Nos. 81-1 and 81-3

IN THE

Supreme Court of the United States

October Term, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY,
Petitioner

v.

UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION OF PETITIONER BOB JONES UNIVERSITY FOR SUMMARY REVERSAL

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Petitioner Bob Jones University hereby respectfully moves the Court for summary reversal on the ground that the Respondent United States of America has confessed error.

1. On February 24, 1982, the University filed a motion with the Court for an order directing the Government to provide the Court the date upon which the Government would fulfill its commitment to restore tax-exempt status to the University. The aim of the motion was, of course, to require the Government to remove any possible doubt respecting mootness—the mootness asserted by the Government on January 8, 1982. In the alternative the University moved the Court to allow the case to proceed in regular course.

2. On February 25, 1982, counsel for the University received a letter (see Appendix A hereto) dated February 22, 1982, from S. Allen Winborne, Assistant Commissioner (Employee Plans and Exempt Organizations), Internal Revenue Service, stating a procedure which the University should pursue in order to have its tax-exempt status restored, but also stating that such restoration could not presently be made, solely in view of the February 18, 1982, order of the United States Court of Appeals for the District of Columbia in *Wright v. Regan.* As the University has pointed out in Motion of Petitioner Bob Jones University For Order Directing Respondent to Act With Respect to Respondent's Memorandum of January 8, 1982, fn. at pages 4-5, the Government's contention that the *Wright* order has such effect is incorrect. The Government remains to this moment fully empowered to do those things necessary to render the case moot. (The University is now filing the "brief statement" to which the Winborne letter refers.)

3. On March 2, 1982, counsel for the University ascertained, in the course of a telephone call to Francis J. Lorson, Esq., Deputy Chief Clerk, that the Government, on February 25, 1982, had filed several motions. These, as of today, March 2, 1982, have not been received by

counsel for the University, although the subsequent brief of the Government, filed February 26, 1982, was received in the mail on March 1, 1982. A telephone call from the University's counsel to Lawrence G. Wallace, Esq., Acting Solicitor General, disclosed that the Government's motions included a new pledge to the Court namely, that the Government would *not* fulfill its January 8, 1982 pledge and act to render the case moot.

4. In its brief filed February 25, 1982, the United States concludes:

> "The judgments of the court of appeals should be reversed." (Brief for the United States, 52).

The Government states the basis for that conclusion as follows:

> "In the succeeding sections we argue—contrary to the Government's position below—that Section 501(c)(3) does not permit the Commissioner of Internal Revenue to withhold congressionally authorized tax exemption from otherwise qualified 'religious' and 'educational' organizations based solely on an administrative determination of failure to conform to the national policy. Our contention is, not that the policy which we fully accept and implement is wrong, but that the Internal Revenue Code—from which all the Commissioner's authority is derived—neither authorizes nor contemplates this kind of broad administrative discretion." (*Id.* at 13).

The Government has thus confessed error on an issue which is dispositive of this action, and this position is precisely that of the petitioner and of two of the four judges below who had concluded that the Commissioner had had no authority from the Congress for his challenged actions.

5. Assuming that the Government now has chosen to abandon the commitment it formally made to this Court and to the petitioners, that it would take the steps necessary to render the case moot (and that indeed it was already in the process of taking those steps), this confession of error plainly calls for a judgment of reversal, as a matter of fundamental justice. The Government had all along insisted that its actions against Bob Jones University were justified—indeed mandated—by the Congress. This insistence has been the single cause of the present litigation which has burdened the University for almost a decade. The Government of the United States of America—no ordinary litigant—has now confessed that its actions against the University were baseless. Certainly this Court is empowered to reverse, "in the interests of justice", where the Government confesses error *Petite v. United States,* 361 U. S. 529, 531 (1966), and certainly here the interests of justice would be served *solely* by the terminating of this unfounded litigation. Obviously, the Court will not mechanically accept a suggestion, or even a declaration, by the Government that a United States Court of Appeals is in error, but may choose "to examine independently the errors confessed" (*Young v. United States,* 315 U. S. 251, 258-259 (1942)), here the lines of examination to be pursued to be found in the majority and dissenting opinions of the Fourth Circuit and in the briefs of the parties. The interposition of views of any non-party, and the delay occasioned with respect thereto, would be unwarranted. Should the Court, following its independent examination, conclude that error was incorrectly confessed, oral argument could and should then ensue upon the First Amendment issues raised by the University.

CONCLUSION

The University continues to support its motion that the Government be required to inform the Court of the date upon which it will fulfill its commitment of January 8, 1982, to restore the tax-exempt status of the University, no bar existing to the carrying out of that commitment. If, however, the Government continues to refuse the restoration, then, the case not being moot, a judgment of reversal should be rendered.

Respectfully submitted,

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March 2, 1982

APPENDIX A

Internal Revenue Service
Assistant Commissioner
(Employee Plans and
Exempt Organizations)

Department of the Treasury
Washington, DC 20224

22 Feb. 1982

Mr. William B. Ball
Ball and Skelly
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108

Dear Mr. Ball:

This is to inform you of the procedures and information that would be necessary in order for Bob Jones University to be restored as tax exempt under section 501 (c)(3) of the Internal Revenue Code. As you know, on January 8, 1982 the Acting Solicitor General advised the Supreme Court that the Treasury Department had initiated the steps necessary to grant tax exempt status to Bob Jones University under Internal Revenue Code section 501(c)(3) and asked the Supreme Court to vacate the judgments of the Court of Appeals as moot.

However, Rev. Proc. 80-28 provides that in cases where section 501(c)(3) tax exempt status is recognized as a result of litigation and an application for recognition of exemption has previously been filed, the organization should submit a brief statement over the signature of a principal officer that its activities have remained the same as during the period considered by the court if such is the fact. We have attached for your information copies of the

applicable procedures to facilitate handling of your statement. Because this matter is in litigation, the statement should be filed with the Department of Justice.

As you may be aware, however, the Service was enjoined by the U. S. Court of Appeals for the District of Columbia in the case of *Wright v. Regan* on February 18, 1982, from granting or restoring "federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school that unlawfully discriminates on the basis of race, *see Runyon v. McCrary*, 427 U.S. 160 (1976), by failing to maintain a 'racially nondiscriminatory policy to students,' as that term is defined in the declaratory judgment in *Green v. Connally*, 330 F. Supp. 1150, 1179 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971)." While this injunction is outstanding, we will be unable to restore tax exempt status to Bob Jones University.

Sincerely,

/s/ S. ALLEN WINBORNE
S. Allen Winborne

Attachments
Rev. Proc. 80-25
Rev. Proc. 80-28
Application Form 1023
Publication 557