No. 81-3

In the Supreme Court of the United States

October Term, 1981

BOB JONES UNIVERSITY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

MOTION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE AND MEMORANDUM OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AS AMICUS CURIAE

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Pursuant to Rule 36.1 of the Rules of this Court, The Church of Jesus Christ of Latter-day Saints submits this motion to file a memorandum as *amicus curiae.* Petitioner has requested and consented to the filing of this brief (Appendix A). Respondent has consented to the filing of this brief (Appendix B).

In this case a non-tax-funded pervasively religious institution which had been recognized as tax-exempt under section 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 section 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 said religious belief violates "public policy," the Internal Revenue Service revoked its recognition of the institution's tax-exempt status.

This raises questions of fundamental importance to all churches in the United States. Is the admitted public policy of the nation favoring freedom of religion as expressed in the first amendment to be limited by a public policy assuring, in the words of a divided United States Circuit Court, "that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race"? This question goes to the heart of the very existence of religious organizations. It has to do with the power to tax as the power to destroy.

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?

Did the requirement of the Internal Revenue Service that, to be tax-exempt, a religious organization must stay in step with "expressed federal policy," as defined by the Internal Revenue Service, violate the establishment clause of the first amendment?

Shall the enumeration of exempt purposes in section 501(c)(3) of the Internal Revenue Code be accorded its clear and unambiguous meaning, or can it reasonably be construed to require that an organization, regardless of whether it is organized and operated exclusively for religious purposes, nonetheless be "charitable" in the common law sense?

We believe that this is a case of first impression so far as the Supreme Court is concerned. Dealing, as it does, with basic first amendment rights, The Church of Jesus Christ of Latter-day Saints believes that this Court will benefit from its views as well as views of other religions in this matter.

It is, therefore, respectfully submitted that this motion to file a memorandum as *amicus curiae* be granted.

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APPENDIX "A"

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July 20, 1981

Oscar W. McConkie, Esq.
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Salt Lake City, Utah 84111

Re: Bob Jones University v. United States;
Supreme Court Docket No. 81-3

Dear Mr. McConkie:

As counsel for petitioner Bob Jones University in the above-captioned case, I hereby consent to the filing of a brief *amicus curiae* on behalf of Church of Jesus Christ of the Latter-Day Saints.

Very truly yours,

/s/ William B. Ball

William B. Ball

WBB:dh

APPENDIX "B"

EMBLEM

U.S. Department Of Justice
Office Of The Solicitor General

Washington, D.C. 20530
July 13, 1981

Oscar W. McConkie, Esquire
Kirton, McConkie & Bushnell
330 South Third East
Salt Lake City, Utah 84111

RE: *Bob Jones University* (Petitioner) v. *United States of America* (Respondent — No. 81-3

Dear Mr. McConkie:

I hereby consent to your filing an *Amicus Curiae* in this case on behalf of The Church of Jesus Christ of Latter-day Saints.

Yours sincerely,

/s/ Lawrence G. Wallace

Lawrence G. Wallace
Acting Solicitor General

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MEMORANDUM OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Church of Jesus Christ of Latter-day Saints is a church with worldwide membership of approximately five million persons. There are 2,780,000 members in the United States, constituting 7,500 congregations. It operates the largest church sponsored university in the nation, Brigham Young University, with over 26,000 students. In addition, it owns and operates Institutes

of Religion and Seminaries enrolling approximately 198,109 students in the United States. It is accorded a tax exempt status under the Internal Revenue Code, section 501(c)(3).

The Church believes in the separation of church and state. "We believe that religion is instituted of God; and that men are amenable to him, and to him only, for the exercise of it, unless their religious opinions prompt them to infringe upon the rights and liberties of others; but we do not believe that human law has the right to interfere in prescribing rules of worship to bind the consciences of men, nor dictate forms for public or private devotion . . . ." *Doctrine and Covenants*, § 134:4. "The Church has no civil or political functions of the state, so the state may not assume the functions of the Church." Message of the First Presidency, April Conference (1942).

We agree with Fourth Circuit Judge Widener as he dissented in this case saying: "For it is the very existence of the religious organization at stake here, the power to tax involving the power to destroy." And, "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 a church itself. There is no difference in this case between the government's right to take away Bob Jones' tax exemption and the right to take away the exemption of a church . . . although that church may not operate a school at all." *Bob Jones University v. United States*, 639 F.2d 147, 156 (4th Cir. 1980) (Widener, J., dissenting).

The Church expresses no viewpoint on the stated policies of the Bob Jones University. The question is not, of course, whether we like or dislike the university's policy; the question is whether the Internal Revenue Service public servants shall have power to grant or deny the lifeline of tax exemption based on what they choose to call "public policy" irrespective of authorization by the Congress.

It does appear that the religious mission of churches could be imperiled if the view of the Internal Revenue Service and the majority opinion of the Fourth Circuit Court were allowed to stand. The broad rule that religious liberty may be curtailed in this circumstance is one frought with dire consequences to all religious groups.

We are advised that this is a case of first impression so far as the Supreme Court is concerned, as well as the Courts of Appeals, and therefore, respectfully urge the Honorable Supreme Court of the United States to determine the matter.

SUMMARY OF ARGUMENT

I. The United States Court of Appeals for the Fourth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. It misconstrued section 501 (c) (3) of the Internal Revenue Code by not according the words thereof their plain and simple meaning. In so rendering the statute it allows the Internal Revenue Service to interpret the "public policy" against racial discrimination

to override and limit the establishment and free exercise clauses of the first amendment of the United States Constitution.

II. The United States Court of Appeals for the Fourth Circuit has decided a federal question in a way in conflict with applicable decisions of this Court. The lower court has allowed the Internal Revenue Service, by use of the mechanism of taxation of those churches which hold and practice beliefs disfavored by it, to prescribe what is acceptable doctrine for churches. This is in contravention of the free exercise and establishment of religion clauses of the first amendment of the United States Constitution and this Court's interpretation thereof.

ARGUMENTS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The dissenting opinion correctly states, "This is a case of first impression so far as the Supreme Court is concerned . . . ." *Bob Jones University v. United States*, 639 F.2d 147, 158 (4th Cir. 1980) (Widener, J., dissenting).

The question of federal law concerned is of national and fundamental importance. All religious institutions in the country are potentially threatened by the

rule of law proposed by the Fourth Circuit which would have the benefit of their tax exemption removed because of their failure to conform to court mandated "public policy." The District Court finding that petitioner's "primary purpose is religious and that it exists as a religious organization" which "also serves educational purposes" appears to be uncontested and accepted. Thus the observations of the dissenting judge seem appropriate and correct. "[W]e 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." *Id.* at 156.

The tax exemption of every organization in the United States 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 depends upon section 501(c)(3) of the Internal Revenue Code for its tax exemption. The United States Court of Appeals for the Fourth Circuit has misconstrued this act of Congress saying that each such organization must meet the common law definition of "charitable" notwithstanding the fact that the category "charitable" is listed separately in section 501(c)(3).

This Court has said that the words of a statute should be interpreted in their ordinary, everyday sense. *Malat v. Riddell*, 383 U.S. 569, 571 (1966). The code does not say what the lower court says it says.

Where substantial constitutional issues under the establishment and freedom of religion clauses of the first amendment arise by extending federal statutory requirements to religious institutions such can only be done by the "clearly and affirmatively expressed" statements of the Congress. It cannot be left to implication. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979).

There was no reason for the lower court to test the exemption for education purposes of Internal Revenue Code section 501(c)(3) because that section expressly granted Bob Jones University its exemption for "religious" purposes. An exemption for religious purposes has the protection of the first amendment. The Supreme Court has said that an exemption for religious purposes not only has such protection but also has the authorization of the first amendment. *Walz v. Tax Commission*, 397 U.S. 664 (1970).

> "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 . . . . There is no genuine nexus between tax exemption and establishment of religion.
>
> . . . For so long as federal income taxes have had any potential impact on churches — over 75 years — religious organizations have been expressly exempt from the tax. Such treatment is an 'aid' to churches no more no less in principal than the real estate tax exemption of the states. Few concepts are more deeply embedded in the fabric of our national life, beginning in the pre-Revolutionary colonial times, than for the government to ex-

> ercise at the very least this kind of benevolent neutrality toward churches and religious exercises generally so long as none was favored over others and none suffered interference.
>
> It is significant that Congress, from the earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies . . . ." *Id.* at 705-13.

The majority of the Fourth Circuit Court struck at the heart of what Justice Brennan saw as one of "two basic secular purposes for granting . . . property exemption to religious organizations" in his concurring opinion in *Walz* when it ruled that its views of "racial discrimination" override the right to live by clearly established religious principle. Justice Brennan wrote:

> "Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities.
>
> Government may properly include religious institutions among the variety of private, non-profit groups that receive tax exemptions, for each group contributes to the diversity of association, view point, and enterprise essential to a vigorous, pluralistic society." *Id.* at 713.

When Judge Hall, sitting by designation on the Circuit Court, demands "that government must 'steer clear' of affording . . . tax support to . . . institutions that practice racial discrimination" he evidences a markedly more restrictive law of religious pluralism than seems to have heretofore been advocated by this Court in *Walz*.

This Court has never held, as the lower court here holds, that the "public policy" of "eliminating all forms of racial discrimination in education" overrides and limits the exercise of religious liberty.

This important issue should be settled by this Court.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The lower court gives lip service to the benevolent neutrality doctrine of this Court. *Gillette v. United States*, 401 U.S. 437 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970). "We agree that the Government must maintain an attitude of neutrality toward all religions." *Bob Jones University, supra* at 154. And then effectively refuses to apply the principle to Bob Jones University, citing as its justification an early anti-Mormon case upholding statutes prohibiting bigamy. *Reynolds v. United States*, 98 U.S. 244 (1878).

This Court has found a compelling governmental interest to justify a denial of religious liberty in very few cases. *Reynolds v. United States*, 98 U.S. 244 (1878); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944). None of these precedents apply to the instant case.

1. *Reynolds*

This Court has come a long way since gratuitously equating the polygamous marriages of the Old Testament and Mormon patriarchs with "human sacrifices" and "a wife . . . to burn herself upon the funeral pile of her dead husband." *Reynolds supra* at 166. We are not here contending that it has gone as far as former Justice Douglas suggested in his dissenting opinion in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

> "The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of *Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed 244, 250, where it was said concerning the reach of the Free Exercise Clause of the First Amendment, 'Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.' In that case it was conceded that Polygamy was a part of the religion of the Mormons. Yet the Court said, 'it matters not that this belief (in polygamy) was a part of his professed religion: it was still belief and belief only.' *Id.* at 167, 25 L.Ed. at 250.
>
> Action, which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled." *Id.* at 247.

In *Yoder* this Court sustained members of the Amish faith in their first amendment right to free exercise of religion in their refusal to obey Wisconsin's compulsory school attendance law.

We are saying that the lower court's opinion that racial concepts and actions contrary to "public policy" override one's right to live by religious principle would render meaningless this Court's pronounced tests for free exercise violation in *Yoder*. *See also Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

In addition *Reynolds* is not applicable as a precedent in this case because it is not contended that Bob Jones University committed a felony.

2. *Jacobson*

A state legislature may enact a statute purporting to be for the protection of a community against the spread of small pox. An adult cannot claim to have been deprived of liberty secured by the fourteenth amendment because of a compulsory vaccination law.

This was a fourteenth amendment case and has nothing to do with the case at bar.

3. *Prince*

In *Prince*, the Court considered the right of a state to regulate family life to the extent that it protects the welfare of children. 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

Jehovah's Witnesses, the selling of which was a part of the doctrine of the church.

The states' right to protect children is simply not an issue in this case.

ESTABLISHMENT AND FREE EXERCISE OF RELIGION

The Pharisees, during the ministry of Jesus Christ, attempted to entangle him in the tenuous church-state relationship. His reply was: "Render therefore unto Caesar the things that are Caesar's; and unto God the things that are God's." Matthew 22:21.

The lower court, speaking for Caesar, asks too much.

This Honorable Court has more faithfully construed our federal papers, which were, in pertinent part, interpreted by President Jefferson in his second inaugural address in these words:

> "In matters of religion, I have considered that its free exercise is placed by the Constitution independent of the powers of the general government." 1 Messages and Papers of the Presidents 367 (Richardson ed. 1897)

The lower court allows the government, by use of the mechanism of taxation of those churches which hold and practice beliefs disfavored by it, to prescribe what is acceptable doctrine for churches.

This is in direct conflict with decisions of the Supreme Court:

1. Religious liberty is a "preferred" freedom and its exercise a "transcendent value". *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); *Norwood v. Harrison*, 413 U.S. 455, 469 (1973);

2. Government shall not give preference to one religion over another. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963);

3. Government must be neutral in matters of religious theory, doctrine and practices. *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968);

4. Law cannot excessively entangle government with religion nor can its primary effect be to either advance nor inhibit religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971);

5. The state should respect the religious nature of its people and accommodate the public service to meet the people's spiritual needs. *Zorach v. Clauson*, 343 U.S. 306 (1952);

6. There is no general power of the state to standardize its children by forcing them out of private religious schools. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);

7. The government shall not be "hostile to any religion." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968);

8. Governmental action should not pressure religious bodies to conform their organization or policy to governmental prescriptions. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 706 (1976);

9. This Court has condemned "compulsory unification of opinion." *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 641 (1943);

10. And, finally, (this is not intended to be a full or complete listing) this Court has, Jefferson-like, upheld the right to maintain religious beliefs despised by others. *United States v. Ballard*, 322 U.S. 78, 87 (1944).

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 in this matter.

Respectfully submitted,

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