NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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

BRIEF FOR THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY, AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN R. DROSDICK
550 Broad Street
Newark New Jersey 07102
(201) 622-4444
Attorney for Amicus Curiae

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623 8611

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Interest of *Amicus Curiae*[1]

The Christian Legal Society (CLS) is a non-profit Illinois corporation founded in 1961 as a professional association of judges, attorneys and law students committed to the historic Christian faith. It has over 3,000 members throughout the United States. The Center for Law and Religious Freedom (The Center) was established as a division of CLS in 1975 to ensure, protect and promote the freedom of Christians in the exercise of their faith under the guarantees of the United States Constitution. CLS, through The Center, undertakes to marshal the necessary legal resources to respond whenever the rights of Christians to exercise and express their faith are threatened.

CLS, through The Center, publishes a variety of materials and sponsors local and national conferences providing continuing legal education in constitutional law, federal practice and procedure, state and federal taxation and, generally, law affecting non-profit organizations. The Center's national membership and professional resources enable it to study legislative trends and case developments and to focus attention upon unconstitutional incursions upon religious freedoms which might otherwise go unrecognized. The Center has previously filed *amicus* briefs in this Court in cases involving questions of religious freedom.

In the case *sub judice*, the Internal Revenue Service (the IRS) has been permitted to deny tax exemption to a religious organization which, in the view of the IRS, does not conform to what the IRS perceives to be "public

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[1] The parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of this Court pursuant to R. 36.1 of the Rules of this Court.

policy." The decision below can therefore have a serious impact upon all religious organizations throughout the nation with respect to practices going far beyond the factual context of petitioner's case. Neither CLS nor The Center endorses petitioner's position on interracial dating and marriage. Nevertheless, because "public policy" is so utterly undefined and indefinable, the IRS may, if the decision below stands, condition tax exemption of religious organizations on their conformity to whatever the IRS believes to be the prevailing public sentiment. This continuing threat to all religious institutions is a matter of great concern to *amicus*.

This brief is filed to provide the Court with the views of *amicus* on aspects of this case which may not otherwise be adequately addressed.

Summary of Argument

The First Amendment's prohibition against "an establishment of religion" or laws "prohibiting the free exercise thereof" has, in the case at bar, come into conflict with the effort of the IRS to enforce its stand against distinctions—any distinctions—based on race. Petitioner was found to be a religious organization sincerely holding religious beliefs against interracial dating and marriage. The Fourth Circuit has held that the practice of those beliefs justifies a denial of tax exemption.

No Act of Congress has spoken to the issue of interracial dating or marriage as a condition of tax exemption. Nevertheless, on vague grounds of "public policy" the Fourth Circuit has authorized the IRS in effect to penalize a religious institution which does not keep in step with the view of the IRS on this very personal matter.

ARGUMENT

I. There has been a significant infringement of religious rights under the First Amendment.

This Court has long guarded the sensitive border bebetween First Amendment religious freedoms and legitimate state interests to avoid any unnecessary conflicts between the two. Only a compelling state interest will allow the government to burden the free exercise of religion. *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963); *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). The government must not interject itself into the internal affairs of religious organizations, particularly where there is a danger of potential entanglement. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Most recently in *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court held that the National Labor Relations Board could not assert jurisdiction over church-operated schools in Chicago. Since Congress had never expressly directed that religious schools be made subject to the N.L.R.B., the Court declined to extend the Board's jurisdiction by implication into such sensitive areas. Everything that went on in such schools would have been subject to review by the N.L.R.B., creating entangling church-state relationships of the very kind the First Amendment sought to avoid.

So also in the present case, if the IRS is authorized to deny tax exemption merely on the basis of its view of "public policy", which in this case conflicts with the parietal rules of a religious school, then very little that goes on in a religious organization might not give rise to further interference. The Revenue Procedure which the IRS has applied here (Rev. Proc. 75-50, 1975-2 C.B. 587 (1975)), by its very terms asserts a right to review all school activities, policies and programs to ensure that a racially nondis-

criminatory policy has been adopted.[2] Even on this issue, the federal entanglement will be thorough and pervasive.

Amicus fears that this issue of racial discrimination is but the thin end of the wedge. By letter to the IRS dated March 20, 1978, Jeffrey M. Miller, Assistant Staff Director for Federal Evaluation of the United States Commission on Civil Rights, with reference to church and other private schools, has already demanded that the IRS "specifically prohibit racial, ethnic and sex discrimination in the treatment and selection of faculty."[3]

The same argument that gives the IRS power to deny tax exemption to those who discriminate on the basis of race would give it the power to deny an exemption to those who discriminate on the basis of sex, age, religion, ethnic background, or whatever other policy the IRS may choose from time to time to favor. Alleged racial, ethnic or sexual distinctions could be said to exist, or might indeed exist, in dormitory assignments, dining facilities, class assignments, athletics, grading, student loans, employment opportunities or disciplinary practices. Would the IRS be justified in denying tax exemption to seminaries or

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[2] "[A] racially nondiscriminatory policy as to students means: the school admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs." (Rev. Proc. 75-50, Sec. 3.01, 1975-2 C.B. 587 (1975)).

[3] Neuberger and Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 Fordham L. Rev. 223, 272 (1979), citing the statement of William B. Ball, *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 208 (1979).

yeshivahs because they do not train *women* to be priests or rabbis, or do not let them teach theology?

Religious distinctions themselves might be seized upon as contrary to public policy. Note the recent case of *Oral Roberts University* v. *American Bar Association*, No. 81-C3171 (N.D. Ill., filed July 17, 1981) where a religious college successfully defended its right to the accreditation of its law school despite its practice of admitting only students who subscribed to specific Christian beliefs. Could the IRS deny exemption to church schools that did not accept atheists as students or teachers?

Arguably, all distinctions may in some sense be against "public policy." But that does not give officialdom a roving commission to impose its views on others, particularly where that would violate sincere religious beliefs and constitute the governmental bureaucracy as a watchdog over the practices of religious institutions.

To deny tax exemption on the vague ground of "public policy" will inevitably affect religious beliefs and practices. If the state directs that the practice of certain beliefs will entail heavy financial burdens, those beliefs are threatened while other beliefs more consonant with official state policy are favored. The resulting entanglement is apparent.

If the policies of the IRS are compatible with the religious beliefs of one sect, that sect would have no difficulty in obtaining a tax exemption, while a different sect, out of step with policies approved by the IRS, would be unable to do so. This creates the double evil of tending to "establish" the one sect and of preventing the second from freely exercising its faith. It would have the indirect effect of imposing a federal presence on religion, quite contrary to the fundamental premise of the First Amendment.

II. Congress has not demonstrated any affirmative intention to interfere with parietal rules of private religious institutions.

As in *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), there is no clear Congressional mandate for the IRS to impose its policies upon religious schools. Under 26 U.S.C. §501(c)(3), the fact that an organization is operated exclusively for *religious* or *educational* purposes is all that is required for tax exemption. The IRS's own regulations provide that any *one* exempt purpose will suffice. Treas. Reg. §1.501(c)(3)-1(d)(1)(iii)(1959). The Fourth Circuit's interpretation, that a *religious* organization (or an *educational* one) must *also* meet the definition of "charitable" and so comply with "public policy," simply flies in the face of all known rules of statutory construction.

Furthermore, by the enactment of the 1980 Treasury and Postal Service Appropriations Act (Pub. L. 96-74, 93 Stat. 559), the IRS was forbidden to spend any money under new regulations to implement these policies in private, religious or church schools. Not only has Congress refrained from ordering the IRS to enter this area, but it also has tied the purse strings to keep the IRS out.

III. The important issues here presented have been before this Court previously, but have not been decided.

This case raises important issues the Court has considered on other occasions, but never decided. In *Coit* v. *Green*, 404 U.S. 997 (1971), this Court affirmed *per curiam*, without opinion, the decision in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971) to the effect that

a segregated *private* school might be denied tax exemption under 26 U.S.C. §501(c)(3). Nevertheless, no *religious* school was involved. When the case at bar was previously before this Court in *Bob Jones University* v. *Simon,* 416 U.S. 725 (1974), it was decided on procedural grounds without reaching the merits. Nevertheless, the Court referred to *Green* as involving a question which "has not received plenary review in this Court, and we do not reach that issue today." (416 U.S. 725 at 740). Since the plaintiffs in *Green* had sought to enjoin the IRS from granting tax exemption to private *non-religious* segregated schools, and since the IRS reversed its own position on appeal, this Court found that there was never any "truly adversary controversy" before the Court (416 U.S. 725, 740). *Green* therefore has little value as precedent for the case at bar.

More recently, in *Runyon* v. *McCrary,* 427 U.S. 160 (1976), this Court held that private *non-religious* schools could not exclude Negroes, but carefully limited the decision to avoid application to "private sectarian schools that practice racial exclusion on religious grounds" (427 U.S. 160, 167).

Here, we have a private sectarian school which does not practice racial exclusion but does, on religious grounds, impose social rules based upon racial distinctions. There is a clear record and findings of fact that the religious beliefs are sincerely held and believed to be based on a Biblical foundation. Although petitioner is not affiliated with any church, its religious beliefs so color all its activities that the trial court held it to be a religious organization in and of itself, and its own religious order. 468 F. Supp. 890 at 894-895.

It would be difficult to find another case that offers a better opportunity to resolve these fundamental questions that have so far evaded authoritative review.

CONCLUSION

For the reasons stated above, *amicus* respectfuly urges this Court to grant a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JOHN R. DROSDICK
550 Broad Street
Newark New Jersey 07102
(201) 622-4444
Attorney for Amicus Curiae