textbooks. I also acknowledge that the holding in *Norwood* may be argued to be that the Fourteenth Amendment prohibition against lending aid to segregated schools is a stronger public policy than freedom of association, nevertheless the right of freedom of association does enter into this case It is an inescapable part of Bob Jones' background, for, in addition to the First Amendment protections offered to this religious organization in its doctrine and discipline, it has the added protection of the First Amendment protection of freedom of association.

Two other cases bear on the question. The first is *Moose Lodge v. Irvis*, 407 U. S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972). The next is *University of California Regents v. Bakke*, 438 U. S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In *Moose Lodge*, the Court upheld the right of a Moose lodge in Pennsylvania to racially discriminate in its guests although it operated under a liquor

license from the Commonwealth of Pennsylvania and its operation was regulated in some particulars by the State. The Court held that this was not State action. But the importance of the case here is that the grant of a privilege not available to all by the State of Pennsylvania was not enough action by the State to be called State action and be invalid under the Fourteenth Amendment prohibition against actions by States according to racial classification. In *Bakke*, while the Court disapproved the denial of admission of Bakke to medical school on account of his race, the Court further held that the State had a substantial interest in an admissions program "involving the competitive consideration of race and ethnic origin." The Court reversed the California court's judgment which had enjoined any consideration because of race, p. 320, 98 S. Ct. at p. 2763. It suggested that the Harvard College admissions program would be satisfactory. In that program, Harvard believed that admissions taking race into account would keep Harvard from losing a great deal of its vitality and intellectual excellence. Thus, the holding of *Bakke* is clear that a consideration of race is in some circumstances permissible. On whatever ground *Moose Lodge* was decided, its holding is that it is not the public policy of the United States to take the license from a Moose lodge with a segregated guest policy just because it operates under a State license. And that of *Bakke* is equally clear. Race may be taken into account as a factor in admitting students to a state university for reasons having to do with the vitality of the university and intellectual excellence.

Moose Lodge especially, I think, is unanswerable in the public policy context. Can we say in candor that it is more important to the nation to permit a segregated Moose lodge to operate than to permit a segregated religious organization to operate? I think not. *Bakke* is very nearly equally compelling. Can we say that it is more important

to a State university to use race as factor in admitting students to obtain overall vitality and intellectual excellence than to permit Bob Jones to maintain a rule against interracial dating and marriage when that is a part of its religious doctrine? Again, I think not.

The First Amendment, while its values may be transcendent, bends from time to time to accommodate the necessities of society. See *Near v. Minnesota*, 283 U. S. 697, 708, 51 S. Ct. 625, 628, 75 L. Ed. 1357 (1931). And, as *Reynolds* and *Prince* illustrate, the First Amendment also bends to accommodate threats to public order and the welfare of children. But I think it is a mistake to say that the public policy of not aiding in any way, no matter how indirect, any segregated activity will not yield in any particular to the First Amendment.

While racial quotas are themselves discriminatory, the cases approving them in remedial context in employment cases are too numerous to mention, the most prominent of which, of course, is *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U. S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979). So it is not against the public policy of the United States for courts to lend their aid to discrimination in any form, and thus the policy against racial discrimination bends. The Civil Rights Acts themselves contain accommodations for private clubs, § 2000a(e); for employment of people of a particular religion by a religious association, § 2000e-1; and employees' religious practices which do not result in undue hardship, § 2000e(j). It is easily seen that the public policy of no discrimination as provided in the Acts of Congress also is not inflexible. *Weber* itself has construed the Civil Rights Act of 1964 to accommodate racial discrimination. With the Constitution, the statutes, and the decisions of the Supreme Court yielding to the demands of society from time to time, especially including religious demands, a "prophylactic rule to pre-

vent such [state] support," p. 153, with no "exception for religion-based schools," p. 150, imposed by the majority, is entirely too inflexible. It places the value of no discrimination protected by the Fourteenth Amendment as a matter of law above the religious protection offered by the First Amendment. I think this is a mistake. Assuming that public policy under the Fourteenth Amendment is correctly stated in the majority opinion, I do not think it is so inflexible that it may not exist side by side with the First Amendment freedoms of the Religious Clauses. I would not deal in such absolutes and would decide only the case before us as is proper in this constitutional setting. *Ashwander v. TVA*, 297 U. S. 288, 341, 56 S. Ct. 466, 480, 80 L. Ed. 688 (1936) (Mr. Justice Brandeis concurring). I would decide that Bob Jones University which is a religious institution may continue to operate in its tax exempt status consistently with a rule which may prevent government aid to secular institutions practicing segregation. I see no need to undertake to apply a prophylactic rule especially for ease of administration as the majority opinion implies is one reason for its holding. pp. 154-155.

Although the question of the admission of unmarried black students is more difficult than the rule against racial intermarriage and dating, I would decide that matter the same way for the same reasons I have expressed above.

Because I think the public policy analysis disposes of the case, I would not reach the other questions presented, *Ashwander*, supra, including the very serious question of whether the Revenue Service's revocation of tax exempt status of institutions which do not agree with its idea of public policy is in violation of the establishment clause.

I would thus affirm the judgment of the district court.

APPENDIX C

Opinion of the United States District Court for the District of South Carolina Greenville Division

Civ. A. No. 76-775.

United States District Court,
D. South Carolina,
Greenville Division.

BOB JONES UNIVERSITY,

Plaintiff,

v.

UNITED STATES of America,

Defendant.

Dec. 26, 1978.

Wesley M. Walker, Leatherwood, Walker, Todd & Mann, J. D. Todd, Jr., O. Jack Taylor, Jr., Greenville, S. C., for plaintiff.

Steven Shapiro, Martin B. Whitaker, Attys., John F. Murray, Chief, Civ. Trial Section, Southern Region, Tax Div., Dept. of Justice, Washington, D. C., J. D. McCoy, III, Asst. U. S. Atty., Greenville, S. C., for defendant.

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

CHAPMAN, *District Judge.*

Plaintiff instituted this action to recover the amount of $21.00 which it paid in federal income taxes under the Federal Unemployment Tax Act (F. U. T. A.). The sum that plaintiff seeks to be refunded belies the importance of this litigation, since resolution of the suit requires a determination of whether plaintiff qualifies as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code, 26 U. S. C. § 501(c)(3).

The controversy between plaintiff and the government originated in July, 1970, when the Internal Revenue Service publicly announced that it would no longer allow tax exempt status to private schools that practiced racial discrimination or allow gifts to such schools as charitable deductions. By letter dated November 30, 1970, the plaintiff was formally notified of this change and informed that the IRS would challenge the tax exempt status of private schools which practice racial discrimination in their admissions policies. Unable to procure an assurance of tax exemption through administrative means, the plaintiff, in September 1971, instituted an action in this court to enjoin the IRS from revoking its tax exempt status. That suit culminated in *Bob Jones University v. Simon*, 416 U. S. 725, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974), in which the Supreme Court held that the Anti-Injunction Act of the Internal Revenue Code of 1954, 26 U. S. C. § 7421(a), prohibited the plaintiff from obtaining judicial review by way of injunctive action before the assessment or collection of any tax. The Supreme Court went on to suggest that a proper procedure for plaintiff to gain judicial review would be for plaintiff to pay ". . . an installment of FICA [Social Security] of FUTA [Federal Unemployment] taxes, ex-

haust the Service's internal refund procedures, and then bring suit for a refund." 416 U. S. 725, 746, 94 S. Ct. 2038, 2051, 40 L. Ed. 2d 496.

On April 16, 1975, the IRS notified plaintiff of the proposed revocation of its exempt status. Official revocation came on January 19, 1976, and was made effective from December 1, 1970. Subsequently, plaintiff filed FUTA returns for the period from December 1, 1970, to December 31, 1975, and paid a tax totalling $21.00 on one employee for the calendar year of 1975. The plaintiff's request for a refund was denied and plaintiff instituted this suit. In its answer to the amended complaint the government counterclaimed for approximately $490,000.00 that it had purportedly determined was due on the returns filed by plaintiff. In its Order filed October 6, 1977, this Court determined that the counterclaim was not dismissible under Rule 12(b)(6) of the Federal Rules of Civil Procedure but granted plaintiff's motion to sever, for a separate trial, those issues raised by defendant's counterclaim other than the tax status issue presented by plaintiff's amended complaint.

On May 10, 1978, the matter of plaintiff's tax exempt status was tried before the Court without a jury. After reviewing the testimony, depositions, admissions, interrogatories, exhibits, pleadings, and briefs of record and studying the applicable law, the Court, pursuant to Rule 52 of the Federal Rules of Civil Procedure, makes the following:

FINDINGS OF FACT

1. Plaintiff was founded in Florida in 1927, moving to its present location in Greenville, South Carolina in the late 1940's. Plaintiff was incorporated as an eleemosynary corporation under the laws of South Carolina on November 20, 1952, for the following purposes, as stated in its Preamble and contained in its Certificate of Incorporation:

> The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures, combating all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel, unqualifiedly affirming and teaching the inspiration of the Bible (both Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; His identification as the Son of God: His vicarious atonement for the sins of mankind by the shedding of His blood on the Cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.

2. Plaintiff's constitution and bylaws provide that, in the event of the dissolution of plaintiff, its residual assets are to be turned over to another organization which has been determined to be exempt from Federal income tax as an organization described in Section 501(c)(3) of the Internal Revenue Code, for use of one or more of its exempt purposes, or to the Federal, State or local government, for use of one or more public purposes.

3. Plaintiff is not affiliated with any religious denomination, and, in addition, receives no aid from local, state, or federal government. Plaintiff accepts students from kindergarten through college and graduate school, offering approximately fifty degrees. It also offers a nondegree, noncredit program entitled The Institute of Christian Service to teach the principles of the Bible and train Christian character. Plaintiff enrolls approximately 5,000 students nearly one half of which are studying for the ministry or preparing to teach in Christian schools.

4. The plaintiff is dedicated to the teaching and propagation of its fundamentalist religious beliefs. Everything taught at plaintiff is taught according to the Bible. Although students may be exposed to theories that are contrary to Biblical scripture, plaintiff's teachers instruct them to disregard these theories and teach the Bible's literal language as being the only true account. The cornerstone of plaintiff institution is Christian religious indoctrination, not isolated academics.

In attempting to accomplish its purpose of training Christian leadership, the plaintiff follows the teachings of the Bible in every instance where literature or philosophy vary from the "word of God" as set forth in the Bible. This is done so that a student can learn to distinguish between that which is of God and that which is of an "anti-God" mind and combat the latter. At plaintiff, every class, every cultural event, and every athletic contest opens with prayer. Fifteen minutes at the close of each day is devoted to gathering together in small groups for prayer. Every teacher, no matter what are his academic credentials, is required to be a "born again" Christian, who must testify to at least one saving experience with Jesus Christ, and who must consider his mission at plaintiff to be the training of Christian character. Any instructor, who fails to believe in or carry out the essentials of plaintiff's Preamble, is dismissed.

5. Student applicants to plaintiff are screened as to their religious beliefs. Plaintiff has extensively enacted a multitude of disciplinary rules in line with its religious beliefs. These rules appear in a student handbook and address almost every facet of a student's life at plaintiff. Upon entry into the plaintiff, the new student has these rules of conduct reviewed for him at a "rules meeting" and is required to sign a statement that he will abide by these

rules and regulations. A small sample of these rules provides: The institution does not permit dancing, card playing, the use of tobacco, movie-going, and other such forms of indulgences in which worldly young people often engage; no student will release information of any kind to any local newspaper, radio station, or television station without first checking with the University Public Relations Director; students are expected to refrain from singing, playing, and, as far as possible, from "tuning-in" on the radio or playing on the record player jazz, rock-and-roll, folk rock, or any other types of questionable music; and, no young man may walk a girl on campus unless both of them have a legitimate reason for going in the same direction.

6. A primary fundamentalist conviction of the plaintiff is that the Scriptures forbid interracial dating and marriage. Detailed testimony was presented at trial elucidating the Biblical foundation for these beliefs. The Court finds and the defendant has admitted that plaintiff's beliefs against interracial dating and marriage are genuine religious beliefs.

7. From January 1, 1975, to May 29, 1975, plaintiff did not accept applications from unmarried black students unless the applicant had been a staff member of the University for four years or longer; married black students were permitted to enroll. During this period, plaintiff's religious beliefs were not against the admission of blacks, but barring unmarried blacks from enrollment was, in plaintiff's judgment, the safest, easiest, and most reliable method to protect its religious conviction against interracial dating and marriage. In response to the Supreme Court's decision that discriminatory admissions policies of private educational institutions were unlawful, plaintiff amended its admissions policy on May 29, 1975, to allow the admis-

sion of unmarried blacks. Plaintiff continues to adhere to its religious belief forbidding interracial dating and marriage although in its judgment this principle may be more difficult to enforce under the new policy. After May 29, 1975, plaintiff rested upon the following disciplinary rules to protect its religious beliefs:

> *There is to be no interracial dating.*
>
> 1. Students who are partners in an interracial marriage will be expelled.
>
> 2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
>
> 3. Students who date outside their own race will be expelled.
>
> 4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.

Plaintiff's rules regarding interracial dating and marriage constitute a part of the admissions program only insofar as an applicant who is known to the plaintiff to be a partner to an interracial couple would be denied admission.

8. Plaintiff's primary objective is in instructing, conveying, and disseminating its fundamentalist religious beliefs. Although plaintiff performs certain scholastic functions, religion reigns, molding every action, policy, and decision of the plaintiff. Plaintiff's Biblical beliefs permeate every facet of the institution. Education is only one of the means used by plaintiff to indoctrinate people with its Christian principles; religion controls and dominates education.

The fact that plaintiff is not affiliated with any denomination, yet, at the same time, is totally guided by its

fundamentalist beliefs, attests that plaintiff is a distinct religious organization in and of itself. Plaintiff is not an educational appendage of a recognized church that may allude in its educational processes to the beliefs of the parent religious order. Instead, the organizational source of plaintiff's religious beliefs is the university. The convictions of plaintiff's faith do not merely guide its curriculum but, more importantly, dictate for it the truth therein. Bob Jones University cannot be termed a sectarian school, for it composes its own religious order.

The Court finds that plaintiff's primary purpose is religious and that it exists as a religious organization. The institution also serves educational purposes. The Court further finds that during the year 1975 plaintiff religious organization was organized and operated exclusively for religious and educational purposes.[1]

CONCLUSIONS OF LAW

1. This Court has jurisdiction under the provisions of 26 U. S. C. § 7422 and 28 U. S. C. § 1346(a)(1).

2. By this action plaintiff seeks the refund of $21.00 that it paid in taxes on one employee for the calendar year of 1975 under the Federal Unemployment Tax Act (F. U. T. A.), 26 U. S. C. § 3301. Plaintiff bases its claim upon the contention that it qualifies as an exempt organization under 26 U. S. C. § 501(c)(3), and is, therefore, exempted under 26 U. S. C. § 3306(c)(8) from paying F. U. T. A.

1. Two other Courts have noted the predominance of religion in descriptions of plaintiff. The Fourth Circuit characterized plaintiff as a "fundamentalist religious organization . . ." *Bob Jones University v. Connally*, 472 F. 2d 903, 904 (4th Cir. 1973). The Supreme Court stated that "the University is devoted to the teaching and propagation of its fundamentalist religious beliefs." *Bob Jones University v. Simon*, 416 U. S. 725, 734, 94 S. Ct. 2038, 2045, 40 L. Ed. 2d 496 (1974).

taxes. Viewed in light of its actual significance, this suit serves as plaintiff's method of obtaining judicial review of the Internal Revenue Service's revocation of its earlier determination letter that plaintiff was an exempt organization under § 501(c)(3).

In support of its position the plaintiff argues that the IRS's revocation of its tax exempt status was unlawful and beyond the powers delegated it by Congress, because plaintiff meets the express provisions of § 501(c)(3) [2] and the related regulations, 26 C. F. R. § 1.501(c)(3)-1. Plaintiff also attacks the revocation as being unconstitutional in that it violates plaintiff's First Amendment right to the free exercise of its religious beliefs and its Fifth Amendment rights to due process and equal protection of the law.

To justify its revocation of plaintiff's tax exempt status, the defendant contends that plaintiff does not meet the specifications of § 501(c)(3) as interpreted by the IRS and delineated in Revenue Rulings and Procedures 71-447, 72-54, 75-50, and 75-231. In these rulings the IRS announced that, under its recent interpretation of the law, schools which racially discriminated would no longer qualify for tax exempt status. The Serivce outlined in these releases certain criterion (for example, requiring the

2. 26 U. S. C. § 501(c)(3) lists as exempt organizations:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

school to show affirmatively that it does not racially discriminate and has publicized such policy) that would entitle the organization to exempt status.

The IRS determined that plaintiff did not meet these new guidelines and revoked its exempt status back to the date plaintiff was formally notified of the change in interpretation of the law. In particular, as to the year in question, 1975, defendant asserts plaintiff maintained a racially discriminatory admissions policy and that the midyear modification of plaintiff's admissions procedures did not remedy its deficiencies. Defendant argues that plaintiff still has not complied at this time because plaintiff's internal rules against interracial dating and marriage are discriminatory and constitute an integral part of its admissions policies.

The reconsideration and revocation of plaintiff's exempt status stems from a decision by the IRS to construe § 501(c)(3) as requiring religious and educational organizations to be charitable in nature. Defendant contends the legislative intent behind this exemption section was to afford exemptions only to those organizations that could be considered charitable under the common law and such law precludes an organization which violates clearly declared federal public policy from being considered charitable. Defendant continues its rationale by asserting that there exists a clearly declared public policy against discrimination by schools on the basis of race in the selection of students. Therefore, according to defendant, since it has appraised plaintiff's admissions procedures to be racially discriminatory, it argues that the law impels it to revoke plaintiff's favorable standing under § 501(c)(3).

Defendant also argues a judicially created rule of construction that Congress may not be presumed to have intended to encourage violations of public policy. If defendant confers tax exempt status on an organization which

violates public policy, defendant contends that it would thus be interpreting the statute contrary to its legislative intent.

As stated earlier, plaintiff not only contests the defendant's construction of the statute but argues that enforcement of the statute, as interpreted by the government, against plaintiff, violates its constitutional rights.

THE APPLICABILITY OF DEFENDANT'S INTERPRETATION OF SECTION 501(c)(3) TO THE PLAINTIFF

The defendant's policy of revoking tax exempt status set forth in Revenue Rulings and Procedures 71-447, 72-54, 72-50, and 75-231, applies only to educational organizations. The Court is well aware that there is substantial authority to support a finding that there exists a federal public policy which condemns racial discrimination in educational institutions; however, the Court concludes there is no corresponding clearly declared federal public policy against the practice of racial discrimination by religious organizations such as plaintiff.

The position of defendant is that an organization's principal activity governs the category into which it must fall for purposes of § 501(c)(3). Whether an organization is created and operated exclusively for exempt purposes is a question of fact. *Haswell v. United States*, 500 F. 2d 1133, 1142 (Ct. Cl. 1974). The Court has found as a fact that the principal activity of the plaintiff rests in the instruction, advancement, and propagation of its religious beliefs. Since plaintiff is categorized for purposes of § 501(c)(3) as a religious organization, defendant's declared procedure for denying tax exempt status to educational organizations that partake in racial discrimination is inapplicable to plaintiff.

The plaintiff was organized and operated in the year of 1975 exclusively for religious and educational purposes,

the predominate purpose being religious. Both of these purposes are decreed exempt purposes under § 501(c)(3). An organization that is organized and operated exclusively for one or more of such exempt purposes may be exempt. 26 C. F. R. § 1.501(c)(3)-1(d)(iii). Assuming defendant's construction of the statute that exempt organizations must not violate clearly declared public policy, the Court detects that no such policy is violated by plaintiff religious organization. Defendant does not contend nor does the Court find that plaintiff is disqualified under the remaining provisions of the statute and the corresponding regulations. Therefore, the Court concludes that for the year 1975 plaintiff was a tax exempt organization under § 501(c)(3) and, for that reason, was not liable by reason of § 3306(c)(8) for F. U. T. A. taxes during that period.

Whether the IRS's policy of denying exemptions to educational organizations that racially discriminate applies to plaintiff is merely one of several important issues presented that concern the Court and merit further discussion. The revocation of plaintiff's exempt status on the basis of defendant's interpretation of § 501(c)(3) has drastic consequences, both legally and in actual effect. The most severe is that defendant's interpretation of § 501(c)(3), which it attempts to impose upon plaintiff, creates an impermissible intrusion of its First Amendment rights and usurps the power of Congress to legislate the federal tax laws.

The Compatibility of Defendant's Interpretation of § 501(c)(3) With the First Amendment

3. The sensitive nature of First Amendment rights has long been recognized, and the judiciary has been vigilant in the protection of these rights. In the present case plaintiff alleges that defendant's revocation of its tax exempt status violates its right to the free exercise of re-

ligion guaranteed under the First Amendment.[3] Briefly stated, the issue is whether defendant's revocation of plaintiff's tax exempt status, because of policies founded on plaintiff's religious beliefs, unconstitutionally infringes upon plaintiff's right to the free exercise of religion.

The religious belief involved is plaintiff's conviction that the Bible forbids interracial dating and marriage and that God has cursed any acts in furtherance thereof. Defendant's revocation of plaintiff's tax exemption for 1975 resulted from its determination that during this time plaintiff maintained an admissions policy which discriminated on the basis of race. Until May 29, 1975, plaintiff refused to accept the admissions applications of single blacks. After plaintiff altered its admissions policy on that date to permit the acceptance of single blacks, defendant asserts plaintiff continued racial discrimination in its admissions procedure. Defendant reaches this conclusion by stating that discrimination against a person on account of the race of that person's spouse or companion is contrary to expressed public policy, and that this alleged unlawful discrimination in plaintiff's internal rules was an integral part of plaintiff's admissions policy after May 29, 1975.

Even were this Court to assume plaintiff is primarily an educational organization, it cannot agree with defendant that revocation of plaintiff's exempt status for the period beginning after May 29, 1975, because of plaintiff's admissions policy, does not violate plaintiff's free exercise rights. The Court need not rule on this constitutional claim in relation to plaintiff's admissions policy earlier that year, because the question is more sharply presented for the time period after May 29, 1975.

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3. The First Amendment to the Constitution, in part, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

At some point in scrutinizing actions surrounding the practice of a religion, a distinction must be made between actions related to a particular religious belief and the actual practice of the belief itself. In the present case, plaintiff's refusal to admit single blacks was not plaintiff's expression of its religious conviction, though the policy was based on and enacted to protect its religious beliefs. Plaintiff's prohibition of interracial dating and marriage and its refusal to approve or, in any way, encourage such conduct are the practice of its religious beliefs. Plaintiff's disciplinary rules as to interracial dating constitute the practice of its religious convictions. . . . These rules are a direct manifestation of plaintiff's religious beliefs, and any interplay between these rules and plaintiff's admissions policy does not remove their fundamental religious nature. Thus, defendant revoked plaintiff's tax exemption for the period after May 29, 1975, because of the direct practice by plaintiff of its religious beliefs.

The limitations imposed upon the government by the free exercise clause of the Constitution were expressed by the Supreme Court in *Sherbert v. Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963):

> The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut*, 310 U. S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1217, 128 ALR 1352. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U. S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U. S. 67, 73 S. Ct. 526, 97 L. Ed. 829; . . . 374 U. S. 398, 402, 83 S. Ct. 1790, 1793, 10 L. Ed. 2d 965, 969.

There can be no doubt that denial of tax-exempt status to the plaintiff for the period after May 29, 1975, because of its rules regarding interracial dating and marriage penalized the plaintiff for the exercise of its religious beliefs. Plaintiff suffered not only taxation of its income but also a substantial loss of contributions since they were no longer tax deductible. That the burden imposed on the free exercise of religion may be characterized as being only indirect does not preclude the religious practice from protection under the First Amendment. *Braumfield v. Brown*, 366 U. S. 599, 607, 81 S. Ct. 1144, 1148, 6 L. Ed. 2d 563, 568 (1961). To condition the availability of benefits upon plaintiff's willingness to violate a cardinal principle of its religious faith effectively penalizes the free exercise of its constitutional liberties. *Sherbert v. Verner*, 374 U. S. 398, 406, 83 S. Ct. 1790.

A burden on First Amendment values is constitutionally permissible only if justifiable in terms of the government's valid aims. *Gillette v. United States*, 401 U. S. 437, 462, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971). The governmental interest advanced by the regulation must be a "compelling state interest" to pass constitutional muster, for it is "basic that no showing merely of a rational relationship to some colorable state interest [will] suffice." *Sherbert v. Verner*, 374 U. S. 398, 406, 83 S. Ct. 1790, 1795, 10 L. Ed. 2d 965.

Defendant argues the interest being protected is the public policy against discrimination on the basis of the race of a person's companion. See *McLaughlin v. Florida*, 379 U. S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964); *Loving v. Virginia*, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). However, these cases, and other cases cited by defendant, manifest a public policy against the state assisting in such discrimination—each decision involved a finding of state action. These decisions do not represent

compelling public policy against this variety of racial discrimination in the private sector.

As authority for its position that revocation of plaintiff's tax exemption does not impermissively intrude on plaintiff's free exercise rights, defendant relies on *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E. D. N. C. 1977). But, this case is inapposite to the present situation. In *Goldsboro*, the Court was confronted with an admissions policy which totally excluded blacks. The admissions policy of the plaintiff beginning after May 29, 1975, did not exclude blacks; any possible discrimination would have to arise from the practice of its religious belief prohibiting interracial dating and marriage. The secular interest being advanced in *Goldsboro* could be considered compelling, for that interest concerned granting blacks equal access to educational institutions, an interest which this Court earlier recognized was in keeping with clearly declared public policy. On the other hand, this Court can discern no public policy of comparable magnitude with respect to the prohibition of discrimination by private institutions on the basis of the race of one's spouse or companion. Thus, revocation of the plaintiff's tax exempt status after May 29, 1975, constitutes an unconstitutional infringement of plaintiff's right to the free exercise of its religious beliefs.

The Court has discussed the free exercise problem only for the period commencing after May 29, 1975, because, as mentioned earlier, this constitutional question is more acutely presented during this time span. The constitutional problem presented by defendant's revocation is so severe that, as the Court has just shown, such conduct is not sustainable even if it is assumed plaintiff is an educational organization. This Court determines plaintiff to be a religious organization, and there has yet to be expressed any compelling public policy prohibiting

racial discrimination by religious organizations. Once plaintiff opened its doors to single blacks on May 29, 1975, regardless of whether it be classified as a religious or educational institution the defendant's revocation of its tax exempt status violated plaintiff's First Amendment right to the free exercise of religion.

In addition, the Court discerns that the construction of § 501(c)(3) advocated and applied by the defendant in this case seriously risks violation of the Establishment Clause of the First Amendment. The legal theories behind defendant's interpretation of the section and Rev. Rul. 71-447 are two-fold: one, that organizations seeking exemption for "religious" or "educational" purposes must also qualify under the common law as being "charitable", and two, that Congress did not intend to permit tax benefits to organizations which operate in contravention of sharply defined national policies.

Defendant's first mentioned legal position would deny exempt status for the plaintiff on the theory that Congress, in passing the predecessors of § 501(c)(3), intended to grant exemptions only to those organizations that could be termed "charitable" under the law of charitable trusts. The separate enumeration of other purposes in the statute, according to defendant, occurred as a result of the exercise of an abundance of caution on the part of Congress. Defendant then turns to the law of charitable trusts to support its revocation of plaintiff's tax exemption because such law disallows charitable status to organizations whose purposes or policies violate law or clearly declared federal policy.

The second legal basis for revoking plaintiff's tax exempt status proceeds on the theory that Congress will not be presumed to have intended conferral of tax benefits to institutions that operate contrary to clearly declared federal policy. See *Tank Truck Rentals v. Commissioner*,

356 U. S. 30, 78 S. Ct. 507, 2 L. Ed. 562 (1958). Thus, both legal theories, which defendant employs to maintain its construction of § 501(c)(3), rely on its interpretation that Congress intended to limit application of the statute to organizations whose activities comport with clearly defined federal policy.

Conflict with the Establishment Clause lurks within defendant's construction of the exemption provision because defendant puts no limit on its application. All religious organizations, such as plaintiff, are to be denied tax exemptions unless the IRS has judged the organization's purposes and practices to be in line with expressed federal policy. Under the government's reading of the statute, only those religious organizations, whose purposes and practices are in harmony with those of the federal government, will be granted an exemption. To preserve its tax exemption, a church, or other religious organizations, such as plaintiff, would have to make sure it stayed in step with federal public policy.

The Supreme Court in *Walz v. Tax Commission of the City of New York*, 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), determined that the granting of property tax exemptions equally to *all* churches did not run afoul of the Establishment Clause. *Walz* considered the across-the-board granting of exemptions to churches and did not address the situation presented by the case at bar where defendant's interpretation of the statute requires denying exemption to some churches while granting it to others. The application of the law, in the manner which defendant construes it, results in the government favoring those churches that adhere to federal policy, more specifically, in this case, those churches whose religious beliefs do not forbid interracial marriage.

In *Tilton v. Richardson*, 403 U. S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971), the Supreme Court reiterated its

well known test for determining if a statute contravenes the Establishment Clause:

> First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion?
>
> 403 U. S. 672, 678, 91 S. Ct. 2091, 2095, 29 L. Ed. 2d 790.

Although the purpose of the government's construction of § 501(c)(3) may be considered secular in nature in that it promotes federal public policy, a primary effect is the inhibition of those religious organizations whose policies are not coordinated with declared national policy and the advancement of those religious groups that are in tune with federal public policy. Instead of all religious organizations being on the same footing as was the case in *Walz*, the government's construction of the section would saddle the burden of taxation only on those religious organizations whose procedures conflict with federal public policy. One form of the oppression of religion by government is the taxation of it. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 793, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973).

In *Nyquist*, the Court struck down a New York tax statute designed to assist parents who sent their children to parochial schools for having the effect of advancing religion. In so doing the Court commented as follows:

> Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court.
>
> 413 U. S. 756, 793, 93 S. Ct. 2955, 1975, 37 L. Ed. 2d 948.

The construction of § 501(c)(3) argued by the government would do away with the general grant of tax exemptions to all religious organizations, which was found in *Walz* to constitute an act of benevolent neutrality, and, in effect, transforms the statute into a law that provides a special tax benefit, because favorable tax status will be accorded only to some, not all, religious organizations. Since only selected religious institutions would receive exemption under defendant's interpretation of the law, tax exemption provided by the section no longer manifests neutrality towards all religions but, rather, favors some over others. The effect is to strengthen those religious organizations whose religious practices do not conflict with federal public policy and to discriminate against those religious groups whose convictions violate these secular principles. The unavoidable effect is the law's tending toward the establishment of the approved religions.

Regarding the element of entanglement, defendant, through its interpretation of § 501(c)(3), seeks the approval of this Court to indulge in the extensive entanglement which, the *Walz* Court decided, is avoided by across-the-board exemptions to religious organizations. Under defendant's theory, the government would be required to monitor continually the practices of all religious organizations to determine their entitlement to exemption. This Court, however, need not further speculate as to whether defendant's interpretation of the statute results in an unlawful entanglement between government and religion, since it has already concluded that implementation of defendant's construction of the section would have the impermissible effect of discriminating between religions. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 794, 93 S. Ct. 2955, 37 L. Ed. 2d 948.

The decisions relied upon by defendant to support its reading of § 501(c)(3) fail to consider defendant's interpretation of the statute as applied to religious organizations

and how such interpretation could be sustained under the Establishment Clause. *Green v. Connally*, 330 F. Supp. 1150 (D. D. C. 1971) (three judge court), aff'd per curiam sub nom. *Coit v. Green*, 404 U. S. 997, 92 S. Ct. 564, 30 L. Ed. 2d 550 (1971);[4] *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E. D. N. C. 1977). The statute, when applied as it is written, engages the government in a constitutionally approved act of neutrality, preserving a healthy separation of church and state. On the other hand, defendant's construction of the statute, by supplying an economic advantage to those religions which conform to federal public policy, leads, in many respects, to an identity between church and state.

DEFENDANT'S INTERPRETATION OF § 501(c)(3) IN RELATION TO THE POWER DELEGATED IT BY CONGRESS.

4. Defendant acknowledges that the limitation which it has attached to the § 501(c)(3), that an organization qualifying under one or more of the listed exempt purposes may be denied exemption if its practices violate public policy, has no support in the language of the section. The construction which the IRS has placed on § 501(c)(3) troubles this Court. The sole legal basis for defendant's revocation of plaintiff's tax exempt status and its promulgation of Revenue Rulings and Procedures 71-447, 72-54, 75-50, and 75-231, is defendant's construction of § 501 (c)(3). This Court concludes that defendant's interpretation cannot be sustained and that this deficiency establishes an additional ground for ruling in favor of plaintiff.

4. During the course of the litigation of *Green*, the defendant adopted plaintiff's position, and, thus, the decision was not the outcome of a true adversarial contest. The Supreme Court has noted that its affirmance in *Green*, for this reason, lacks the precedential weight of a case involving a truly adversary controversy. *Bob Jones University v. Simon*, 416 U. S. 725, 740, n. 11, 94 S. Ct. 2038, 40 L. Ed. 2d 496.

The enumeration of exempt purposes in § 501(c)(3) is plain and unambiguous—"religious, charitable, scientific, testing for public safety, literary, or educational purposes, ..." The corresponding regulations speak with equal clarity and state, in part, as follows:

> (d) *Exempt Purposes*—(1) *In general.* (i) An organization may be exempt as an organization described in section 501(c)(3) if it is organized and operated exclusively for one or more of the following purposes:
>
> (*a*) Religious,
>
> (*b*) Charitable,
>
> (*c*) Scientific,
>
> (*d*) Testing for public safety,
>
> (*e*) Literary,
>
> (*f*) Educational, or
>
> (*g*) Prevention of cruelty to children or animals.
>
> * * *
>
> (iii) Since each of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. 26 C. F. R. § 1.501(c)(3)-1(d)(1), (2).

Both the statute and the related regulation separately enumerate the various exempt purposes as being independent and sustaining. This Court must sustain the regulation because it is neither unreasonable nor plainly inconsistent with the revenue statute. *DeTreville v. United States*, 445 F. 2d 1306, 1311 (4th Cir. 1971).

The interpretation of the section invoked by defendant to revoke plaintiff's exempt status acts to place a limitation or condition on the section's express terms. Plaintiff religious organization is organized and operated exclusively for religious and educational purposes, yet defendant denies it exempt status. The device that defendant utilizes to place a condition on the unqualified language of the statute is the legal principle that taxing statutes are construed to give effect to legislative intent. Applying this rule of construction to the present case, defendant reaches the conclusion that the intent of Congress was not to grant exempt status to those organizations, otherwise qualifying, whose policies violate federal public policy.

The Courts, which have interpreted § 501(c)(3) as restricted to those organizations in accord with federal policy, base their rationale on the judicial precept that congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are illegal or contrary to public policy. *Green v. Connally*, 330 F. Supp. 1150, 1161 (D. D. C. 1971), *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314, 1318 (E. D. N. C. 1977). In so construing the statute, these Courts refused to premise their conclusion upon defendant's alternate theory in support of its position, mentioned earlier, that Congress, in setting forth the various exempt purposes, intended to require qualification under the law of charitable trusts. With all due deference to the Courts in *Green* and *Goldsboro*, this Court believes that these decisions did not fully consider the nature of the limitation they engrafted on the statute.

In deciding that tax exemptions were not intended to be granted to organizations which violate public policy, both the Court in *Green* and in *Goldsboro* rely on the Supreme Court's opinion in *Tank Truck Rentals v. Commissioner*, 356 U. S. 30, 78 S. Ct. 507, 2 L. Ed. 2d 562

(1958). The *Tank Truck* decision involved public policy as the basis for denying deduction of specific expenses; it did not concern public policy as the basis for denying the complete exemption of an organization due to a select practice of it. The defendant has failed to bring to this Court's attention any judicial decisions, other than *Green* and *Goldsboro* where this public policy rationale has been used to deny exemptions.[5] Nevertheless, the *Tank Truck* decision is instructive in the present case.

In *Tank Truck*, the taxpayer sought to deduct, as a business expense, amounts paid in fines occurring in the course of its business for violations of a state penal statute. After finding that allowing this deduction would encourage violations of state law, the Supreme Court defined the scope of the public policy limitation as follows:

> This is not to say that the rule as to frustration of sharply defined national or state policies is to be viewed or applied in any absolute sense. "*It has never been thought . . . that the mere fact that an expenditure bears a remote relation to an illegal act makes it non-deductible.*" *Commissioner v. Heininger*, supra (320 U. S. 467 at 474 [64 S. Ct. 249, at page 253, 88 L. Ed. 171]). Although each case must turn on its own facts, *Jerry Rossman Corp. v. Commissioner* (CA2) 175 F. 2d 711, 713, *the test of nondeductibility always in the severity and immediacy of the frustration resulting from allowance of the deduction.* The flexibility of such a standard is necessary if we are to accommodate both the congressional intent to tax only net income, and the presumption against congressional

5. *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770 (E. D. Cal. 1974), cited by defendant, did not expressly adopt defendant's interpretation of § 501(c)(3) but, instead, decided that, even under defendant's interpretation, plaintiff qualified for tax exempt status.

> intent to encourage violation of declared public policy. [Emphasis Added]. 356 U. S. 30, 35, 78 S. Ct. 507, 510, 2 L. Ed. 2d 562.

Thus, assuming that permitting a deduction closely compares to granting an exemption as the defendant argues, the Court must analyze the facts of this case to determine if conferral of exempt status to plaintiff severely and immediately frustrates national policy.

A comparison of the facts of this case with the criterion established by the Supreme Court for invoking the public policy exception immediately reveals an absence of the close relationship required to exist between the tax benefit and the frustration of federal policy. In *Tank Truck*, the Supreme Court found that allowing deduction of fines for illegal acts would frustrate a state policy in severe and direct fashion by reducing the "sting" of the penalty and encouraging violations. To the contrary, permitting tax exempt status to plaintiff does not so act as to encourage plaintiff to discriminate on the basis of race. Plaintiff's racial views result from sincerely held religious beliefs. Regardless of plaintiff's tax status, its religious beliefs remain immutable. The relationship between plaintiff's exemption and a national public policy against discrimination is simply too remote. In instances where a deduction has been denied on the ground of this public policy limitation, the relationship between the questioned expense and the applicable policy has been sufficiently close that allowance of the deduction directly and in a significant manner frustrates the clearly defined policy such as where the expenditure itself is illegal or is paid as a penalty for an unlawful act. *Tank Truck Rentals v. Commissioner*, 356 U. S. 30, 35, 36, 78 S. Ct. 507, 2 L. Ed. 2d 562. See also, Annot. 27 A. L. R. 2d 498 (1953). The mere fact that a taxpayer, who receives a tax benefit, has violated public policy does not, by itself, require a denial of the tax benefit.

Thus, the judicially created "public policy" limitation is much restricted[6] and not applicable to situations, such as the case at bar, where the relationship between the tax benefit and the proscribed conduct is tenuous. The nature of this relationship is crucial to the application of the doctrine but was not examined by the Court in *Green* or *Goldsboro*.[7] The defendant ignores this required nexus inadvocating a construction of § 501(c)(3) that any organization, seeking exemption, whether its purpose be religious, educational or otherwise, must comport with clearly defined federal policy. Defendant requires no relationship between the unlawful conduct and the exemption. According to defendant's application of the public policy limitation expressed in *Tank Truck*, exempt status would be denied to any church that somehow committed a violation of a federal statute, a recognized expression of de-

6. The Supreme Court expressed its view that the doctrine should be confined rather than expanded, as the defendant attempts to do, in application in *Commissioner v. Tellier*, 383 U. S. 687, 86 S. Ct. 1118, 16 L. Ed. 2d 185 (1966):

> But where Congress has been wholly silent, it is only in extremely limited circumstances that the Court has countenanced exceptions to the general principle reflected in the Sullivan, Lilly, and Heininger decisions [which permitted deduction of expenses qualifying under the terms of the statute despite conduct of the taxpayer that was contrary to public policy]. . . . The present case falls far outside that sharply limited and carefully defined category.

383 U. S. 687, 693-694, 86 S. Ct. 1118, 1122, 16 L. Ed. 2d 185.

7. The following excerpt from the *Goldsboro* opinion illustrates the decision's failure to take into consideration the relationship between the tax benefit and the actual frustration of a clearly defined federal policy:

> It cannot be assumed that Congress intended to confer this encouragement, however *indirect*, to organizations which actively violate declared national policy. [Emphasis added]. 436 F. Supp. 1314, 1318.

clared federal policy, because defendant's theory requires no showing of any relation between conferral of the exemption and frustration of the federal policy.

The relationship between the tax benefit and the proscribed conduct in the present case is similar to that in *Commissioner v. Tellier*, 383 U. S. 687, 86 S. Ct. 1118, 16 L. Ed. 2d 185 (1966). In *Tellier* the Supreme Court determined that legal fees incurred by the taxpayer in the unsuccessful defense of a criminal prosecution involving the taxpayer's business did not fall within the "public policy" exception. The taxpayer in *Tellier* was exercising his constitutional right to counsel; plaintiff in the instant case is exercising its First Amendment right to the free exercise of religion as manifested by its racial policies. The taxpayer's exercise of his constitutional right in *Tellier* was held not to frustrate any public policy. Similarly, in the present case, in the absence of any showing that allowance of an exemption to the plaintiff will itself act to dilute severely and directly public policy, the application of the "public policy" exception is not warranted.

On a related matter, defendant argues that the circumstances are more compelling in the present case than in *Tank Truck* for employing the public policy limitation. Defendant's contention is that in *Tank Truck* the Court had to balance public policy considerations against the competing only net income, while in the present case, defendant asserts, there exists no comparable countervailing consideration with respect to § 501(c)(3).

This Court disagrees with defendant and detects that there does exist a competing consideration underlying § 501(c)(3) that must be weighed against public policy limitations. Defendant recognizes in its argument that the legislative intent behind this section was that exemptions should be granted to those organizations formed for the listed purposes, because they provide a reciprocal benefit

to the public. The desire of Congress not to tax religious and educational organizations that, presumptively, benefit society does represent a competing consideration in this case to counterbalance the presumption against congressional intent to encourage violation of declared public policy.[8] As to defendant's theory that the public policy exception expressed in *Tank Truck* supports its interpretation of § 501(c)(3), the case in dispute must undergo, and this Court so performed, the same rigorous analysis required by Supreme Court in *Tank Truck* for determining the applicability of this limited doctrine.

The *Tellier* decision not only instructs concerning the public policy exception but also makes an important pronouncement involving the federal income tax laws in general that, in this Court's opinion, especially pertains to the case at bar. In defining the scope of the tax law, the Court decreed the following:

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8. In the course of defendant's argument that there is no competing consideration to offset the public policy exception, defendant suggests that, because it has determined plaintiff racially discriminates, plaintiff does not benefit the public and, thus, does not merit exemption. The Court considers defendant's logic on this point as somewhat of a nonsequitur, seemingly stemming from its confusion of the terms "public policy" and "public benefit". The two are not synonymous. Public policy is many faceted, one facet of which is that society may provide relief from taxation to those organizations, such as plaintiff religious organization, that are of benefit to the public. The good resulting to the public from these groups depends upon the fulfillment of their purposes. Because one of these organizations may have, in an area of its operations, engaged in conduct that might not have been completely in line with some other aspect of public policy does not automatically mean the public no longer benefits from the organization. Defendant seems to imply that a change in plaintiff's policies to conform to defendant's guidelines would transform the religious organization from one that did not benefit the public into one that did, although the function and purposes of plaintiff remain unchanged throughout.

> We start with the proposition that the federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes.
>
> 383 U. S. 687, 691, 86 S. Ct. 1118, 1120, 16 L. Ed. 2d 185.

The deduction and exemption provisions of the Code, where Congress has been wholly silent, are to be applied equally without regard to whether the taxpayer has committed an illegal act or violated public policy. Only under very limited circumstances, later pointed out in the *Tellier* opinion, where there exists a direct correlation between allowance of the tax benefit and direct, actual frustration, or encouragement of such frustration, of a clearly defined governmental policy, will public policy preclude bestowing the tax benefit.

The Court reads the above quote from *Tellier* as the Supreme Court's admonishment of defendant not to use the tax laws as a means of enforcing other laws and public policies if the revenue statute makes no mention of such conduct or if there does not exist a tight nexus between the tax benefit and the alleged unlawful conduct. The defendant's blanket policy announcements in Revenue Rulings and Procedures 71-447, 72-54, 75-50, and 75-231, that it will deny tax exempt status to organizations which racially discriminate, but otherwise qualify under § 501 (c)(3), constitute a use by the IRS of the federal tax law as a sanction for what it considers a wrongdoing, or its idea of proper social conduct of persons of different races, uses of the Code prohibited by the Supreme Court. The underlying purpose of these Revenue Rulings and Procedures is so clear as not to require scrutiny of the taxpayer

on a case by case basis to determine the relationship between permission of the exemption and its role in severely and immediately frustrating public policy, as is required by the Supreme Court to trigger the public policy exception.

In these administrative pronouncements the IRS, in effect, announced that it will implement § 501(c)(3) on the basis of whether the taxpayer has abided by federal law or public policy. The section is to become the IRS's mechanism for disciplining wrongdoers or promoting social change. The Supreme Court ruled in *Tellier* that use of the tax laws for the former purpose is improper and it follows that the same rule would apply to the latter. In addition, the Court is concerned with the many dangers inherent in defendant's interpretation that exemptions may be revoked for violations of federal public policy. Federal public policy is constantly changing. When can something be said to become federal public policy? Who decides? With a change of federal public policy, the law would change without congressional action—a dilemma of constitutional proportions. Citizens could no longer rely on the law of § 501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided the law to be for that particular day. Our laws would change at the whim of some nonelected IRS personnel, producing bureaucratic tyranny.

This Court has brought to light the legal and administrative problems presented by defendant's construction of § 501(c)(3) because the Court finds this construction is not supported by any theory defendant advances to show that legislative intent warrants its interpretation. The Court has already, at length, commented on why the judicially created presumption against congressional intent to encourage violations of federal policy does not apply to the present case. The Court also rejects defendant's other basis for its construction of the section—that

the original legislative history behind the section indicates that Congress, although it separately stated the several exempt purposes, intended only to exempt those organizations which could qualify as charitable under the common law.

Congress' individual listing of exempt purposes within § 501(c)(3) strongly suggests that it intended to make each of the enumerated purposes an exempt purpose in itself. Defendant, without reference to the actual legislative history in support of its contention asks this Court to rule that the separate enumeration of "religious" and "educational" is superfluous and redundant because the term "charitable" includes the former two terms. Absent any specific legislative history sustaining defendant's contention, the Court will not indulge in such a construction of the section. It is not " 'permissible to construe a statute on the basis of a mere surmise as to what the Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated'." *United States v. Deluxe Cleaners and Laundry, Inc.*, 511 F. 2d 926, 929 (4th Cir. 1975). Moreover, if a statute admits a reasonable construction which gives effect to all its provisions, this Court may not adopt a strained reading which renders one part a mere redundancy. *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307-308, 81 S. Ct. 1579, 6 L. Ed. 2d 859 (1961).

Defendant fails to bring forth any legislative history that would compel this Court to depart from these cardinal rules of statutory construction. Those cases, which defendant cited in support of its interpretation, referred to the common law to construe the term "charitable", as used in the Act, and did not rule that Congress intended that organizations, qualifying for the other listed exempt purposes, must also qualify as being charitable under the common law. *Pennsylvania Co. for Insurance on Lives,*

Etc. v. Helvering, 62 App. D. C. 254, 66 F. 2d 284 (1933); *Girard Trust Co. v. Commissioner*, 122 F. 2d 108 (3rd Cir. 1941). These decisions approved reference to the law of charitable trusts to construe a word, "charitable", within the statute, not to construe the entire section as defendant now seeks. This Court finds no indication that Congress intended to exempt only those organizations that are "charitable". In light of the plain, unambiguous language of § 501(c)(3) this Court must give effect to those exempt purposes specified besides "charitable" and rule that organizations seeking exemption for such purposes need not also qualify as being "charitable".[9]

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9. The meager amount of legislative history which this Court has been able to undercover concerning the original predecessor of § 501(c)(3) does not suggest that "religious" and "educational" were intended to be synonymous with "charitable". During the House debate in 1913 on the Bill that became the first modern income tax law, an amendment was offered to add "scientific" and "benevolent" to the list of types of corporations exempted under the Bill, which already exempted religious, charitable, or educational corporations. Rep. Hull, in speaking for the Bill, opposed the amendment by stating:

> Of course any kind of society or corporation that is not doing business for profit and not acquiring profit would not come within the meaning of the taxing clause of paragraph G. So I see no occasion whatever for undertaking to particularize, because we could find innumerable kinds of these charitable or educational or other organizations called by different names, and there would be no end to it.
>
> 50 Cong. Rec. 1306

"Charitable" and "educational" are spoken of as different types of nonprofit organizations covered by the exemption clause; the terms are used in an exclusive, not inclusive sense. It cannot be concluded from this passage that exempt status under the clause was to be limited only to corporations meeting the definition of "charitable" under the law of charitable trusts.

[Subsequently, the Senate amended the Act so that in its final form it did include "scientific". 50 Cong. Rec. 3856. 38 Stat. 172.]

Since both of defendant's alternate theories regarding legislative intent fail to support restricting § 501(c)(3) exempt status to organizations whose practices are in unison with federal public policy, defendant's construction of the law is unfounded. Furthermore, the statute contains no language creating the limitation contended by defendant. Although plaintiff satisfies the written requirements of § 501(c)(3) defendant has revoked its exemption. Thus, the IRS in this case and in its policy pronouncements, as exemplified by Rev. Rul. 71-447, has enacted in substance and effect a change in the law.

In enforcing a construction of the statute which is unwarranted by its legislative history or express terms, the IRS has overstepped its authority and usurped that of Congress. In *Manhattan General Equipment Co. v. Commissioner*, 297 U. S. 129, 56 S. Ct. 397, 80 L. Ed. 528 (1935), the Supreme Court clearly delineated the bounds of an agency's power:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.
>
> 297 U. S. 129, 134, 56 S. Ct. 397, 400, 80 L. Ed. 528.

"This reasoning applies with even greater force to the Commissioner's rulings and acquiescences." *Dixon v. United States*, 387 U. S. 68, 75, 85 S. Ct. 1301, 1305, 14 L. Ed. 2d 223 (1965). By altering the law in the present case, the IRS has attempted to exercise a power that is reserved only to Congress. The rulings and procedures which the IRS has used to change the law are a nullity.

The revocation by the IRS of plaintiff's tax exempt status under its misinterpretation of § 501(c)(3) is unlawful and unconstitutional.

It is the province of Congress, not the IRS, to make the federal tax laws. The law that Congress has passed in this instance is clear and unambiguous and this Court will give it effect. Should Congress desire to change the law, it may so do in keeping with the Constitution. This Court cannot, and will not, approve changes in the law by an administrative agency that completely bypass the legislative process.

CONCLUSION

5. Having determined that revocation of plaintiff's tax exempt status by defendant was improper under defendant's own rulings and procedures, violated plaintiff's First Amendment rights, and resulted from the Treasury's exceeding those powers delegated to it, the Court determines that it is unnecessary to examine further claims made by plaintiff. For the foregoing reasons, the Court concludes plaintiff was entitled to exemption for the calendar year of 1975 under § 501(c)(3) and is, therefore, entitled, pursuant to § 3306(c)(8) of the Act, to judgment against defendant for the amount of $21.00 representing a refund of the F. U. T. A. tax previously paid.

AND IT IS SO ORDERED.

APPENDIX D

Opinion of the United States District Court for the District of South Carolina Greenville Division

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Civil Action No. 79-163

Bob Jones University,

Plaintiff,

v.

W. Michael Blumenthal, Secretary of the Treasury, and Jerome Kurtz, Commissioner of Internal Revenue,

Defendant.

This matter is before the Court on plaintiff's motion for preliminary relief and on defendants' motion to dismiss. The Court heard these motions on April 16, 1979.

Plaintiff brings the instant action to effectuate the decision of this Court in *Bob Jones University v. United States of America*, Civil Action No. 76-775, [*Bob Jones II*], in which, by Orders dated December 26, 1978, and January 11, 1979, the Court determined plaintiff was a religious organization exempt from taxation under 26 U. S. C. § 501 (c)(3). The earlier suit, now on appeal by the United States to the U. S. Court of Appeals for the Fourth Circuit,

was a refund action by plaintiff and resulted in a determination in plaintiff's favor both on it's claim and the government's counterclaim. Despite this Court's ruling in *Bob Jones II*, the Internal Revenue Service of the Department of the Treasury has failed to reinstate plaintiff as an organization exempt from taxation in its "Bulletin", its "Cummulative List of Organizations" (Publication 78), or by issuance of a "Ruling Letter", thus refusing to give any practical effect to the judicial determination of plaintiff's status. By way of the present action, plaintiff seeks a mandatory injunction, in the nature of mandamus, compelling defendants to make the above restoration and publication of its exemption from taxation and enjoining defendants from issuing, in the future, these publications unless the plaintiff is listed as an exempt organization. Plaintiff's present motion seeks preliminary injunctive relief.

Defendants move this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss the action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The basis of defendants' motion is that the present action is barred under the Anti-Injunction Act of the Internal Revenue Code of 1954, 26 U. S. C. § 7421, and the Declaratory Judgment Act, 28 U. S. C. §§ 2201, 2202. Defendants further contend that the doctrine of sovereign immunity precludes the relief sought by plaintiff.

Because of the Supreme Court's repeated strict construction of 26 U. S. C. § 7421, as illustrated by its opinion in plaintiff's first attempt to secure judicial review in *Bob Jones University v. Simon*, 416 U. S. 725 (1974) [*Bob Jones I*], this Court conceives the application of this statute to be the major question presented by both motions. Moreover, the Fourth Circuit has held the federal tax exception to the Declaratory Judgment Act is co-extensive with the

Anti-Injunction Act, *Jules Hairstylists of Maryland, Inc. v. United States*, 268 F. Supp. 511, 515 (D. Md. 1967), aff'd 389 F. 2d 389 (4th Cir. 1968), cert. denied, 391 U. S. 934 (1968). As a result of this interpretation, a decision as to whether plaintiff's suit is barred by 26 U. S. C. § 7421 will also determine whether such action can be maintained under 28 U. S. C. §§ 2201, 2202.

The defendants argue that, for purposes of § 7421(a),[1] the posture of the present case is essentially indistinguishable from *Bob Jones I.* Defendants contend that the instant action to compel the restoration of plaintiff's exemption and advance assurance of deductibility of contributions is a suit for the "purpose of restraining the assessment or collection" of a tax, and, as such, is squarely barred under *Bob Jones I.* The Court, however, disagrees with this characterization of the present suit and concludes the Supreme Court in *Bob Jones I* left the issue of injunctive relief in a refund action, an open question.

The case now before the Court differs substantially from that before the Supreme Court in *Bob Jones I.* Simply stated, that decision involved a pre-enforcement action by plaintiff for injunctive relief to enjoin the defendants from revoking plaintiff's tax exempt status. After deciding that plaintiff's suit was precluded under § 7421(a), the Supreme Court in *Bob Jones I* suggested a means whereby plaintiff could properly secure judicial review.[2] Plaintiff followed

1. The section provides the following:

§ 7421. Prohibition of suits to restrain assessment or collection

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed. . . .

2. 416 U. S. 725, 746.

this directive in *Bob Jones II*, by instituting a suit for refund. This Court then made the requisite findings of fact and conclusions of law, embodied in its Order dated December 26, 1978. Thus, unlike *Bob Jones I*, the case at bar does not involve a pre-enforcement action for injunctive relief, since the question of plaintiff's exemption from taxation has been properly adjudicated and determined.

By way of footnote in *Bob Jones*, I, the Supreme Court expressly stated that its decision was not dispositive of the question of whether § 7421(a) bars the present suit:

> 22. Petitioner did not bring this case as a refund action. Accordingly, we have no occasion to decide whether the Service is correct in asserting that a *district court* may not issue an injunction in such a suit, but is restricted in any tax case to the issuance of money judgments against the United States . . . . For example, it may be possible to conclude that a suit for a refund is not "for the purpose of restraining the assessment or collection of any tax . . . ," and thus that neither the literal terms nor the principal purpose of § 7421(a) is applicable. Moreover, such a suit obviously does not clash with what the Court referred to in Williams Packing, supra, as a "collateral objective of the Act—protection of the collector from litigation, pending a suit for refund." 370 U. S. at 7-8, 8 L. Ed. Ed. 2d 292. And there would be a serious question about the reasonableness of a system that forced a § 501(c)(3) organization to bring a series of backward-looking refund suits in order to establish repeatedly the legality of its claims to tax-exempt status and that precluded such an organization from obtaining prospective relief even though it utilized an avenue of review mandated by Congress

> . . . . *But our decision today that § 7421(a) bars preforcement injunctive suits by organizations claiming § 501(c)(3) status unless the standards of Williams Packing are met should not be interpreted as deciding whether injunctive relief is possible in a refund suit in a district court.* 416 U. S. 725, 748, n. 22 [Emphasis added].

Defendants interpret the above comment to prohibit injunctive relief until a "final decision in a refund suit". Defendants' Memorandum in Support of their Motion to Dismiss, p. 11. By the term "final", defendants mean the conclusion of the appellate process.

Defendants' construction of footnote 22 has no foundation therein. The Supreme Court twice makes reference to the jurisdiction of a "district court". In discussing the possibility of injunctive relief for the taxpayer, the Supreme Court necessarily was considering the situation where a taxpayer prevailed in a refund action in district court. The Supreme Court was equally aware that the government could appeal such an adverse determination, yet it does not qualify the possibility of injunctive relief as turning on the outcome of an appeal. Rather, footnote 22 unequivocally focuses on the power of a district court and leaves unanswered the question now confronting this Court.

The defendants cite *Marvel v. United States,* 548 F. 2d 295 (10th Cir. 1977) in support of their position that § 7421(a) precludes the instant action. In *Marvel,* the plaintiffs sought to enjoin the IRS from levying on their assets during the pendency of their suit for refund. The Tenth Circuit found the relief sought was barred by § 7421(a). *Marvel,* however, did not decide the propriety of such relief *after* a judicial determination in favor of the taxpayer in the district court in a refund action—

the present case. The Tenth Circuit in *Marvel*, while failing to decide it, recognized the issue in the instant action in the following:

> A more complete reading of these cases [*Bob Jones* I and "*Americans United*", the companion case of *Bob Jones I*] indicates the Supreme Court was concerned with the range of remedies available *after* a final determination had been reached in a refund suit, *viz.*, whether a district court could enjoin the IRS from withdrawing an organization's 501(c)(3) status after the legality of the organization's claim to such status had been judicially determined. 548 F. 2d 295, 299 [Emphasis in original].

The Tenth Circuit similarly frames the question as one involving the district court. Furthermore, the Court in *Marvel* speaks of the outcome of a refund suit in district court in terms of being a "final determination" and makes no requirement of completion of the appellate process.

Whether this Court's decision in *Bob Jones II* may be considered as "final" is not determinative of whether the present action is precluded by the construction of § 7421 (a) by the Supreme Court in *Bob Jones I* and by the Tenth Circuit in *Marvel*.[3] What is controlling is that these two courts classify the open question as one involving the power of the district court after its determination of a plaintiff's § 501(c)(3) status in a refund action. Having concluded that existing decisions leave unresolved whether the present suit is barred under § 7421(a), the Court determines that permission of the action would not conflict with the enunciated purposes of the Anti-Injunction Act and accord with basic equitable considerations.

3. For the purpose of appeal, it is certainly characterized as final. 28 U. S. C. § 1291.

In *Bob Jones* I, the Supreme Court summarized the purpose of the Anti-Injunction Act as follows:

> The Court has interpreted the principal purpose of this language to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of *preenforcement* judicial interference, "and to require that *the legal right to the disputed sums be determined in suit for a refund.*" Enochs v. Williams Packing & Navigation Co., supra at 7, 8 L. Ed. 2d 292. See also, e.g., State Railroad Tax Cases, 92 US 575, 613-614, 23 L. Ed. 663 (1876). Cf. Cheatham v. United States, 92 US 85, 88-89, 23 L. Ed. 561 (1876). The Court has also identified "a collateral objective of the Act—protection of the collector from litigation *pending a suit for refund.*" Williams Packing, supra., at 7-8, 8 L. Ed. 2d 292, 82 S. Ct. 1125.
>
> 416 U. S. 725, 736-737 [Emphasis added.]

Approving injunctive relief in the present case does not transgress the above purposes since their primary concern is to avoid judicial intervention pre-enforcement and prior to a suit for refund. Plaintiff has had the tax assessed against it, paid a refund on a part thereof, and vindicated its legal right to tax exempt status in a subsequent suit for refund. The case at bar substantially differs from *Bob Jones I* which involved plaintiff's premature, untenable attempt to attain judicial review. Maintenance of the instant action does not violate the principal purposes of § 7421(a).

Regardless of this determination that *Bob Jones I* does not preclude the present action, the Court finds the circumstances have evolved, since that earlier action, to the state that plaintiff now satisfies the one judicially established exception to § 7421(a). In this earlier suit,

the Supreme Court spelled out the following necessary elements to circumvent the Act under the exception:

> Only upon proof of the presence of two factors could the literal terms of § 7421(a) be avoided: first, irreparable injury, the essential prerequisite for injunctive relief in any case; and second, certainty of success on the merits. Id., at 6-7, 8 L. Ed. 2d 292. An injunction could issue only "if it is clear that under no circumstances could the Government ultimately prevail. . . ." Id., at 7, 8 L. Ed. 2d 292. And this determination would be made on the basis of the information available to the Government at the time of the suit. "Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." Ibid.
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> 416 U. S. 725, 737.

In *Bob Jones I*, the Supreme Court was not as much concerned with plaintiff's ability to show irreparable harm as with its inability to satisfy the second requirement. The Supreme Court expressed concern over the "especially harsh regime" imposed on § 501(c)(3) organizations threatened with the loss of their favorable tax status, but noted the matter as one Congress must decide. 416 U. S. 725, 749-750. Since that decision, plaintiff has had its § 501(c)(3) status revoked and, undeniably, suffers severe injury, even after this Court's ruling in *Bob Jones II*, because defendants have failed to reinstate its exemption or provide advance assurance of deductibility to contributors.

Plaintiff's fatal deficiency in *Bob Jones I* with respect to the Williams Packing standard, set out above, rested in the Supreme Court's assessement of plaintiff's certainty of success on the merits. "Without deciding the merits, we think that petitioner's [plaintiff's] First Amendment, due

process, and equal protection contentions are sufficiently debatable to foreclose any notion that 'under no circumstances could the Government ultimately prevail. . . .'" 416 U. S. 725, 748-749. Having reviewed the evidence presented and the legal arguments advanced by both sides, and promulgated findings of fact and conclusions of law in accordance therewith, in *Bob Jones II*, this Court determines that "under no circumstances" can the government ultimately prevail, under present tax laws, in its attempt to deny plaintiff § 501(c)(3) standing.

As a reading of the Order of this Court, dated December 26, 1978, in *Bob Jones II* reveals, the reasons for the entry of judgment on plaintiff's behalf in its refund action were numerous and substantial. In view of evidence that was before this Court at that time and not considered by the Supreme Court in *Bob Jones I*, this Court found as a fact that plaintiff is a religious organization. The proof offered in *Bob Jones II* fully substantiated this finding which can be overturned only if it is "clearly erroneous". Furthermore, application of law to the facts adduced at trial and in discovery provided two additional legal bases for plaintiff's prevailing in its refund action: the government's interpretation of § 501(c)(3) as regards plaintiff both transgressed the First Amendment and exceeded the authority granted it by Congress. Each of these just discussed determinations by the Court in *Bob Jones II* constitutes an independent basis for plaintiff's success on the merits. Although this Court can not be expected to measure the legal sufficiency of the parties' positions any differently than it did in its Order of December 26, 1978, and, so, is in an awkward position with respect to reviewing its own Order for purposes of the Williams Packing standard, the Court's singular familiarity with the facts convinces it that "under no circumstances" can the government prevail.

In sum, § 7421(a) provides no bar to plaintiff's present action. Plaintiff comes under the sole recognized exception to the Act, and the application of the Act to plaintiffs, who are successful in a refund action in district court, has yet to be decided. As to the latter question of the effect of § 7421, the Court decides that the compelling hardship borne by plaintiff warrants the issuance of injunctive remedies to effectuate this Court's Order in plaintiff's refund suit, *Bob Jones II*.

As the Fourth Circuit has pointed out, the first step for the district court, in considering an application for an interlocutory injunction, is "to balance the 'likelihood' of harm to the defendant." *Blackwelder Furniture Co. of Statesville Inc. v. Seilig Manufacturing Co., Inc.*, 550 F. 2d 189, 195 (4th Cir. 1977). Absent advance assurance of deductibility, the flow of donations to plaintiff has been seriously impaired. Not only have donations from individuals been impeded, but various non-profit foundations are prohibited from making or matching gifts to plaintiff until its tax exempt status is formally recognized by the IRS. In his affidavit in support of plaintiff's motion, Mr. Roy A. Barton, Jr., Executive Director of Financial Affairs of plaintiff, attests that he has received numerous inquiries but has been unable to assure potential donors that contributions to plaintiff are deductible. The harm suffered by plaintiff is great and immediate.

Aside from an inconsequential loss of revenue, defendants argue the harm of permitting injunctive relief in the present case, more particularly, the precedent that would be established for similar suits. However, contrary to defendants' contentions, the present action does not, as already elaborated upon, involve premature judicial interference in the government's tax system. Consequently, the likelihood of irreparable harm to plaintiff far outweighs that to defendant.

With respect to the other conditions for preliminary relief, not only does the Court discern a probability of success on the merits but has found defendants have no chance of prevailing. Likewise, public interest favors restoring the tax exempt status of an organization, such as plaintiff, that presumptively benefits the public and has successfully litigated its right to that exemption. Preliminary injunctive relief is proper.

The purpose of the issuance of an interlocutory injunction is "to maintain the *status quo ante litem*". *Blackwelder*, 550 F. 2d 195. Defendants might argue continuance of the present status quo would not entail publication of plaintiff's exemption from taxation because such was not being done at the time this suit was instituted. This analysis overlooks the fact that plaintiff has been precluded, as a matter of law, from preserving the "status quo" it now seeks. Plaintiff's action in *Bob Jones I* was to enjoin revocation of its exemption but was legally precluded by § 7421(a). After the Supreme Court's decision in *Bob Jones* I, defendants withdrew plaintiff's favorable status, resulting in the existing "status quo" of nonrecognition. Plaintiff, thus, was foreclosed from seeking injunctive relief until after the revocation of its exemption, although it has tirelessly contested defendants' action. The plaintiff's purpose in both *Bob Jones I* and *Bob Jones II* was to achieve a judicial determination of its tax status, the latter suit being necessitated to properly secure judicial review. The same fundamental issue has been in dispute in these past two, as well as the present, action. Under these circumstances, the Court agrees with plaintiff that the proper framework for determining a "status quo ante litem", as far as defendants' position on plaintiff's exempt status, is the state of affairs that existed when plaintiff undertook this unbroken string of litigation in *Bob Jones I*. A weighing of the equitable considerations involved

also results in a decision that the proper status quo, for purposes of the present motion, is that existing prior to defendants' unlawful revocation.

Defendants' final ground in opposition to plaintiff's motion and in support of their motion to dismiss is that the doctrine of sovereign immunity prohibits maintenance of the instant action. The question then becomes whether the relief sought by plaintiff, characterized by it as being in the nature of mandamus, violates the principle of sovereign immunity. The answer lies in the peculiar nature of plaintiff's action.

Although Rule 81(b) of the Federal Rules of Civil Procedure abolished the writ of mandamus, 28 U. S. C. § 1361 provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Plaintiff herein seeks by way of mandatory injunction to compel defendants to restore, and to publish notice of the restoration of, plaintiff's tax exempt status because such performance is, in accord with this Court's decision in *Bob Jones II*, owed the plaintiff. Since plaintiff clearly meets the requirements for this special relief, the Court follows the well reasoned opinion of the Seventh Circuit in *Vishnevsky v. United States*, 581 F. 2d 1249 (7th Cir. 1978), that holds, in such instances, an action does not violate the principles of sovereign immunity.

The necessary elements for the remedy now sought by plaintiff are: (1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available. *Burnett v. Tolson*, 474 F. 2d 877, 880 (4th Cir. 1973). This Court's decision in *Bob Jones II* establishes the first two elements, while defendants refusal to reinstate plaintiff's tax exempt status, although its

entitlement to the same has been judicially determined in a suit at law, manifests the necessity for equitable relief, the third element.

This Court determined in *Bob Jones II* that defendants' revocation of plaintiff's exemption from taxation under the IRS's interpretation of § 501(c)(3) was unlawful as well as unconstitutional. Plaintiff was adjudicated to be an exempt organization under § 501(c)(3). The tax status of plaintiff is no longer a matter of discretion or administrative judgment and its exempt status can not be actualized until defendants perform the ministerial acts presently sought by plaintiff. The failure of defendants to reinstate plaintiff's § 501(c)(3) status is illegal, thus making proper the remedy. See *Sleeth v. Dairy Product Co. of Uniontown*, 228 F. 2d 165, 168 (4th Cir. 1955), cert. denied 351 U. S. 966 (1956).

Under these circumstances, the Court judges the reasoning of the Court in *Vishnevsky*, that soveriegn immunity does not preclude the instant action, as persuasive. In *Vishnevsky*, the Seventh Circuit found, after a comprehensive review of case law, the proposition that sovereign immunity bars injunctive relief in the nature of mandamus can not be reconciled with the long line of Supreme Court cases permitting such actions and the express language of these opinions, in particular *Minnesota v. Hitchcock*, 185 U. S. 373, 386 (1902). The decision relied upon by defendants to support their position that the present suit can not be maintained without the consent of the sovereign, *Estate of Watson v. Blumenthal*, 586 F. 2d 925 (2nd Cir. 1978), is inapposite. In *Watson*, the plaintiffs, who were essentially suing the government for specific performance of a contract to redeem "Flower bonds", did not show that the conduct of the defendant government officer was clearly illegal or that plaintiffs' remedy at law was inadequate. In so far as *Watson* might be read to invoke sovereign immunity where the elements for injunctive relief

in the nature of mandamus are clearly established, the Court respectfully declines to follow the reasoning, finding the rationale of *Vishnevsky* controlling as to this issue.

CONCLUSION

By the appropriate method of a refund action, plaintiff has been adjudicated as qualifying as an exempt organization under § 501(c)(3). Defendants have eviscerated the practical effect of this earlier judgment by failing to restore plaintiff's exempt status and publish notice of such status in the customary fashion. Plaintiff's remedy at law is inadequate, and plaintiff has made the full requisite showing for preliminary mandatory injunctive relief compelling defendants to perform the acts prayed for. Neither the Anti-Injunctive Act, the Declaratory Judgment Act, nor the doctrine of sovereign immunity precludes the present action.

IT IS, THEREFORE, ORDERED that defendants' motion to dismiss be, and the same is hereby, denied.

IT IS FURTHER ORDERED that plaintiff's motion for preliminary injunctive relief be, and the same is hereby granted, and that defendant W. Michael Bluementhal, Secretary of the Treasury, and defendant Jerome Kurtz, Commissioner of Internal Revenue, in their respective official capacities, restore the status of plaintiff as an organization exempt from taxation under § 501(c)(3), in accord with the Order of this Court in *Bob Jones University v. United States of America*, Civil Action No. 76-775, filed December 26, 1978, publish notice of the restoration of plaintiff's tax exempt status and advanced assurance of the deductibility of contributions to plaintiff in the next and all future Internal Revenue Bulletins and quarterly supplements to the Cumulative List of Organizations (Publication 78), and are enjoined from making such future publi-

cations unless the plaintiff is listed therein as an organization exempt from taxation under § 501(c)(3).

IT IS FURTHER ORDERED that the above preliminary injunctive decree be in effect until further order of the Court directing otherwise.

/s/ ROBERT F. CHAPMAN
Robert F. Chapman
United States District Judge

May 14, 1979

TRUE COPY
Test:

MILLER C. FOSTER, JR. CLERK
name illegible
By: Deputy Clerk
ENTERED
5-14-79

APPENDIX E

Address any reply to: P. O. Box 632, Atlanta, Georgia 30301

DEPARTMENT OF THE TREASURY
DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE

Date: Apr 16 1975
In reply refer to: 730:TPS

Bob Jones University
Greenville Station
Greenville, South Carolina 29614

Gentlemen:

By letter of November 30, 1970, you were informed that the Internal Revenue Service, after careful study, had concluded that private schools with racially discriminatory admissions policies are not legally entitled to Federal tax exemption and that contributions to such schools are not deductible as charitable contributions. You were also requested to furnish evidence of a racially nondiscriminatory admissions policy.

In addition to other requirements for exemption set forth in section 501(c)(3) of the Internal Revenue Code, a private school must have a racially nondiscriminatory policy as to students within the meaning of Rev. Rul. 71-447, 1971-2 C. B. 230. In this regard, such a school must make the showing required by Rev. Proc. 72-54, 1972-2 C. B. 834 and meet the publicity requirements prescribed therein.

As you have not furnished evidence that you have a racially nondiscriminatory policy as to students and meet

the publicity requirements of Rev. Proc. 72-54, notice is hereby given of the proposed revocation of the determination letter to your organization dated March 30, 1951, recognizing your exemption as an organization described in section 501(c)(3) of the Internal Revenue Code. This notice is in accordance with Rev. Proc. 72-4, 1972-1 C. B. 706.

Your organization has the right to protest this proposed revocation by submitting a statement of facts, law and arguments in support of your position. After filing your protest, you have the right to a District conference. You may, however, waive the right to a conference in the District office and request referral of the matter directly to the National Office and request a conference there.

If you intend to file a protest, you should do so within 15 days from the date of this letter. Please give us a suggested date for the District or National Office conference, if one is desired. If you do not respond within 15 days, notice of revocation of the determination letter will be issued.

The undersigned has responsibility for your area with respect to exemption rulings and revocations for organizations described in section 501 of the Code. If you have any questions, please call at 404-526-4516. Correspondence should be sent to the address above, and should include the symbols shown in the upper right corner of this letter. A copy of the Atlanta District examination report is enclosed with this letter.

Sincerely yours,

/s/ H. E. KENWORTHY
H. E. Kenworthy
Chief, Employee Plans & Exempt
Organizations Division

Enclosure

APPENDIX F

DEPARTMENT OF THE TREASURY
DISTRICT DIRECTOR

INTERNAL REVENUE SERVICE

Date: January 19, 1976
In reply refer to: 7202:ABJ

Bob Jones University
Wade Hampton Boulevard
Greenville, South Carolina 29614

Gentlemen:

You were notified on April 16, 1975, of the proposed revocation of your exempt status under Section 501(c)(3) of the Internal Revenue Code.

This is to notify you that the proposed revocation is final and your exempt status is revoked effective December 1, 1970. You are now required to file Federal income tax returns on Form 1120 for years beginning on or after June 1, 1975. If you have any further questions, please call Artemus Jewell at 404-526-6926.

Please keep this determination letter in your permanent records.

Sincerely yours,

/s/ H. E. KENWORTHY
H. E. Kenworthy
Chief, Employee Plans and
Exempt Organizations

cc: Mr. O. Jack Taylor, Jr.

APPENDIX G

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR

Social Security or Employer Identification Number:
57-0360095

Document Locator Number:

Kind of Tax:
FUTA—Form 940

Tax Period Ended:
June 1, 1975 to December 31, 1975

Amount Claimed:
$19.13

Date Claim Received:
February 4, 1976

Person to Contact:
H. B. Sindseil

Contact Telephone Number:
765-5701

Date: May 3, 1976

Bob Jones University
Wade Hampton Boulevard
Greenville, South Carolina 29614

Gentlemen:

CERTIFIED MAIL

We are sorry, but we cannot allow the above claim for an adjustment of your tax, for the reasons stated below. Our decision is based on provisions of the internal revenue laws and regulations. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties, or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Claims, 717 Madison Place NW., Washington, D. C. 20005. The law permits you to do this within 2 years from the mailing date of this letter. Suit may not be filed in the United States Tax Court.

If you have any questions, please contact the person named above.

Sincerely yours,

/s/ H. B. BINDSEIL
District Director

Reasons for disallowance:

Claim not allowable.

cc: Mr. Wesley M. Walker, Attorney
Mr. O. Jack Taylor, Jr., Attorney

901 Sumter St., Columbia, S. C. 29201

Form L-60 (Rev. 3-74)

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

C. A. No. 76-775

Bob Jones University,

Plaintiff,

v.

United States of America,

Defendant.

Order

This matter is before the Court on the Defendant's Motion to Dismiss for want of subject matter jurisdiction. This is an action for refund of federal unemployment taxes (FUTA) paid by the Plaintiff with respect to one employee of the Plaintiff for the period June 1, 1975, through December 31, 1975. The Defendant contends that said FUTA taxes must be paid for a full calendar year in order for the Court to have jurisdiction of this refund action. The Plaintiff contends that it may pay the taxes for the

short period June 1, 1975, through December 31, 1975, and litigate its entitlement to exempt status for that period through the refund procedure.

At an informal conference attended by counsel for the parties, Plaintiff's counsel indicated their willingness to pay the FUTA tax on the one employee for the entire calendar year 1975, and file an amended FUTA tax return for that period, but would do so only with the understanding that Plaintiff would not waive any of its rights, particularly any right to rely upon the revocation letter dated January 19, 1976, from the Internal Revenue Service to the University. The Court understands that the Defendant is agreeable to such amendment.

THEREFORE, IT IS ORDERED:

1) That the Plaintiff file its amended FUTA tax return for the calendar year 1975, and pay the tax due therein for the one employee, and that by doing so the Plaintiff does not waive and retains any and all rights it may now have and, in particular, the right to rely upon the revocation letter dated January 19, 1976.

2) The Defendant will promptly, within five (5) days of the filing of such amended FUTA tax return and claim for refund, deny said claim for refund in the same manner and upon the same grounds as the University's prior claim for refund was denied by letter dated May 3, 1976.

3) The Plaintiff is granted leave to amend its Complaint so as to allege the filing of said amended FUTA tax return and denial of claim for refund.

4) The Defendant is granted ten (10) days to answer the Amended Complaint filed by the Plaintiff.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN

Robert F. Chapman, Judge
United States District Court

May 23, 1977.

WE CONSENT:

/s/ O. JACK TAYLOR, JR.
Wesley M. Walker
J. D. Todd, Jr.
O. Jack Taylor, Jr.

Counsel for the Plaintiff

/s/ J. D. MCCOY, JR.
J. D. McCoy, Jr.
Assistant U. S. Attorney

Counsel for the Defendant

APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Civil Action No. 76-775

Bob Jones University,

Plaintiff,

v.

The United States of America,

Defendant.

Order

[Filed March 2, 1979]

Subsequent to the filing of this Court's Order in December 1978 the defendant has asked for a ruling as to the production and admission of a letter written May 29, 1975 from Dr. Bob Jones, III, President of Bob Jones University to O. Jack Taylor, Jr. of the firm of Leatherwood, Walker, Todd and Mann, attorneys for Bob Jones University. The production and admission of this letter were objected to at the time of trial upon the basis that it was protected by attorney-client privilege. The Court read the letter prior to making its findings of fact and conclusions of law and finds that the same is protected by the attorney-client privilege. No mention of this letter was made in the final Order of the Court, and the purpose of this Order is to make a definitive ruling on the May 29, 1975 letter.

IT IS, THEREFORE, ORDERED that the letter of May 29, 1975 from Bob Jones, III to O. Jack Taylor, Jr. is protected by attorney-client privilege and need not be produced to the attorney for the United States of America. Since the United States has indicated its intention of appealing the prior findings and Order of this Court and since the letter of May 29, 1975 may be of some use to the appellate court, a copy of the same is being attached to this Order in a sealed envelope to be opened only by the Judges of the United States Court of Appeals for the Fourth Circuit who may be selected on the panel to hear the appeal in this case.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN
Robert F. Chapman
United States District Judge

February 28, 1979
Columbia, South Carolina

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1293

BOB JONES UNIVERSITY,
Plaintiff-Appellee

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY AND JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE,
Defendant-Appellants

C/A 79-163

Order Staying Injunctive Order

It is hereby ordered that the order of the United States District Court for the District of South Carolina issued on May 14th, 1979 in the above entitled case, directing the Secretary of the Treasury and the Commissioner of Internal Revenue Service, "in their respective official capacities, restore the status of plaintiff as an organization exempt from taxation under Section 501(c)(3), in accord with the Order of this Court in *Bob Jones University v. United States of America*, Civil Action No. 76-775, filed December 26, 1978, publish notice of the restoration of plaintiff's exempt status and advance assurance of the deductibility of contributions to plaintiff in the next and all future Internal Revenue Bulletins and quarterly supple-

ments to the Cumulative List of Organizations (Publication 78) and are enjoined from making such future publications unless the plaintiff is listed therein as an organization exempt from taxation under Section 501(c)(3)", be stayed until this matter can be heard by the United States Court of Appeals for the Fourth Circuit.

name illegible
Senior United States Circuit Judge

May 15th, 1979
Alexandria, Virginia

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1293

Bob Jones University,

Appellee,

v.

W. Michael Blumenthal, Secretary of the Treasury, and Jerome Kurtz, Commissioner of Internal Revenue,

Appellants.

Order on Motion to Vacate Order
(Filed June 6, 1979)

Upon consideration of Bob Jones University's motion to vacate the order of a single judge of this court entered May 15, 1979, staying an injunction of the district court entered May 14, 1979; the motion of the government to continue the stay; the briefs, record, and argument of counsel;

With the concurrence of Judge Bryan, Judge Butzner, and Judge Dumbauld, it is ORDERED that the motion to vacate the stay is denied, and the stay is continued pending appeal.

For the court by direction

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1215

Bob Jones University,

Appellee,

v.

United States of America,

Appellant.

No. 79-1216

Bob Jones University,

Appellee,

v.

United States of America,

Appellant.

No. 79-1293

Bob Jones University,

Appellee,

v.

W. Michael Blumenthal, Secretary of the Treasury and Jerome Kurtz, Commissioner of Internal Revenue,

Appellants.

Order

(Filed April 8, 1981)

Upon consideration of the petition for rehearing and suggestion for rehearing en banc and, a request for a poll on the suggestion for rehearing en banc having been made, but the poll failed for a lack of majority support,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall, with the concurrence of Judge Merhige, USDJ. Judge Widener dissents to the denial of rehearing en banc as well as denial by the panel.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk