No. 81-3

In the Supreme Court of the United States

October Term, 1981

BOB JONES UNIVERSITY,
Petitioners,

VS.

THE UNITED STATES OF AMERICA,
Respondents.

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

BRIEF OF CHURCH OF GOD, A/K/A WORLDWIDE CHURCH OF GOD

AMBASSADOR COLLEGE

AS AMICI CURIAE IN SUPPORT OF GRANTING CERTIORARI

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INTRODUCTION

This brief is being filed in support of the petition of Bob Jones University for a Writ of Certiorari in the above numbered case.

CONSENT OF THE PARTIES

The parties have granted their consent to the amici curiae for the filing of this brief.

INTERESTS OF THE AMICI CURIAE

Amici Curiae organizations are a church and a theological college and as such, are particularly qualified to represent to the court a detached and authoritative viewpoint.

The Church of God (a/k/a The Worldwide Church of God, an unincorporated association) consists of an established church with approximately 700 local church congregations, 975 ordained ministers, and a membership constituency of approximately 70,000 adult, baptized, church-attending members. There are in addition approximately 33,000 nonbaptized members in the United States only who support the church financially.

Ambassador College consists of an established theological college with two campuses with a total student body of approximately 700 students, which are purposely kept to a minimum so as to enhance the student-teacher ratio. The college trains the ministry for the church.

These amici curiae are not parties to the subject action, nor have they been involved in any of the activity alleged to form the basis for the action giving rise to the petition herein.

SUMMARY OF ARGUMENT

The direct issue tendered in this case is "discrimination", racial in nature. But the clear principle of rule of law to be derived will be the power and authority of the govenment to transgress the religious rights of churches and theological schools for any discrimination—sex, sexual preference, national origin or religious.

So what is affected here is not just the rights of Bob Jones University and its student body but those of every church, religious body, and theological college in America.

Therefore, these amici strongly support the petition of Bob Jones University and urge this court to consider the amici's fundamental accompanying brief setting forth their reasons for that support. The amici will file a more comprehensive brief upon the granting of the petition by the Court and setting the same for oral argument.

ARGUMENT

I.

The IRS has adopted the theory that all nonprofit organizations are and must be "charitable" under the provisions of the Internal Revenue Code.

The court must be alert to the unanticipated adverse *consequences* that flow from the seemingly innocuous conclusion that all tax exempt organizations, including churches and theological schools are "charitable." A single example will suffice:

The Attorney General of California obtained the *ex parte* appointment of a receiver which confiscated all the real and personal property of a church, amounting to mil-

lions of dollars, and all of the church's documents and records. The receiver assumed full management and control of all of the church's "fiscal affairs." The Attorney General justified the appointment on the theory that the church was "charitable." Being charitable, under a legal fiction, the church held all of its property and records in trust for the public. Holding all of its property in charitable trust for the public, all such property and documents belong to the public as the beneficiary of the trust.

Therefore, it was argued that the church had no right to complain as to the First, Fourth and Fourteenth Amendments of the U.S. Constitution being violated as all such property and documents belonged to the public and the Attorney General represented the public.

If all such organizations are "charitable," then the Attorney General, like the king of England (whose historical authority of charitable trusts was cited as a precedent) can, in effect, commit no constitutional wrong in his dealing with tax exempt organizations, including churches and theological colleges.

II.

The historical concept and meaning of the Ninth Amendment of the U.S. Constitution will, in effect, be repealed by administrative fiat as governmental agencies can engender or define public policy which, in effect, abrogates clear-cut fundamental constitutional rights. Such a role would usurp the sovereignty of the citizenry and the states by the federal governmental agency arrogating such authority and power onto themselves.

Such an arrogation of power by a governmental agency not only transgresses the religious clauses of the Constitution but the constitutional black letter law and penumbra rights of freedom of association, of speech and the right

to teach and to learn implicit in the due process clause of the Fifth Amendment. These additional fundamental rights would be torn from the individual citizens and the states.

III.

The impact of this case is not limited to "racial discrimination." The legal principle to be derived will be the alleged reference of "discrimination."

The discrimination that will lead to the forfeiture of churches' and theological schools' tax exemption will pertain to sexual discrimination (religious conviction against ordaining women ministers); sexual preference discrimination (refusing to baptize homosexuals); national origin discrimination (refusal of ethnic churches to admit members of another ethnic origin) and then religious discrimination (refusal to hire ministers or members of other faiths or of no faith; refusal to hire theological teachers of another faith or no faith; refusal to admit members of another faith into certain areas of the church or temple).

IV.

The IRS's contention that Bob Jones' religious practice violates public policy justifying the forfeiture of their tax exempt status is truly a case of first impression.

The appellate court attributed the Constitution and tax exemption as the basis for justifying the public policy giving rise to the forfeiture of Bob Jones' tax exemption.

There is not even a hint of a suggestion that the conduct of Bob Jones University constitutes state action. Therefore, how can their private individual conduct not constituting state action constitute an actionable transgression of the federal Constitution?

The Court's attempt to hang their finding of public policy on the argument that tax exemption constitutes a "subsidy" toward racial discrimination directly and absolutely conflicts with this Court's clear-cut pronouncement in *Walz v. Tax Commission,* 397 U.S. 664 (1970).

There is no hint of a suggestion that the conduct of Bob Jones University constitutes a crime. Therefore, IRS's grasping at "public policy" cannot give rise to the degree of a "compelling state interest" which is necessary to justify the infringement of a citizen's constitutional rights by the government. This point becomes embarrassingly vivid to the government when we consider that the principal case relied on by the appellate court explicitly stated that the conduct in that case constituted crime and not a mere civil wrong (See *Tank Truck Rentals v. Commissioner,* 356 U.S. 30 (1958)).

It is a fundamental principle that one source of true public policy is to be found in the statutes *Twin City Company v. Harding Glass Company,* 283 U.S. 353 (1931). Therefore, when we look to Title VII, which is the federal Civil Rights Act of 1964, we find that theological schools and religious organizations are exempted from accusations of religious discrimination (42 U.S.C., §§2000e-1 and 2000e-2(e)).

Further, under Title IX, the act prohibiting discrimination based on sex in federal aid to education, religiously associated educational instructions are exempted (20 U.S.C., §1681(a)(3) and 45 C.F.R., §86.12).

V.

It is imperative to our individual and state rights that neither religious freedoms nor religious convictions hinge upon political prejudice that finds its expression in the whimsical caprice of "public policy." In *Patton*

v. U.S., 281 U.S. 276, 306, 50 S.Ct. 253, 261, 74 L.Ed. 854, 70 ALR 263 (1929), we read, "The truth is that the quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another."

CONCLUSION

For the reasons set forth herein the Petition for Certiorari in the present case should be granted and the judgment of the Fourth Circuit Court of Appeals be reversed.

July, 1981

Respectfully submitted,

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