State of West Virginia
Office of the Attorney General

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July 2, 2015

Via Certified Mail & Email

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510
senator@mcconnell.senate.gov

The Honorable John Boehner
Speaker
United States House of Representatives
H-232 The Capitol
Washington, DC 20515
SpeakerBoehner@mail.house.gov

Re: A communication from the States of West Virginia, Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Nebraska, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wisconsin regarding tax-exempt status for religious organizations

Dear Majority Leader McConnell and Speaker Boehner:

As the chief legal officers of our States, we are concerned that the Internal Revenue Service (IRS) may deny tax-exempt status to religious organizations following the decision of the Supreme Court of the United States in *Obergefell v. Hodges*.

Under the First Amendment to the U.S. Constitution, citizens have the right to exercise their religion freely without government pressure to change their minds or penalties for unpopular beliefs. The U.S. Solicitor General recently indicated, however, that the federal government might decide based on *Obergefell* that certain religious organizations no longer qualify as tax-exempt organizations under the Internal Revenue Code and also that contributions to these organizations are not deductible as charitable contributions. We take very seriously the religious freedom of our States' citizens and believe that Congress should take action now to preclude the IRS from targeting religious groups in this way.

The First Amendment guarantees a citizen's right to freely exercise his or her religion and "a religious group's right to shape its own faith and mission." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012). It prevents the Government from enacting or enforcing laws "prohibiting the free exercise" of religion "or abridging the freedom of speech." U.S. CONST. amend. I. The Government may not decide the truth or correctness of religious beliefs, or attempt to change religious beliefs by penalizing those it disfavors. As the Supreme Court long ago stated, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Consistent with the Constitution's commitment to religious freedom, Congress has enacted several laws providing additional protection to religious groups. Under Title VII of the Civil Rights Act of 1964, Congress protected religious believers from workplace discrimination. 78 Stat. 253 (as amended). In 1993, Congress restricted government action that "substantially burden[s] a person's exercise of religion," 42 U.S.C. § 2000bb–1, under the Religious Freedom Restoration Act ("RFRA"), a law "designed to provide very broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014). Then in 2000, Congress extended RFRA-type scrutiny to state and local land-use and prison regulations under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, another law intended to provide "expansive protection for religious liberty," *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015).

Congress has also supported religious organizations by exempting them from federal taxation. Under the Internal Revenue Code, an organization is "exempt from taxation" if it is "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." 26 U.S.C. § 501(a) & (c)(3). Contributions to a religious organization are also deductible on tax returns as charitable contributions. *Id.* § 170 (a) & (c). These exemptions serve at least two salutary purposes. *First*, the blanket exemption avoids the possibility of any unequal or selective tax treatment on the basis of certain organizations' religious beliefs. *Second*, tax exemptions exist for religious groups because these "institutions and organizations exist and function for [many] purposes which Congress deems beneficial to society as a whole." *Founding Church of Scientology v. United States*, 412 F.2d 1197, 1199 (Ct. Cl. 1969).

The only significant exception to Congress's provision of tax-exempt status to religious organization is the judge-made public policy doctrine.[1] In *Bob Jones University v. United States*,

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[1] The IRS also denies tax-exemption to groups undertaking activities that are illegal under federal or local laws. Rev. Rul. 71-447, 1971-2 C.B. 230; *see, e.g.*, *Church of Scientology of*

the IRS claimed the power to withhold tax-exempt status for any organization that participates in any activity "contrary to a fundamental public policy." 461 U.S. 574, 592 (1983). That case involved an organization engaged in "racial discrimination in education"—an activity that the Court affirmed was "so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred" by the organization. *Id.* In an opinion for seven justices, the Court rested its decision on the Government's "compelling . . . interest in eradicating racial discrimination in education" as applied to "religious schools"—while making clear that it did not hold that this interest authorized taking away tax-exempt status for "churches or other purely religious institutions." *Id.* at 604 & n.29. Two justices expressed concern with the power the Court granted to the IRS over Congress.[2]

On behalf of our citizens and religious organizations in our States, we are concerned about recent statements by the Government in oral arguments before the Supreme Court in *Obergefell v. Hodges*. The U.S. Solicitor General said that tax-exempt status is "certainly going to be an issue" for religious organizations in the future. Trans. of Oral Argument, Question 1 at 38:14, *Obergefell v. Hodges*, No. 14-556 (Apr. 28, 2015). But stripping tax-exempt status from religious organizations in this way—a severe consequence that could force groups to exit the public square—would be an unprecedented assertion of governmental power over religious exercise. The public policy exception has never applied beyond educational organizations or the Government's interest in "eradicating racial discrimination in education." To allow the IRS to proceed in this way would suggest that the IRS has the power to target disfavored beliefs in any religious organization, to effectively decide the truth or correctness of a religious belief, and to penalize as a matter of "policy" a mainstream belief held by groups that long have received tax-exempt status. This would go beyond the common law public policy doctrine, beyond the text of the Internal Revenue Code, and beyond the strictures of the First Amendment and RFRA.

We urge Congress to take steps to prevent the IRS from choosing this course. The Free Exercise Clause supports a federal tax policy that keeps the federal government out of disputes over religious belief. Further, as the Supreme Court has acknowledged, "Congress, the source of IRS authority," can write the Internal Revenue Code to preclude the public policy doctrine's

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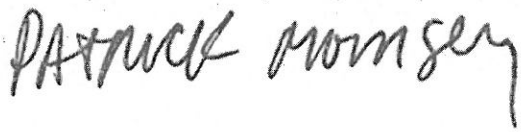
Cal. v. Comm'r of Internal Revenue, 83 T.C. 381, 502–09 (1984) (denying tax-exempt status to an organization that attempted to manipulate tax-exempt status to shield a criminal conspiracy).

[2] *See Bob Jones Univ.*, 461 U.S. at 611 (Powell, J., concurring in part and concurring in judgment) ("[T]he balancing of these substantial interests is for *Congress* to perform. I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently 'fundamental' to require denial of tax exemptions."); *id.* at 622 (Rehnquist, J., dissenting) ("I have no disagreement with the Court's finding that there is a strong national policy in this country opposed to racial discrimination. . . . But . . . this Court should not legislate for Congress.").

application in specific cases, and "can modify IRS rulings it considers improper." *Bob Jones Univ.*, 461 U.S. at 596. We encourage Congress to renew its commitment to religious freedom and to continue to support the many "religious, charitable, scientific, testing for public safety, literary, or educational purposes" that non-profit organizations of varied religious beliefs serve. 26 U.S.C. § 501(a) & (c)(3).

We appreciate your prompt attention to this critical issue.

Sincerely,



Patrick Morrisey
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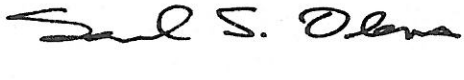

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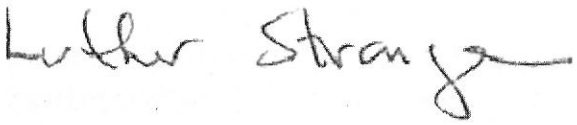

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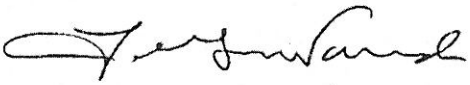

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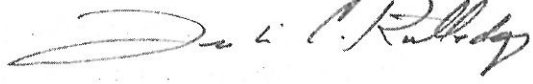

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