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Harvard Does Have Options if It Loses Tax-Exempt Status

To the Editor:

As scholars of nonprofit, tax-exempt organizations, we wish to take issue with Marie Sapirie's recent article, "Harvard Has a Precedent Problem in Fight to Keep Exempt Status."[1] We admire and learned from her history of *Bob Jones University*.[2] However, we disagree with her characterization of both the case and the avenues for judicial review available to organizations facing revocation of exemption.

Unlike Sapirie, we do not read *Bob Jones University* as authorizing the IRS to determine fundamental public policy and then revoke exemption on the basis of its determination. Instead, it permitted the IRS to make decisions regarding exemption that reflect fundamental public policy, as demonstrated by actions of all three branches of government. The court did not defer to the IRS. It decided for itself the major question of whether racial discrimination in education constituted a violation of fundamental public policy. It concluded that the IRS rulings in the case were consistent with fundamental public policy, already firmly established independently of it by all three branches of government.

Sapirie instead relies on revenue rulings from the '70s applying a standard different from that announced years later in *Bob Jones*. We take the position that standards announced in a Supreme Court opinion override revenue rulings to the extent they apply a different standard, much as a new statutory provision supersedes existing regulations inconsistent with the new statute.

Admittedly, the opinion in *Bob Jones University* left uncertain what constitutes a fundamental public policy. Sapirie's article, however, fails to emphasize what we consider the most important lessons of the case. *Bob Jones University* violated fundamental public policy because its explicit ban on interracial dating contravened the "unmistakably clear" position of all three branches of government stretching back decades.[3] The opinion noted that Congress had ratified the IRS's revocation decision by rejecting more than a dozen bills that would have overturned the IRS's position.[4] In reaching its decision, the majority opinion explained that, since the 1954 Supreme Court decision of *Brown v. Board of Education*,[5] "every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest to a firm national policy to prohibit racial segregation and discrimination in public education."[6] The opinion also cautioned that "a declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[7]

Should the IRS mistake public policy and fundamental public policy in the ways Sapirie suggests, Sapirie writes that "Harvard faces procedural obstacles if its exemption is revoked," citing "precedent set by the litigation against Bob Jones University" prohibiting an injunction under the Anti-Injunction Act. This statement fails to describe current law in two different ways.

Under current section 7428, an organization that has had its exemption revoked can seek a declaratory judgment action in any of several federal courts. Congress enacted the provision precisely because of the difficulties Bob Jones University encountered in achieving judicial review.[8] At the time of the initial *Bob Jones University* litigation in the early '70s,[9] before the IRS had issued an initial revocation of its status in

[1] Sapirie, "Harvard Has a Precedent Problem in Fight to Keep Exempt Status," *Tax Notes Federal*, May 12, 2025, p. 990.

[2] *Bob Jones University v. United States*, 461 U.S. 574 (1983).

[3] *See id.* at 598.

[4] *See id.* at 600.

[5] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[6] *Bob Jones University*, 461 U.S. at 593.

[7] *Id.* at 598.

[8] Joint Committee on Taxation, "General Explanation of the Tax Reform Act of 1976," JCS-33-76, at 402 (1976).

[9] *Bob Jones University v. Simon*, 416 U.S. 725 (1974).

1976, section 7241(a), the AIA, and the Declaratory Judgment Act, 28 U.S.C. section 2201(a), had been interpreted to bar review of revocation. Indeed, the IRS revoked Bob Jones University's status in January 1976, but the university was unable to file a challenge in district court until December 1976 after it had paid federal unemployment tax and then sought a refund.

Shortly thereafter, in the Tax Reform Act of 1976,[10] Congress enacted section 7428. Under this provision, if the IRS revokes a determination letter, the organization has 90 days from the date of the revocation letter to file a declaratory judgment action with either the U.S. Tax Court, the U.S. District Court for the District of Columbia, or the Court of Claims. An organization must exhaust its administrative remedies before challenging a revocation; a final revocation notice, usually issued only after consideration by the IRS Office of Independent Appeals, demonstrates exhaustion of administrative remedies. An organization can further appeal the decision of any declaratory judgment, all the way to the Supreme Court if it chooses. Thus, Sapirie is correct that Harvard generally has limited ability to get into court before a final revocation. But it does not today face the problem Bob Jones University faced. If the IRS were to revoke Harvard's status, Harvard has an immediate right to challenge that revocation.

Additionally, a recent precedent indicates that if Harvard had credible information that the IRS is considering revocation of its exempt status on unconstitutional grounds, it could seek review in a district court during the examination process. In *Z Street v. Koskinen*,[11] the organization alleged, based on a conversation between its lawyer and an IRS agent, that the IRS was applying more rigorous scrutiny to the organizations with policies that contradicted those of President Obama's policies regarding Israel.[12] Before its rights under section 7428 were ripe, Z Street filed an action against the IRS alleging a constitutional violation of "blatant viewpoint discrimination in violation of the First Amendment."[13] The IRS argued that the AIA barred this litigation, but the D.C. Circuit found that the AIA does not bar suit where the organization has no other opportunity for review of the alleged violation.[14] In short, although historically the law has denied revoked organizations access to the courts, current law differs sharply from the situation that faced Bob Jones University in 1974.

Bob Jones University teaches that we must distinguish "public policy" from "fundamental public policy." Public policy includes all actions and decisions by governmental bodies to address societal issues. As in *Bob Jones University*, fundamental public policy involves core values. A new presidential administration is free to establish a new public policy. But such a new public policy does not create a fundamental public policy. Fundamental public policies do not change with changes in presidential administrations. Charities do not gain, and then lose, and then perhaps regain exemption depending on the positions of whatever U.S. president is in office. If the IRS fails to observe the distinction between public policy and fundamental public policy in revoking Harvard's exemption, Harvard will have several avenues for seeking judicial review.

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[10]P.L. 94-455, Title XIII, section 1306(a).

[11]*Z Street v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015).

[12]*Id.* at 26.

[13]*Id.* at 28.

[14]*Id.* at 31.