IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 81-3

BOB JONES UNIVERSITY,
Petitioners,

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 of
NATIONAL ASSOCIATION OF EVANGELICALS
As Amicus Curiae
in Support of Granting Certiorari.

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The National Association of Evangelicals, with the consent of the parties, submits this brief as amicus curiae in support of Petitioners. The parties have consented to the filing of this brief and their letters of consent have been filed with the clerk pursuant to Rule 36.

INTEREST OF AMICUS CURIAE

The National Association of Evangelicals ("NAE") is a nonprofit religious corporation exempt under §501(c)(3) of the Internal Revenue Code. NAE is an association of state and local evangelical organizations, colleges, and universities and some 36,000 churches from 74 denominations. The immediate constituency of NAE is about 3.5 million people; through its affiliates NAE has a service constituency in excess of 10 million persons worldwide. These affiliates include the National Religious Broadcasters, the World Relief Corporation, and the Evangelical Foreign Mission Association.[1]

NAE is dedicated to strengthening the ministry of the local church, including religion-based schools. While evangelicals can and do differ with one another in the interpretation of Scripture, what unites them is their affirmation of the truth and inspiration of the Bible, as well

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[1] Because of its separatist character and strict theological views, Bob Jones University would consider the limited doctrinal tenets of NAE too "liberal." Thus the University is not a member or affiliate of NAE.

as the Lordship and Deity of Jesus Christ.[2]

What has prompted our submission of this brief is the ominous threat to religious freedom posed by the decision of the court below. No case has gone to such extremes in applying the public policy against invidious racial discrimination. Until this case that public policy had been applied only in situations of invidious discrimination, that is, when at least some element of personal bias or prejudice was present. Since May 29, 1975, Bob Jones University has admitted black and white students on an equal basis.[3] And it has enforced its religious convictions with respect to interracial dating and marriage with an even hand.

The court below has ignored crucial factual differences in the cases it relies

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2 Most evangelicals would not agree with the view of Bob Jones University that interracial dating and marriage is contrary to Scripture.

3 From January 1 to May 29, 1975, the University barred unmarried blacks from enrollment (unless the applicant for admission had been a University staff member for at least four years). This policy of virtual exclusion of blacks was followed as the safest, easiest, and most reliable way to protect its religious conviction against interracial dating and marriage.

upon, such as the total exclusion of blacks from educational institutions. In so doing, it erroneously applies a public policy intended to rid our country of invidious racial discrimination to a University which admits blacks, but follows a policy with respect to interracial dating and marriage based not on personal bias or prejudice, but sincere religious belief.[4]

The basis for our concern is reflected in the dissenting opinion of Judge Widener, in which he states (639 F.2d at 156): "Accepting the foregoing findings of the district court as correct, and even the majority does not claim they are clearly erroneous, and the previous findings of this court and the Supreme Court, as we must, that Bob Jones University is a religious organization, we are dealing in this

[4] NAE is familiar with the University and its strict theological views, including its religiously based nonmiscegenation belief. We would not submit this brief on behalf of the University if we had reason to believe that its professed religious beliefs were being used to mask invidious racial discrimination. In its 1964 Resolutions, NAE addressed "the problem of race prejudice" and called "upon our churches to accelerate the desegregation of their own institutions both in spirit and in practice and the opening of the doors of all sanctuaries of worship to every person, regardless of race or national origin."

case not with the right of the government to interfere in the internal affairs of a school operated by a church, but with the internal affairs of the church itself. There is no difference in this case between the government's right to take away Bob Jones' tax exemption and the government's right to take away the tax exemption of a church which has a rule of its internal doctrine or discipline based on race, although that church may not operate a school at all."

We are also disturbed at the precedential potential of the lower court's decision with respect to the Government's use of other clearly defined public policies, such as the policy against sex discrimination, as the basis for withdrawing tax exemption. Discrimination against women on the basis of sincere religious belief exists in many churches in NAE's constituency.

STATEMENT OF THE CASE

Bob Jones University has sued the United States for a refund of $21 in FUTA taxes it paid for calendar year 1975. The Government has counterclaimed for approximat-

ely $490,000 in unemployment taxes, plus interest, which it asserts are due on returns filed by the University for the years 1971 through 1975.

At issue is revocation by the IRS of the University's exemption as an organization described in §501(c)(3) of the Internal Revenue Code. IRS contends that § 501(c)(3) only exempts organizations which are "charitable" in character; that whether the University is religious in purpose and character is irrelevant; that an organizations which violates the clearly defined public policy against racial discrimination cannot be considered "charitable"; and that the University's policy against interracial dating and marriage--though it concedes this policy is based on sincere religious belief--violated federal public policy.

The District Court found the University to be a religious organization and therefore the Government's declared procedure for denying tax exempt status to educational organizations engaging in racial discrimination was inapplicable to it. Moreover, the District Court held that the revocation of the University's tax exemption violated its rights under the Free

Exercise Clause.

The Court of appeals, Judge Widener dissenting, reversed. Its decision rests on four pillars:

1. The University is subject to IRS revenue rulings and procedures prohibiting racial discrimination in private schools because it is an educational institution as well as a religious one. 639 F.2d at 149.

2. That the University is not a "charitable" organization because, in the University's enforcement of its rules relating to interracial dating and marriage, it violated "the government policy against subsidizing racial discrimination in education, public or private." Id. at 151.

3. That, assuming the revocation of the University's tax exemption did impinge upon its Free Exercise rights, the government's interest in eliminating all forms of racial discrimination in education is compelling. Thus its action did not violate rights of the University under the Free Exercise Clause. Id. at 153.

4. That the principle of Government neutrality toward religion embodied in the Establishment Clause does not prevent government action based upon the compelling

state interest in the enforcement of the public policy against racial discrimination. And it found that since the only inquiry which government would make of the University would be whether the institution maintains racially neutral policies, no excessive entanglements would be created. Id. at 154-155

QUESTION PRESENTED

This brief is addressed to the important question whether the public policy against invidious racial discrimination, weighed in the balance with the Free Exercise Clause, constitutes a "compelling state interest" sufficient to justify revoking the tax exemption of a pervasively religious organization which does not discriminate between the races except on the basis of its sincere religious belief that interracial dating and marriage is contrary to Scripture.

SUMMARY OF ARGUMENT

The balancing process employed by the court below in weighing public policy with respect to invidious racial discrimina-

tion against the Free Exercise rights of the University presents a startling and unprecedented departure from the teaching of this Court in such cases as Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); and Thomas v. Review Board, 49 U.S.L.W. 4341 (April 6, 1981). The rationale of the court below is one dimensional--it so elevates the doctrine of "compelling state interest" that the Free Exercise Clause is totally eclipsed.

The Court of Appeals professes to recognize the fact that the religious belief of the University is sincere and its racial policy immutable. 639 F.2d at 148. Yet, notwithstanding the University's open admissions policy and the absence on the record of any invidious discrimination against black students, the court below finds a pressing need to fashion a "prophylactic rule" to prevent indirect support by Americans of an exempt organization that believes Scripture forbids interracial dating and marriage. The "balance" the lower court has struck in this case inevitably leads to speculation that the court was unconvinced, its rhetoric notwithstanding, of the sincerity of the rel-

igious belief. Perhaps the University's view of Scripture seemed far-fetched to the court below. But as this Court stated in United States v. Ballard, 322 U.S. 78, 87 (1944), the First Amendment protects adherence to religious views that "might seem incredible, if not preposterous, to most people."

The prophylactic rule of the court below appears virtually absolute, judging from the court's application of that rule to the unique facts of this case. Under that rule, it is apparently irrelevant whether racial discrimination proceeds from the worst of motives or the best of intentions; whether from personal bias and rank prejudice or from a devout desire to obey the will of God.

Surely in a free society whose basic charter nourishes religious pluralism the public policy against invidious racial discrimination leaves room for the University's exercise of a belief that interracial dating and marriage contravenes Scripture. In short, there is no need here, "for the protection of society," Cantwell v. Connecticut, 310 U.S. 296, 304 (1940), to sustain the absolutist prophylactic rule announced by the Court of

Appeals.

The court below also erred in its expansive interpretation of Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958). That case involved public policy as the basis for denying specific expenses directly attributable to illegal acts; it did not concern public policy as the basis for denying the complete exemption of an organization due to a particular practice based upon sincerely held religious beliefs. Moreover, the Court of Appeals broadened the application of the Tank Truck doctrine without mentioning this Court's decision in Commissioner v. Tellier, 383 U.S. 687, 693-694 (1966), which indicated that, if anything, the Tank Truck doctrine was to be confined rather than expanded.

ARGUMENT

I.

THE COURT BELOW HAS DEPARTED FROM THIS COURT'S TEACHING IN FREE EXERCISE CASES

In upholding revocation of Bob Jones University's tax exemption, the court below forces the University to choose between its right under the Free Exercise Clause and the receipt of a government benefit other-

wise available. (We perceive no difference of constitutional dimensions between government benefits in the form of tax exemption or welfare payments).

In Thomas v. Review Board, 49 U.S.L.W. 4341, 4344 (April 6, 1981) this Court once again affirmed a principle of long standing--"that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." (Actually, the University cannot abandon the practice of its immutable religious belief, though the court below suggests that course, without being hypocritical.) We recognize that the lower court did not have the benefit of this Court's thinking in that case, but the long established principle expounded in Thomas had been thoroughly discussed in Sherbert v. Verner, 374 U.S. 398 (1963).

In Sherbert this Court stressed that "appellant's declared ineligibility for benefits derives solely from the practices of her religion, but the pressure upon her to forego that practice is unmistakable." Id., at 404. This Court reiterated the same principle when in Thomas v. Review Board it stated: "Where the state conditions re-

ceipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." 49 U.S.L.W. at 4344.

In revoking the tax exemption of the University, the Government has put substantial pressure on the University to modify its behavior and to violate its beliefs. The question thus narrows to whether the Government can "justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." Ibid. As this Court observed in Thomas, quoting from Wisconsin v. Yoder, "'[t]he essence of all that has been said and written on the subject is that only those interests of the highest order can overbalance legitimate claims to the free exercise of religion.'" Ibid.

That the University's beliefs with respect to interracial dating and marriage are a matter of sincere religious convic-

tion is an undisputed fact on the record. It is thus beyond question that Bob Jones asserts a legitimate claim under the Free Exercise Clause. Hence the ultimate question becomes whether the public policy against invidious racial discrimination justifies revocation of the University's tax exemption.

The Court below has equated the University's sincere religious belief that Scripture forbids miscegenation with invidious racial discrimination. That is evident from the many cases relied upon by the court below which involve situations where blacks were excluded from admission to educational institutions or otherwise the victims of racial prejudice. In support of its indiscriminate concept of racial discrimination, the Court of Appeals relies upon such Equal Protection cases as Loving v. Virginia, 388 U.S. 1 (1967) (law prohibiting interracial marriage unconstitutional) and McLaughlin v. Florida, 379 U.S. 184 (1964) (interracial cohabitation law invalid). Such laws from a bygone white supremacy era were obviously prompted by blatant racial prejudice. We fail to see their relevance where a University's disciplinary rule is based upon sincerely held

religious beliefs.

In Runyon v. McCrary, 427 U.S. 160 (1976), this Court held that 42 U.S.C. §1981 prevents private schools from discriminating racially among applicants. This Court carefully observed in footnote 6 of its opinion that Runyon did not concern a private school which excluded applicants on religious grounds, and that the Free Exercise Clause was thus in no way involved. Here it is, for while Bob Jones University does not exclude blacks, it follows a religiously based policy which the court below treats as invidious racial discrimination.

Judge Widener states in his dissenting opinion: "This is a case of first impression so far as the Supreme Court is concerned, as well as the Courts of Appeals." 639 F.2d at 158. As just discussed, it was not addressed in Runyon v. McCrary. To the extent that Congress has considered the question, as Judge Widener pointedly observes, it has raised grave doubts about the validity of the public policy rationale of the court below. 639 F.2d at 160-161. Only this Court can remove those doubts.

ARGUMENT

II.

THE TANK TRUCK RENTALS DOCTRINE IS INAPPLICABLE TO THIS CASE

When a school excludes blacks for racial reasons or otherwise discriminates against black students, that racial discrimination is rightly characterized as invidious and pervasive. We assume, for the sake of argument, that in such cases the doctrine of Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958), could arguably be applied on an equally pervasive basis to revoke the exemption of the offending institution. But that is plainly not the case here. There is simply no authoritative source for applying the Tank Truck Rentals public policy doctrine as the basis for revoking the exemption of a religion-based school which admits black students on an equal footing with white students, and treats black and white students alike with respect to all its disciplinatory rules, including rules against interracial dating and marriage founded on sincere religious belief.

The guarded comments of this Court in Commissioner v. Tellier, 383 U.S. 687, 693-

694 (1966), indicating that the Tank Truck Rentals doctrine should be confined rather than expanded are ignored by the court below on the theory that Tank Truck involved a profit-making, computational situation. Therefore, as matters now stand, there are virtually no constraints on the IRS in its expansive application to the §501(c)(3) exempt organization area of Tank Truck Rentals.

The devasting financial impact of the Tank Truck Rentals doctrine as applied to the unique facts of the present case is only symptomatic of a greater problem. There is a pressing need for this Court to settle the question of the applicability of that amorphous doctrine in the §501(c)(3) exempt organizations area. Otherwise, we envision IRS branching out in additional public policy areas such as discrimination on the basis of sex, age, or physical handicap. What, in principle, is to prevent IRS from questioning the "charitable" character of offending exempt organizations in these other public policy areas. Any such developments should not be left to the discretion of the Commissioner of Internal Revenue, but to Congress.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

FOREST D. MONTGOMERY,

Attorney for Amicus Curiae.

July 29, 1981