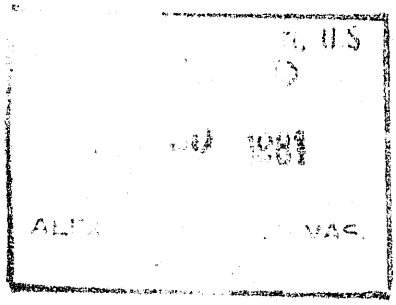

Nos. 81-1 and 81-3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

BOB JONES UNIVERSITY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS (COLPA) AS AMICUS CURAE

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Interest of Amicus Curiae

The National Jewish Commission on Law and Public Affairs ("COLPA") is a volunteer association of attorneys and social scientists organized to represent the interests of the Orthodox Jewish community in matters arising under the Free Exercise and Establishment Clauses of the First Amendment to the Constitution, and in related areas involving the right to worship and observe traditional religious customs and practices. In this capacity, COLPA has appeared as amicus and/or represented intervenors in numerous cases before this Court, including Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970).

In submitting this brief, COLPA wishes to make it clear that it strongly disapproves and condemns the racial practices of both petitioners. As we have testified previously,

> ". . . [I]t is contrary to Jewish religious principles to discriminate against [any person]. . . on the basis of race or skin color. No Jewish organization has ever been

> heard to have closed its doors to any Jew based on race. We know too well the invidious effects of racial discrimination, and will not lend ourselves to any scheme that encourages or perpetuates such a social and moral evil." (Statement of National Jewish Commission on Law and Public Affairs, Hearings Before the Subcommittee on Oversight, of the Committee on Ways and Means, 96th Cong., 1st Sess., on Proposed IRS Revenue Procedure Affecting Tax Exemption of Private Schools (Feb. 20, 21, 1979) 507-508.)

However, notwithstanding its unequivocal position on matters of racial discrimination, the Orthodox Jewish community is concerned by the broad implications in the opinions below which indicate that organizations created by minority groups in pursuit of the Free Exercise of their religions may be denied tax exemption and required to pay taxes, not for doing something illegal, but merely because they refuse to conform to the "policies" of the majority. The loss of tax-exempt status would undermine the economic viability of such organizations and, hence, their ability to exercise their First Amendment rights.

For example, many religious bodies have time-honored practices and traditions which prescribe different roles for men and women during worship and related activities, including education. While these distinctions are not perceived by their adherents as discriminatory in purpose or effect, it is conceivable that the lower courts might attempt to interpret the decisions below in the present cases to require the Internal Revenue Service to deny tax-exempt status to any entity which fails to conform to the evolving federal policies on the treatment of women. This could include every orthodox and many conservative Jewish synagogues and yeshivas, the Catholic Church, Moslem mosques, Far Eastern temples and many Protestant churches.

We protest a rationale which could all too easily lead to such results. It is not the business of Government to require religious groups to conform to social "policies."

Joining in this brief are the following organizations, which represent a broad cross-section of the orthodox Jewish community in the United States:

Agudath Israel of America
National Council of Young Israel
Rabbinical Council of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

ARGUMENT

THE INTERNAL REVENUE SERVICE MAY NOT DENY TAX-EXEMPT STATUS TO A BONA FIDE RELIGIOUS ORGANIZATION WHICH DOES NOT VIOLATE ANY SPECIFIC LAW MERELY BECAUSE IT DOES NOT CONFORM TO FEDERAL SOCIAL POLICY

We agree with and strongly urge upon the Court the reasoning of the dissenting judge in Bob Jones University in the Fourth Circuit. As a result, we will restrict our comments to a few points which appear to warrant some short elaboration.

A. Congress did not intend to Restrict Tax-Exemption to Religious Organizations which also Meet some Common-Law Concept of "Charity".

Section 501(c)(3) of the Internal Revenue Code exempts a long list of entities, of which three are "religious," "educational" and "charitable." Others include "scientific" and "literary" organizations, as well as entities organized to test for public safety or foster certain types of sports activities. Despite the plain meaning of the statute, which connects these separately listed items disjunctively, with the word "or," the lower courts have concluded that Congress really meant to exempt only "charitable" organizations, and that the other specifications were, perhaps, merely examples of such charitable entities. The lower courts therefore decided that Congress used a phrase 46 words long, when only one was needed, and that it did not mean "or" when it said "or."

The only authority cited for this

conclusion was a 1939 Committee report,1/ to the effect that each of the categories in the statutory list benefitted the public by promoting "general welfare." But this statement in the Report was hardly a complete explanation. For that, one may refer to this Court's historical summary of both income and property tax exemptions for religious entities in Walz v. Tax Commission of the City of New York, 397 U.S. 664, 673-674.

The Court pointed out that the exemption of religious entities2/ from federal income taxes goes back to the very origins of federal legislation on the subject--at least to 1894

1/ H.R. Rep. No. 1820, 75th Cong., 3d Sess. 19 (1939).

2/ Although the exemptions in these cases may have been requested and, in part, analyzed under the "educational" category, the issue in this case arises because the institutions were also inherently religious in purpose and function. Without that element, those cases would stand on entirely different footings. See NLRB v. Bishop Ford Central High School, 623 F.2d 818, 823 (2d Cir., 1980), petition for cert. filed Dec. 22, 1980 ("It is the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed which create the conflict with the Religion Clauses. . .").

(i.e., 45 years before the cited Committee Report) and, in a footnote, recognized the distinction between exemptions based on "religious" and "eleemosynary" purposes (397 U.S. at 676-677:

> "For so long as federal income taxes had any potential impact on churches--over 75 years--religious organizations have been expressly exempt from the tax."4/

4/ Act of August 27, 1894, §32, 28 Stat 556. Following passage of the Sixteenth Amendment, federal income tax acts have consistently exempted corporations and associations, organized and operated exclusively for religious purposes along with eleemosynary groups, from payment of the tax. Act of Oct. 3, 1913, §11G(a), 38 Stat 172. See Int Rev Code of 1954, §501, et seq., 26 USC §501 et seq." (Emphasis added)

In the case of property taxes, the Court traced the exemptions for religious entities back into pre-Revolutionary days, and stated, "Few concepts are more deeply embedded in the fabric of our national life. . .".

The Court specifically rejected "good works" as the underlying rationale of exemptions:

"Grants of [tax] exemption historically reflect the concern of authors of constitutions and statutes as to latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers.

* * *

"We find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others--family counselling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need.

"As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions." (Emphasis added.)

The "good works" rationale also collapses when one considers the exemption for sports activities. While it may be possible to define "charity" to include the "fostering" of sports competitions, there is a parenthetical limitation in the statute to those which do not provide athletic facilities or equipment. If fostering sports is a form of "charitable" activity, the providing of equipment or facilities should be just as charitable. This limitation demonstrates that each exempt category in §501(c)(3) has its own characteristics and purposes, and that the concept of charitable "good works" is not the universal touchstone.

Hence, the lower courts' conclusions that Congress intended to grant tax exemptions to religious organizations only if they otherwise engaged in charitable, or "eleemosynary" activities, is unsound. In Walz, that contention has already been rejected by this Court, and it should again be rejected in this case.

B. Having Granted Tax-Exemptions to Religious Entities in General, the Government may not Deny Exempt Status to those Religious Groups which Fail to Conform to the Social Policies of the Majority.

The purpose of the First Amendment is to protect minorities from the tyranny of the majority. The Government represents and acts for the majority, but the majority may not use its power to control the Government to destroy the constitutional rights of the minority, whether through taxation or otherwise. Tax-exemption is a status without which most non-profit organizations could not exist in today's world. The purpose of the First Amendment and its limitation on the powers of the majority would be frustrated if tax exemption and, with it, economic viability, could be granted to or withheld from the minority by the majority merely because the minority, in pursuit of its religious rights, refuses to conform to the social practices of the majority. If the majority could so behave, the First Amendment would be meaningless.

Thus, the courts have uniformly held that if the Government accords some privilege, right, or benefit to a class in general, it may not withhold or limit that privilege, right or benefit to an individual member of that class merely because that member refuses to forego rights or privileges guaranteed under the First Amendment. The Government just may not put its citizen to such a choice.

For example, in Speiser v. Randall, 357 U.S. 513 (1957), in which tax exemption was denied because of failure to sign a loyalty oath, this Court held that the tax-exemption could not be conditioned on a surrender of First Amendment rights of free speech. In Sherbert v. Verner, 374 U.S. 398 (1963), in which an employee who refused to work on his Sabbath was denied unemployment compensation by the State, this Court held that the First Amendment did not permit the State to force a citizen to choose between exercising his religion and the receipt of unemployment compensation benefits. And in Michaelson

v. Booth, 437 F. Supp. 439 (E.D.R.I., 1977), in which municipal elections were scheduled on a religious holiday, it was held that a local government could not force a citizen to choose between exercising his right to vote and observance of his religious practices, and the government had to make reasonable accommodations to permit citizens to vote in a manner that would not force them to violate their religious beliefs.

The principle, then, is well established. The First Amendment does not allow the Government to force minorities to conform, to surrender their diversity and assimilate to the undifferentiated masses, as a condition of tax-exemption. A contrary rule would make a mockery of the First Amendment.3/

3/ The lower court's reliance on the principle in cases like Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958), disallowing deductions for payments which are illegal and contrary to public policy, is misplaced in this context. No First Amendment issue was involved in those cases, and the payments were clearly illegal.

Different rules might well apply if it had been determined that the acts of the petitioners herein constituted crimes or otherwise violated specific laws. In that case, such laws would have to be tested to determine if they reflected a sufficiently compelling Government interest, such as "clear and present danger", to warrant overriding religious practices and rights. E.g., Reynolds v. United States, 98 U.S. 145 (1878)(prohibiting polygamy). But that situation just did not occur in these cases. No laws prohibit what petitioners do. And the Internal Revenue Service cannot nullify the guarantees of the First Amendment in the absence of such laws.4/

4/ Even if the activities of the organization violated specific laws, the remedy would appear to be prosecution under those laws. Denial of tax exemption should not be the proper remedy in the case of bona fide religious organizations. Thus, polygamy may be prosecuted or enjoined, but the church should nevertheless retain its exemption from tax as a bona fide religious organization.

C. A Tax Exemption is not the Equivalent of Governmental Support of the Organization.

The lower courts in both these cases concluded that tax exemption somehow involves the Government in the activities of the entity itself, just as though the Government was subsidizing the entity. That line of reasoning is fallacious, and was specifically rejected by this Court in Walz.

The premise that tax exemption is a subsidy to the entity is a confusion of concepts. Clearly, no money runs from the Government to the entity merely because it is exempt. Quite the contrary, if it is not exempt, funds will run from the entity directly to Government. Exemption merely creates a neutral condition, with neither the Government subsidizing the organization nor the organization supporting the Government.

Of course, if the Government removed the exemption, the entity would be required to pay large sums to the Government and, in an indirect sense, the Government's forebearance

in collecting that sum is a "benefit" to the entity--it has more funds for its religious activities if it is exempt than if it is not. But by that reasoning, the Government could constitutionally tax 90% or 99% or conceivably even 100% of the organization's income or property, and its forebearance from doing so is just as much--or even more--a "benefit" as its forebearance to tax at the more customary lower rates. The argument that forebearance in taxing a religious activity is a "benefit" is based on a semantic error in the meaning of the word "benefit". It is like saying that your enemy "benefits" you when he stops punching you in the nose. Only under a most distorted view would that be considered a "benefit".

The true nature of a tax-exemption was considered at length in Walz, supra, which raised the question whether property tax exemptions of churches violated the Establishment Clause. Clearly, the Establishment Clause prohibits the government from giving any

financial "benefits" to any church. This Court held that a tax exemption is not a benefit, but a mere act of neutrality (397 U.S., at 674-676):

> "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'"

While that case involved property taxes rather than income taxes, the Court drew no distinction between the two. It expressly noted that property tax exemptions and income tax exemptions have the same purpose and economic consequences (397 U.S. at 676-677):

> "[Income tax exemption] is an 'aid' to churches no more and no less in principle than the real estate tax exemption granted by the States. Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality

> toward churches and religious exercise generally so long as none was favored over others and none suffered interference."

The decision of the lower courts in this case not only ignored this explanation, but also missed the warning in the last sentence quoted above, against favoring some over others, for they would favor those churches which conform over those which refuse.

To hold that tax exemption is a "benefit" which involves the Government in the activities of the organization goes much too far. If that concept is correct, the Internal Revenue Service will be forced to deny exemption to <u>any</u> entity--and not just those listed in §501(c)(3)--which operates in a manner contrary to national policy. The list of tax exemptions that would have to be lifted would be endless: any pension plan which covers employees of employers who discriminated against blacks, women, handicapped or the aged (Code §§401, 501(c); unions whose seniority rules perpetuate past discriminations (Code §501(c)(5));

social clubs (Code §501(c)(7); fraternities (which ones did not discriminate in the past?) (Code §501(c)(8) and (10)); cemetery companies (§501(c)(13); and even homeowners associations (§528).

The Internal Revenue Service is not, and cannot, be the Government's tool for social engineering. Congress did not intend tax exemption as a benefit in the sense used by the lower courts, and it is not the majority's cudgel for beating the minority until the latter acts in the manner the former from time to time happens to think morally or socially desirable.

SUMMARY

We underscore our repudiation of the practices of the petitioners in these cases, and regret that it is necessary--as it often is when difficult Constitutional issues are involved--to defend the rights of those with whom we so strongly disagree.5/ But the

5/ In some respects, the real difficulty in these cases lies in the findings of the lower (footnote continued)

Constitution gives each of us the right to dissent, to be different, to believe that the

(footnote 5 continued)

courts (in Goldsboro Christian Schools, more of an assumption than a finding) that racial discrimination was based on a bona fide theological belief. If these cases could be retried--and on this issue, Goldsboro Christian Schools probably can be--the bona fides of that belief should be tested. Too often religion has been used as a blind excuse for engaging in the grossest and most repugnant behavior. Where religion is merely a pose (e.g., the so-called "mail order churches" whose principle purpose appears to be to claim property tax exemptions or quasi-political fronts feigning to be religious movements), it may be a sham not entitled to First Amendment protections. In this case, there may still be a question whether the religious beliefs were the real source of the discriminatory practices, or merely a pretext for doing what the parties were determined to do, regardless of the legal and moral restrictions. Even in the case of Bob Jones University, does the weight of the evidence establish that the current leadership and membership are actuated by the purported theological justification for anti-black behavior, or are the obscure theological references merely convenient excuses? While such inquiries may be extremely difficult and sensitive, they are permitted--indeed, if the protections of the First Amendment are not to be obliterated by abuse, they may even be necessary. Nothing in the Court's decision in this case should foreclose future inquiry into this factual issue by the courts.

others are wrong. As long as a religious organization does not do something actually illegal, the Internal Revenue Service may not take away that right.

* * *

Much Madness is divinest Sense--
To a discerning Eye;
Much Sense--the starkest Madness--
'T is the Majority
In this, as All, prevails--
Assent--and you are sane--
Demur--you're straightway dangerous--
And handled with a Chain--

(From "The Complete Poems of Emily Dickenson" (1929))

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