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CHURCH-STATE CASES

WILFRED R. CARON, ESQUIRE

I. VOLUNTARY PRAYER IN PUBLIC SCHOOLS—

Widmar v. Vincent & Brandon v. Board of Education

The topic of this discussion is voluntary prayer in public schools. The principal cases in this connection are *Widmar v. Vincent*¹ and *Brandon v. Board of Education*.² In *Widmar*, the University of Missouri at Kansas City encouraged students to participate in various on-campus activities. It permitted the use of a student center and other university facilities for such purposes.³ There were approximately ninety student groups, one of which was a group known as Cornerstone. Cornerstone consisted of approximately twenty students who gathered together to discuss religion and their faith experiences.⁴ After approximately 4 years of this activity, Cornerstone applied for permission to use the university facilities.⁵ The application was fairly explicit and revealed that their intent was to engage in worship. The university regulations, however, provided:

[N]o University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction.⁶

Cornerstone's application was considered and before it was denied, the group was asked for a clarification of its activities. The attorney for the group wrote in part:

Typical Cornerstone meetings in University facilities usually include the following: 1. The offering of prayer; 2. The singing of hymns in praise and thanksgiving; 3. The public reading of scripture; 4. The sharing of personal

¹ 102 S. Ct. 269 (1981). The *Widmar* decision affirmed the Eighth Circuit's holding in *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980).

² 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1981).

³ 635 F.2d at 1312.

⁴ *Id.* at 1313.

⁵ *Id.*

⁶ *Id.*

views and experiences (in relation to God) by various groups; 5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and 6. An invitation to the interested to meet for a personal discussion.⁷

The attorney made it clear that these meetings were open to the public and that members of all religious persuasions were invited.⁸ He further stated, "There also is no doubt that the undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth."⁹

The district court opined that the regulation could be upheld, that there was a legitimate state interest,¹⁰ and that any policy of neutrality under these circumstances would have the effect of advancing religion in violation of the Constitution.¹¹ The court of appeals, however, was of the view that the regulation actually had the primary effect of inhibiting religion, and that it would lead to excessive entanglement in religious matters, such as defining what constitutes worship and the practice of religion.¹² The court of appeals, therefore, sustained Cornerstone's claim and invalidated the regulation as an unconstitutional burden on free exercise.¹³

The *Brandon* case involved the denial of permission to high school students to engage in voluntary prayer on school premises before the commencement of the schoolday. A unanimous Court of Appeals for the Second Circuit held that to permit such activity would advance religion in violation of the establishment clause.¹⁴ The court distinguished the

⁷ *Id.*

⁸ *Id.* at 1313-14.

⁹ *Id.* at 1314.

¹⁰ *Chess v. Widmar*, 480 F. Supp. 907, 917 (W.D. Mo. 1979). The district court was convinced that the "State of Missouri's interest in maintaining a strict separation of church and state [was] a sufficiently compelling interest to overbalance [the] plaintiffs' claims to free exercise of religion." *Id.* This conclusion would allow approval of the regulation even if the plaintiffs had established that their constitutional rights had been violated.

¹¹ *Id.* at 914-15. The district court quoted Justice Brennan, concurring in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). Justice Brennan believed that "[t]he State must be steadfastly neutral in all matters of faith," and that "government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality." 480 F. Supp. at 914 (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring)).

¹² 635 F.2d at 1317-18. Religious speech is an area protected by the first amendment. *Id.* at 1315. Similarly, the freedom to associate for the advancement of religious beliefs is also protected. *Id.* Since the state must maintain neutrality toward these rights, such a prohibition is an unfair interference with these constitutional mandates. *Id.* at 1318.

¹³ *Id.* at 1320.

¹⁴ *Brandon v. Board of Educ.*, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970

Widmar case noting that in *Brandon*, a younger, more impressionable student body was involved.¹⁵ In the court's view, this factor had constitutional significance sufficient to warrant a different result. Further, the court held that the prohibition of high school students from using school premises for voluntary prayer could not be held to be an undue burden on their free exercise rights.¹⁶

II. UNEMPLOYMENT COMPENSATION—

Alabama v. Marshall & St. Martin *Evangelical Lutheran Church v. South Dakota*

Prior to 1970, the employees of section 501(c)(3) tax-exempt organizations were exempt under the Federal Unemployment Tax Act.¹⁷ In 1970, that was changed by amendments to the Act, that, subject to various exceptions, made employer coverage applicable to section 501(c)(3) organizations.¹⁸ Only three of the exceptions are of immediate interest.

First, section 3309 of the Internal Revenue Code excepts services rendered to "(A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches."¹⁹ A second exemption applies

(1981). The establishment clause of the first amendment commands that there be "no law respecting an establishment of religion." U.S. CONST. amend. I; see *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). This, however, is a vague concept, the violation of which is not always easily identifiable. 403 U.S. at 612. Thus, the Court has been forced to draw lines with reference to the three main evils against which the establishment clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). The only way a state statute or regulation respecting religion does not contravene the establishment clause is if "(1) the enactment has a secular purpose, (2) its principle or primary effect neither advances nor inhibits religion, and, (3) it does not foster an excessive entanglement with religion." 635 F.2d at 978.

¹⁵ 635 F.2d at 980. In the *Widmar* case, the facilities of a university were identified as a "public forum," where religious speech and association could not be prohibited. This is distinguishable from a high school classroom where sensitive establishment clause considerations limit the right to air religious opinions. See *id.*

¹⁶ *Id.*

¹⁷ I.R.C. § 501(c)(3). Section 501(c)(3) provides that "[c]orporations, and any community chest, fund or foundation, organized . . . for religious, charitable, scientific . . . or educational purposes" shall be considered exempt from income taxes for the purpose of any law which refers to organizations exempt from income tax. *Id.*

¹⁸ The Unemployment Compensation Amendments Act of 1970, Pub. L. No. 91-373, § 104(b)(1)-(5), 84 Stat. 697 (now I.R.C. § 3309(b)(1)-(5)), required states' programs to include certain organizations within their unemployment compensation coverage.

¹⁹ I.R.C. § 3309(b)(1)(B).

to ministers and members of religious orders.²⁰ Third, the 1970 amendments included an exemption for persons in the employ of a school that is not an institution of higher education.²¹

In 1976, the third exemption was repealed.²² The Secretary of Labor took the position that the particular exemption was intended to exclude all employment in schools that were private in nature.²³ Therefore, the repeal had the effect of eliminating the exemption for employees of all church-related schools. The Secretary further contended that the first exemption, applicable to employees of churches or associations or conventions of churches, was meant only to apply to services of persons who are employed in connection with the maintenance of a church or other religious building.²⁴ This is a very narrow view of the section.

The Fifth Circuit Court of Appeals held that the Secretary's view was unduly restrictive and stated, in part:

The statute plainly indicates that the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. There is no question here that the persons performing services in these religious schools fall within the 'in the employ of' language of the statute, therefore, if the employees involved are employed by a 'church', the exemption applies to them.²⁵

The court continued with this critical language:

Resolution of this question depends upon what is meant by 'church' as used in the statute. We are convinced the plain meaning of 'church' requires a definition as something qualitatively greater than the physical building of worship, and, at a minimum, the term encompasses the legal entity commonly referred to as a church.²⁶

Another case, *St. Martin Evangelical Lutheran Church v. South Dakota*,²⁷ involved two Lutheran schools which trained students for the ministry. One of these was a preparatory school, training students for further education in two colleges.²⁸ To put it succinctly, the South Dakota Supreme Court simply agreed with the Secretary's narrow view and deter-

²⁰ *Id.* § 3309(b)(2).

²¹ Pub. L. No. 91-373, § 104(b)(1)(b)(3), 84 Stat. 697 (1970).

²² Unemployment Compensation Amendments Act of 1976, Pub. L. No. 94-566, § 115, 90 Stat. 2670 (now I.R.C. § 3309(b)(3)).

²³ See *Alabama v. Marshall*, 626 F.2d 366, 368 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

²⁴ 626 F.2d at 368.

²⁵ *Id.* at 369.

²⁶ *Id.*

²⁷ 451 U.S. 772 (1982), *rev'g In re Determination of Unemployment Ins. Coverage of Northwestern Lutheran Academy*, 290 N.W.2d 845 (S.D. 1980).

²⁸ 290 N.W.2d at 846.

mined that those sectarian schools or persons in their employ were not exempt from the Federal Unemployment Tax Act.²⁹ The decision of the court in *Evangelical Lutheran* has been appealed.³⁰

Tom Rayer will now offer comments on the posture of a Louisiana case.

TOM RAYER:

A decision from the Louisiana Supreme Court is now on petition for certiorari to the United States Supreme Court. The State Department of Labor filed a petition for certiorari following the granting of certiorari in *Evangelical Lutheran*. The petition has been filed with the supporting appendices and all the documentation by the State Department of Labor.

After reviewing the *amicus* brief of USCC and other briefs that were filed in the *Evangelical Lutheran* and *Alabama* cases, and subsequent to reviewing the documentation and support of the application for certiorari by the State Department of Labor, which we felt adequately described the posture of our case, we initially determined that we would not file any direct response to the petition for certiorari. We felt that we would rise or fall upon what the Court chose to do with the *Evangelical Lutheran* decision—that depending upon the outcome of the decision in that case, we would either be granted or denied certiorari. A curious thing has happened, however. Several weeks ago we received a letter from the clerk of the Supreme Court requesting that we file a responsive brief in opposition to, or at least commenting upon, the application for certiorari. I have talked to several attorneys about this and it is very difficult to determine what the Court is telling or asking us. Perhaps they are not asking for anything other than an expression.

From talking to those who heard the oral argument in the *Evangelical Lutheran* case there is one further aspect we need to address. Some of the Justices apparently are concerned, or were concerned, about the distinction between those schools and entities that were operated under the corporate auspices of “the Church,” in terms of either a diocese or a parish, and those separately incorporated schools, particularly secondary schools that may be operated and owned or controlled by corporate entities other than the mother church.

In the Louisiana case we have a conglomeration of class action plaintiffs, ranging from the typical garden variety parochial school through the

²⁹ *Id.* at 848.

³⁰ On appeal, the Supreme Court reversed the decision of the South Dakota Supreme Court, holding that the two schools were exempt from unemployment compensation taxes under section 3309(b)(1)(A) of the Code. The Court stated that “the employees working within these schools plainly are ‘in the employ of . . . a church or convention or association of churches’ within the meaning of § 3309(b)(1)(A).” 451 U.S. at 785.

diocesan owned and operated high school and into the private high school operated by a religious order of men and women. We were able to persuade our state supreme court that the distinction, corporately, between the ownership and control of these various types of institutions was not constitutionally significant. We argued that in effect the evidence in the case indicated that all of these schools operated in the same manner as church-related schools, and that their employees, the faculty and others, are employees of a church. I think that this is the issue to which we must address ourselves in the respondent's brief.

III. PREGNANCY DISCRIMINATION ACT—

National Conference of Catholic Bishops v. Bell

In *National Conference of Catholic Bishops v. Bell*,³¹ the plaintiff brought an action to declare unconstitutional that section of the Pregnancy Discrimination Act which requires employers to provide compensation for time off taken by employees who have abortions and, in addition, provides for the payment of all expenses for abortions where the life of the mother would be endangered if the fetus were carried to term.³² The lawsuit was dismissed in the district court on the ground that there was no case or controversy and, therefore, no subject matter jurisdiction under Article III.³³ The court also held that, in any event, the case was not ripe for adjudication.³⁴ The rationale of the court was grounded primarily on the fact that there had been no enforcement effort made by the Equal Employment Opportunity Commission, and that there had been no complaint filed by any employee of the National Conference of Catholic Bishops.³⁵ On appeal, the decision was affirmed.³⁶ As far as I am con-

³¹ 490 F. Supp. 734 (D.D.C. 1980), *aff'd per curiam sub nom.* National Conference of Catholic Bishops v. Smith, 653 F.2d 535 (D.C. Cir. 1981).

³² See 42 U.S.C. § 2000e(k) (Supp. IV 1980).

³³ 490 F. Supp. at 742. Judge Pratt stated that the "plaintiffs' various allegations of injury are premature and are not appropriate for judicial resolution at this time." *Id.* See generally O'Shea v. Littleton, 414 U.S. 488 (1974). Article III of the Constitution requires that those who seek to invoke the power of the federal courts must demonstrate the existence of a "case or controversy" as a threshold requirement. 414 U.S. at 493.

³⁴ 490 F. Supp. at 741-42. Ripeness is a matter of judicial discretion. Judge Pratt reasoned that in addition to the constitutional mandate that a case or controversy be presented, the issues at bar were not ripe since the questions of fact involved required "extensive refinement and elaboration in order to present a mature case." *Id.*

³⁵ The court stated that the mere existence of a statute that a plaintiff reasonably believes should apply to and be enforced against him does not automatically create a case or controversy. *Id.* at 738-39. Further, the court added that until and unless an employee of the plaintiffs requests benefits and is denied the request, no justiciable claim exists. *Id.*

³⁶ National Conference of Catholic Bishops v. Smith, 653 F.2d 535 (D.C. Cir. 1981) (*per curiam*).

cerned, that is the end of the lawsuit.

IV. CHURCH'S SECTION 501(c)(3) STATUS—

Abortion Rights Mobilization, Inc. v. Miller

A relatively new lawsuit has been brought against the National Conference of Catholic Bishops and the United States Catholic Conference. Commenced in the Southern District of New York, *Abortion Rights Mobilization, Inc. v. Miller*,³⁷ challenges the tax-exempt status of the Conference. There are five categories of plaintiffs: first, three prochoice organizations; second, contributors to one of the prochoice organizations known as Abortion Rights Mobilization, Inc.; third, certain Protestant and Jewish clergymen; fourth, certain abortion clinics and doctors associated with those clinics; and, finally, certain persons who apparently are Roman Catholics and contribute to the Church, but who are opposed to the Church's views on abortion. This panoply of plaintiffs is designed to overcome all of the obvious standing objections that will be raised.

Why do we have this lawsuit? According to the complaint, by intervening politically in the area of prolife, the Catholic Church has violated section 501(c)(3) of the Internal Revenue Code.³⁸ The plaintiffs cite as the focal point the pastoral plan adopted by the bishops in November, 1975. They view this plan as issuing marching orders to all Catholics in the United States to oppose prochoice candidates and support prolife candidates. Insofar as any specifics are concerned, the allegations necessarily are general. Nevertheless, it is alleged that during the 1978 and 1980 political campaigns, church newspapers and bulletins in many parts of the country, including Minnesota, Michigan, Pennsylvania, and Texas, published articles attacking, by name, proabortion candidates. One publication is identified, namely, the official publication of the San Antonio, Texas Archdiocese which, in May 1980, carried an editorial supporting Ronald Reagan, attacking John Anderson, and commenting on specific congressional candidates. The article was entitled: "To the IRS—NUTS!!!"

³⁷ No. 80-5590 (S.D.N.Y. Oct. 2, 1980).

³⁸ Section 501(c)(3) of the Internal Revenue Code includes as exempt organizations: corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

I.R.C. 501(c)(3).

The complaint also alleges that in October, 1978, agencies and officials of the Pittsburgh Diocese published bulletins and letters criticizing William Morehead by name and urging Catholics to vote for his opponent. In another allegation, the plaintiffs claim that in September, 1980, Cardinal Medeiros, the Roman Catholic Archbishop of Boston, attacked two congressional candidates in a letter he sent to 410 pastors which was read from many pulpits. A few days earlier, a priest in the diocese of Worcester allegedly distributed a letter attacking the candidates for their stand on abortion. The final allegation is that in April, 1980, a South Dakota priest publicly attacked Senator George McGovern for his abortion rights stand, supported his opponent by name, and called upon his brother priests for their moral and active support.

For a variety of jurisdictional and other reasons, we are hopeful that this suit will be dismissed on motion. I will not go into the legal theory of the complaint, but a part of it is that the Secretary of the Treasury and the Commissioner of Internal Revenue were well aware that the Roman Catholic Church allegedly was engaged in these activities, in violation of section 501(c)(3), but failed in the performance of their duties as public servants when they did not revoke the Conference's exempt status. The relief sought includes an order directing the Secretary and the Commissioner to perform their "ministerial duties to revoke the tax-exempt status."

The United States Attorney, on behalf of the two governmental defendants, has filed his motion which challenges the plaintiffs' standing and the court's jurisdiction to exercise this type of supervisory role over the government. He has made other challenges as well. As part of our motion to dismiss, we are considering raising a defense claiming the unconstitutionality of section 501(c)(3), insofar as it burdens the right of free speech and free exercise. This is an important case, and I think that it serves as a reminder that giving legal advice in the very sensitive area of political and lobbying activity is a heavy responsibility.