No. 81-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOB JONES UNIVERSITY
Petitioner

—*against*—

UNITED STATES
Respondents

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

BRIEF *AMICI CURIAE*
OF THE AMERICAN BAPTIST CHURCHES IN THE U.S.A. JOINED BY THE UNITED PRESBYTERIAN CHURCH IN THE U.S.A.

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QUESTIONS PRESENTED

1. May the I.R.S. require that a religious organization, to be tax-exempt, must conform to "expressed federal policy" as defined by the I.R.S. when so to conform would require serious alteration of sincerely held religious beliefs?

2. May the I.R.S., in effect, establish the criteria for membership in a church by threatening the loss of tax exemption?

3. May the I.R.S. disregard the Establishment Clause tests set by this Court and the statutory requirements of § 501(c)(3) set by Congress in determining the tax exemption of religious organizations under § 501(c)(3)?

4. May Congress provide for tax exemption of a class of organizations without that provision constituting state sponsorship or subsidy?

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CHURCH IN THE U.S.A. AS *AMICI CURIAE*

INTEREST OF THE *AMICI*

At the outset of the statement of the Interest of the *Amici* in this case, *amici* are compelled to make four brief statements:

1. *Amici* emphatically state that they disagree with Petitioner's beliefs on human relations.
2. *Amici* hold that those beliefs are racist and, for that reason, reflect a faulty interpretation of the Bible and its teachings on human relations.
3. *Amici* specifically repudiate any form of racism for any reason.
4. *Amici* are of the opinion that the beliefs held by Petitioner are sincerely held and are protected by the First Amendment.

The American Baptist Churches in the U.S.A. is a national Baptist denomination, of some 6000 congregations with some 1,613,000 members, which embraces the tradi-

tional Baptist demand for the preservation of religious liberty and the separation of church and state. A recent declaration of the Executive Director of the Baptist Joint Committee on Public Affairs, of which the American Baptist Churches in the U.S.A. is a cooperating member, reflects *amicus*' beliefs on the case at bar and delineates its interest in that case: "The Baptist Joint Committee on Public Affairs, which represents eight Baptist denominations with some 27 million constituent members, strongly objects to any attempt by the government to force—by threat of loss of tax exemption—any religious organization to alter sincerely held religious beliefs to conform to public policy arbitrarily defined by a government agency such as the Internal Revenue Service [I.R.S.]. To do otherwise would be un-Baptistic and anti-Baptistic."* The very essence of religious liberty is involved in this case. The American Baptist Churches in the U.S.A. is compelled by sincerely held religious beliefs to speak to the issues raised by this case.

The United Presbyterian Church in the United States of America [UPCUSA] on December 31, 1980 had 2,434,033 members and 14,502 ordained ministers, organized into 8,832 neighborhood churches. These churches are governed by representatives elected to boards called sessions. The neighborhood churches are organized into 152 governing bodies called presbyteries, in turn grouped into 15 governing bodies called synods. Fifteen synods, 152 presbyteries, 8,832 neighborhood churches, and 2,434,033 church members are governed by the General Assembly.

Amicus considers the issues presented in this case to be important to the UPCUSA and to all other churches in this country. The UPCUSA adheres to the principle of organic separation of church and state and the constitutional right to exercise religion free from the control, regulation, pressure and influence of government. *Amicus* believes that these principles and rights would be breached if the arguments of the United States of America in the instant case were affirmed.

*November 11, 1981 in Jackson, Mississippi before the annual meeting of the Mississippi Baptist Convention.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amici will discuss only issues which involve the following:

U.S. Constitution Amendment I:

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

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, 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."

QUESTIONS PRESENTED

The decision below raises four major questions which *amici* will address in this brief: (1) May the I.R.S. require that a religious organization, to be tax-exempt, must conform to "expressed federal policy" as defined by the I.R.S.

when so to conform would require serious alteration of sincerely held religious beliefs? (2) May the I.R.S., in effect, establish the criteria for membership in a church by threatening the loss of tax exemption? (3) May the I.R.S. disregard the Establishment Clause tests set by this Court and the statutory requirements of § 501(c)(3) set by Congress in determining the tax exemption of religious organizations under § 501(c)(3)? (4) May Congress provide for tax exemption of a class of organizations without that provision constituting state sponsorship or subsidy?

STATEMENT OF THE CASE

The facts of this case are clearly, fully, and correctly stated in Petitioner's Brief on the Merits. *Amici* have nothing to add to the facts as stated.

Amici do not agree that the two cases combined by this Court for the purpose of oral argument are "identical twins." *Amici's* arguments will address only the issues and decisions raised by Petitioner Bob Jones University. In this brief *amici*, when referring to "Petitioner," are referring *only* to Bob Jones University.

SUMMARY OF ARGUMENT

The argument may be briefly summarized as follows:

1. A statutory exemption of religious organizations from taxation does not constitute state aid to or sponsorship of religion.

2. The I.R.S. exceeded its statutory authority by adding its "public policy" test to the criteria for tax exemption established by Congress in § 501(c)(3) of the Internal Revenue Code.

3. The I.R.S. may not require Petitioner to forego constitutional rights in order to secure the statutory privilege of tax exemption.

4. The state lacks competence directly or indirectly to establish the criteria for membership in a religious organization.

5. First Amendment rights are fundamental rights which

take precedence over public policy evolved from non-First Amendment rights.

ARGUMENT

The First Amendment to the Constitution of the United States is a limitation on the power of government and may not be read as a limitation on the rights of the people. All laws passed by Congress are subject to that limitation. Administrative regulations and decisions must adhere to the letter and spirit of enabling statutes and, consequently, to the constitutional limitations.

Under very limited circumstances the state may limit or proscribe certain religious actions of individuals or organizations, *see Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), but the state may not bootstrap on its legitimate powers to achieve an unconstitutional power *over* religion.

Amici argue that the I.R.S. has attempted to exert power *over* religion in the case at bar.

1. A statutory provision for exemption of an organization from taxation does not constitute a form of state sponsorship or subsidy.

The threshold question in the instant case is whether a decision by the state to exempt from taxation a broad class of private nonprofit organizations, including religious organizations, constitutes a form of state sponsorship or subsidy. The I.R.S. seems to assume that tax exemption is a kind of sponsorship or subsidy which constitutes state action. Therefore, it asserts the degree of jurisdiction over tax-exempt nonprofit organizations which allows it to require Petitioner, a religious nonprofit organization, to choose between its sincerely held religious beliefs and its tax exemption.

In *amici's* view, statutory tax exemption of nonprofit organizations is neither state sponsorship nor subsidy but is a corollary of the nonprofit character of voluntary associations which do not create wealth and, thus, are not a part of the revenue system. As legal scholars have stated:

> The exemption of nonprofit organizations from federal income taxation is neither a special privi-

> lege nor a hidden subsidy. Rather, it reflects the application of established principles of income taxation to organizations which, unlike the typical business corporation, do not seek profit.*

In the floor debate on the Revenue Act of 1913, the author of the Act, Cordell Hull, objected to enumerating explicit categories of exemption on the grounds that the law was designed to tax specific categories and those not specifically listed would be exempt:

> 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. . . . I see no occasion whatever for undertaking to particularize. 50 *Cong. Rec.* 1306 (1913).

The legislative history of § 501(c)(3) and its predecessors clearly indicates that tax exemption of this class of organizations was not intended to be and is not a special privilege or subsidy given to some organizations because of meritorious behavior or denied to others because they lack that behavior. It derives solely from the nonprofit character of the exempt organization. This Court recognized this fact in its statement on the exemption of nonprofit religious organizations from *ad valorem* taxes in New York. In *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970) at 675, 676, the Court stated:

> 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. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion. As Mr. Justice Holmes commented in a related context "a

*Bittker and Rahdert, "The Exemption of Nonprofit Organizations from Federal Income Taxation," 85 *Yale L. J.* 299 (1976) at 357, 358. *See also* D. M. Kelley, *Why Churches Should Not Pay Taxes* (New York 1977).

> page of history is worth a volume of logic." . . . The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.

It is the view of *amici*—and apparently of this Court—that tax exemption of religious organizations is neither direct nor indirect aid to religion but is simply a situation of refraining from demanding that the church support the state, and of distancing the government from the whole spectrum of nonprofit voluntary organizations whose members already support the state through their own individual taxes. Tax exemption is the way the government refrains from taxing them again for voluntary activity which benefits the public—or parts of it—without enriching the taxpayers who undertake it.

As we have said, tax exemption of a broad class of nonprofit organizations is not aid or sponsorship. It is a natural and logical attribute of all nonprofit voluntary organizations and must not be predicated on their conformity to arbitrarily determined "public policy" at a particular time or place. If these organizations engage in illegal activities, the remedy may be found in civil or criminal causes of action but not in the loss of tax exemption. When the nonprofit organization is also a religious organization, the religion clauses of the First Amendment must be considered also. These organizations and their leaders remain subject to civil and criminal action but not to "public policy" determinations of the I.R.S.

2. The I.R.S. has exceeded its statutory authority and, thereby, usurped congressional authority in its decision to revoke Petitioner's § 501(c)(3) status on public policy grounds.

The statutory criteria for an organization to qualify for tax exemption under § 501(c)(3) of the Internal Revenue Code are clear: the organization must fall within specific categories of nonprofit organizations, it must not substantially attempt to influence legislation, and it must not be-

come involved in partisan politics. The I.R.S. seeks to add a fourth criterion: the organization must not go contrary to whatever the I.R.S. subjectively and arbitrarily determines to be public policy—even when sincerely held religious beliefs compel the organization to go contrary to that determination.

The I.R.S., along with other administrative entities, has broad general powers to promulgate rules and regulations necessary for the enforcement of laws passed by Congress. However, these powers do not include the formulation of a public policy test which is beyond the scope of the laws being enforced. *See NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

Congress did not add to § 501(c)(3) any criteria concerning racial discrimination which would exclude an organization from inclusion in the class. § 7805(a) of the Internal Revenue Code authorizes the issuance of regulations "as may be necessary by reason of any alteration of law in relation to internal revenue." There having been no "alteration of law" the I.R.S.'s actions are *ultra vires*.

The I.R.S. clearly did not rely on the legislative history of § 501(c)(3) or its predecessors in seeking authorization for revoking Petitioner's tax-exempt status. As a matter of fact, the most recent expression of congressional intent in this area is the Ashbrook Amendment, P. L. 96–74, 93 Stat. 599 § 103. That amendment to the Appropriations Act provided that none of the appropriated money be used to carry out any rule, policy, or procedure issued after August 21, 1978 which would cause church schools to lose § 501 (c)(3) status over the issue of public policy on racial enrollment in those schools. Whatever the effect of the Amendment, the sense of Congress was to repudiate the I.R.S. approach to the matter.

The fact that Petitioner is a religious organization of necessity brings the religion clauses of the First Amendment into consideration. This Court held in *Catholic Bishop*, *supra*, at 501, that the bases for rules and regulations must not be implication or deduction but that "'the affirmative intent of Congress [must be] clearly expressed' before concluding that the Act grants jurisdiction."

We submit that § 501(c)(3) clearly does not express the intent of Congress that the I.R.S. has the authority to revoke the § 501(c)(3) status of religious organizations on public policy grounds.

3. **The state may not require the relinquishment of a constitutional right as the price of gaining the statutory privilege of tax exemption.**

Generally all § 501(c)(3) organizations depend on that classification for their very existence. They do not seek a profit and must receive contributions to prevent annual losses and ultimate failure. Membership in the class of § 501(c)(3) organizations entitles contributors to a tax deduction under § 170(a).

When one of those § 501(c)(3) organizations is a religious organization, the First Amendment comes into play—particularly when sincerely held religious beliefs are at stake. In *Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105 (1943) at 112, this Court spoke to the taxation of religious practices: "Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance." If the I.R.S. actions in the instant case are sustained, Petitioner's life as an organization, if it is to be true to its religious beliefs, is doomed. Neither our forebears nor this Court have countenanced the position that the state may destroy a religious organization through administrative fiat.

Petitioner in the case at bar has sincerely held religious beliefs on separation of the races. Both of the courts below evidenced their acceptance of those beliefs as sincere and integral to Petitioner's theology. Government enters into a forbidden domain when it inquires into the correctness or incorrectness of those beliefs. *United States* v. *Ballard*, 322 U.S. 78 (1944) at 87. *See also Cantwell* v. *State of Connecticut*, 310 U.S. 296 (1940) at 303; *Murdock* v. *Pennsylvania*, *supra*. The First Amendment serves as a guarantee against such examination.

> [T]o define the limits of religious expression may be impossible if philosophically desirable. Moreover, any definition of religion would seem to violate religious freedom in that it would dictate to

> religions, present and future, what they must be.*

In the case at bar the state, through its agent the I.R.S., has, in essence, said to Petitioner, "Either change your theological beliefs on race relations or forego tax exemption and tax-deductible contributions." This is a choice which the I.R.S. constitutionally may not require of a religious organization.

> . . . as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. *Frost* v. *Railroad Commission*, 271 U.S. 583 (1926) at 593, 594. *See also Lemon* v. *Kurtzman*, 310 F.Supp. 35 (D.C. Pa. 1969), *reversed on other grounds*, 403 U.S. 602 (1971).

By its actions the I.R.S. has put Petitioner in an untenable position and itself in the position of attempting to manipulate out of existance a segment of religious rights guaranteed by the First Amendment.

4. The state may not directly or indirectly establish the criteria for membership in a religious organization.

Such a statement would seem to be axiomatic and yet, in effect, the I.R.S. is doing precisely that in the case at bar and is doing so by threatening the loss of tax exemption for failure to comply.

A religious organization, under the First Amendment guarantees, must be the sole determiner of the qualifications for its own membership. The state has no legal or theological competence in this matter. The religious organiza-

*Weiss, "Privilege, Posture, and Protection—Religion in the Law," 73 *Yale L. J.* 593 (1964) at 604.

tion may require that applicants be "born again," be baptized in a particular way at a particular age, be tithers, or be of a particular racial or ethnic background. In short, under the First Amendment a religious organization may discriminate in the acceptance of members. An Orthodox Jewish congregation may not be required by the state to open its membership to Baptists. A Black Muslim organization may require that all its adherents be black. The state can play no role in those determinations. To permit the state a role would be to destroy the religious organization itself.

In the case at bar the lower courts agreed that Petitioner is a religious organization in its own right. As such, Petitioner has the right under the First Amendment, *amici* contend, to establish the criteria for admission into its fellowship and for retention of good standing in that fellowship. Concomitantly, the state has no role to play in establishing criteria for fellowship and, also under the First Amendment, cannot force its way into such a role through threatening the loss of tax exemption.

At the very least such actions constitute state action *respecting* an establishment of religion.

> A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment. *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612 (*emphasis in original*).

If state action effectively determines the criteria for membership in a religious organization such as Petitioner, that action is at least "a step that could lead to such establishment." If the state can determine the parameters of membership for a relatively small, somewhat unpopular religious organization, can it do so for others? Such a determination would be a clear preference for one form of religious

organization. The state may not prefer one form of religious organization over others.

Amici contend that the action of the I.R.S. in the case at bar of setting the criteria for fellowship in a religious organization goes beyond an action "respecting an establishment of religion" and reaches "the forbidden objective" of establishing a religion. That is, it fails the last two of the establishment tests enunciated in *Lemon* v. *Kurtzman*, *supra*, at 612, 613. The principal or primary effect of state action to set criteria of fellowship in a religious organization is to exhibit a hostility toward sincerely held religious beliefs, thereby chilling Petitioner's religious actions and requiring Petitioner to choose between the sincerely held religious beliefs and tax exemption. Further, the setting of criteria of fellowship would require an excessive entanglement with religion by necessitating a continuing monitoring of the fellowship practices and procedures of religious organizations.

5. First Amendment rights, which include the guarantee of religious liberty, are fundamental rights and public policy relating to non-First Amendment rights must defer to First Amendment rights.

This Court has held that the First Amendment rights are "the transcendent value," *Norwood* v. *Harrison*, 413 U.S. 455 (1973) at 469, and "rank high 'in the scale of our national values,'" *NLRB* v. *Catholic Bishop of Chicago*, *supra*, at 501. In cases involving First Amendment rights the burden is on the state to show that its actions do not infringe those rights. It is the position of *amici* that the government has not carried and cannot carry that burden.

Further, this Court has emphasized that the preferred position which the First Amendment gives to religion is not limited to the so-called "mainline" or popular religions. "The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position." *United States* v. *Ballard*, *supra*, at 87.

As *amici* have indicated, they do not agree with the theological beliefs of Petitioner and wish that it believed other-

wise. However, public policy dealing with non-First Amendment rights must, generally, give way to those beliefs.

> With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. *Davis* v. *Beason*, 133 U.S. 333 (1890) at 342, 343, quoted with approval in *United States* v. *Ballard*, *supra*, at 87.

There has been no showing below that either the peace, prosperity, or morals of the people are interfered with by Petitioner's racial criteria for admission to or retention in what is a religious fellowship.

The I.R.S. has set itself up to be the sole determiner of the content of public policy as it relates to tax matters. It asserts that if it discovers a § 501(c)(3) religious organization whose practices pursuant to sincerely held religious beliefs are contrary to what the I.R.S. has determined to be public policy, it can legitimately make the organization choose between its beliefs and tax exemption. This is clearly not what the Code states, nor is the I.R.S. public policy test in the instant case based on securing the "peace and prosperity, and the morals of its people. . . ."

Unless First Amendment rights prevail against such arbitrary application of a public policy test by the I.R.S., religious liberty is seriously at risk. If there is a public policy against discrimination on the basis of sex, could a religious organization be denied tax exemption because the tenets of its faith forbid it to ordain women to its priesthood? If the country were in a state of war, would the tax exemption of traditional peace churches such as the Society of Friends and the Church of the Brethren be in jeopardy?

It is clear that the First Amendment freedoms form the foundation of our free society. To allow public policy, defined arbitrarily even though based on non-First Amendment rights, to impinge on fundamental First Amendment

freedoms is both unwise and unconstitutional. As this Court has said in *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978) at 13:

> We must not confuse what is "good," "desirable," or "expedient" with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication.

CONCLUSIONS

Amici are agreed that racism is wrong and that Petitioner's reading of what the Bible teaches about human relations is faulty. However, the wrongness of racism cannot be the real issue in this case. As this Court said in *Commissioner* v. *Tellier*, 383 U.S. 687 (1966) at 691:

> 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.

The I.R.S. has used its asserted power under § 501(c)(3) as a sanction against what it unilaterally determines to be wrongdoing but which Petitioner asserts is not wrongdoing but simply the following of sincere religious beliefs.

The very existence of a religious organization is at stake in this case. Chief Justice Marshall, speaking for the Court in *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819) at 431, stated that the power to tax *involves* the power to destroy. Even if the power to tax does not involve the power to destroy, it does involve the power to define and control—and such power, when applied to religious organizations, is contrary to the letter and the intent of the religion clauses of the First Amendment.

For the reasons stated above *amici* pray this Court to reverse the decision of the court below and to affirm again the primacy of religious liberty and the separation of church and state in this nation's scale of social and legal values.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Earl W. Trent, Jr., certify that I have mailed three copies of the foregoing Brief *Amici Curiae* to each of the Attorneys of Record in this case, on November 27, 1981.

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