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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

Elizabeth HUNTER; et al.,

Plaintiffs,

v.

DEPARTMENT OF EDUCATION; and Catherine LHAMON, in her official capacity as Assistant Secretary for the Office of Civil Rights, U.S. Department of Education,

Defendants,

COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, WESTERN BAPTIST COLLEGE d/b/a CORBAN UNIVERSITY, WILLIAM JESSUP UNIVERSITY AND PHOENIX SEMINARY,

Intervenor-Defendants.

Case No. 6:21-cv-00474-AA

DECLARATION OF PAUL CARLOS SOUTHWICK ISO RESPONSE TO INTERVENOR-DEFENDANT CCCU'S NOTICE OF SUPPLEMENTAL AUTHORITY

I, Paul Carlos Southwick, declare:

1. I am over 18 years of age and have personal knowledge of the matters stated in this declaration and would testify truthfully to them if called upon to do so.
2. Attached as **Exhibit A** is a true and accurate copy of Amendment No. 6482 to H.R. 8404 (Respect for Marriage Act), Title II—Religious Beliefs and Moral Convictions (proposed by Senator Mike Lee)).
3. Attached as **Exhibit B** is a true and accurate copy of a news article entitled "Ancaster Redeemer University student calls for change on how education institution addresses LGBTQ+ students." December 5, 2022. TheSpec.com
4. Attached as **Exhibit C** is a true and accurate copy of the Brief submitted by the National Association of Evangelicals in *Bob Jones University v. United States*, 461 U.S. 574 (1983).
5. Attached as **Exhibit D** is a true and accurate copy of a Gallup article and polling data regarding opinions on interracial marriage. Dated September 10, 2021.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 30th day of December, 2022.

By: s/Paul Carlos Southwick
Paul Carlos Southwick

KIN22430 J75 S.L.C.

AMENDMENT NO._____ Calendar No._____

Purpose: To improve the bill.

IN THE SENATE OF THE UNITED STATES—117th Cong., 2d Sess.

AMENDMENT Nº 6482

To r **By** Lee spect
for **To:** H.R. 8404 ses.
Refe 7 and
Page(s)

GPO: 2008 45-603 (mac)

AMENDMENT intended to be proposed by Mr. LEE (for himself, Mr. CRAPO, Mr. CRUZ, Mr. GRAHAM, Mr. HAWLEY, Mr. MARSHALL, Mr. PAUL, Mr. SASSE, Mr. THUNE, Mr. WICKER, ~~and~~ Mr. RISCH, Mr. Braun, Mr. Johnson, and Mr. Scott of Florida.

Viz:

At the end, insert the following:

TITLE II—RELIGIOUS BELIEFS AND MORAL CONVICTIONS

SEC. 201. PROTECTION OF THE FREE EXERCISE OF RELIGIOUS BELIEFS AND MORAL CONVICTIONS.

(a) IN GENERAL.—Notwithstanding section 7 of title 1, United States Code, section 1738C of title 28, United States Code, or any other provision of law, the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person speaks, or acts, in accordance with a sincerely held

religious belief, or moral conviction, that marriage is or should be recognized as a union of—

(1) one man and one woman; or

(2) two individuals as recognized under Federal law.

(b) DISCRIMINATORY ACTION DEFINED.—As used in subsection (a), a discriminatory action means any action taken by the Federal Government to—

(1) alter in any way the Federal tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay, or revoke an exemption from taxation under section 501(a) of the Internal Revenue Code of 1986 of, any person referred to in subsection (a);

(2) disallow a deduction for Federal tax purposes of any charitable contribution made to or by such person;

(3) withhold, reduce the amount or funding for, exclude, terminate, or otherwise make unavailable or deny, any Federal grant, contract, subcontract, cooperative agreement, guarantee, loan, scholarship, license, certification, accreditation, employment, or other similar position or status from or to such person;

(4) withhold, reduce, exclude, terminate, or otherwise make unavailable or deny, any entitlement or benefit under a Federal benefit program, including admission to, equal treatment in, or eligibility for a degree from an educational program, from or to such person; or

(5) withhold, reduce, exclude, terminate, or otherwise make unavailable or deny, access or an entitlement to Federal property, facilities, educational institutions, speech fora (including traditional, limited, and nonpublic fora), or charitable fundraising campaigns from or to such person.

(c) ACCREDITATION; LICENSURE; CERTIFICATION.—The Federal Government shall consider accredited, licensed, or certified for purposes of Federal law any person that would be accredited, licensed, or certified, respectively, for such purposes but for a determination against such person wholly or partially on the basis that the person speaks, or acts, in accordance with a sincerely held religious belief or moral conviction described in subsection (a).

SEC. 202. JUDICIAL RELIEF.

(a) CAUSE OF ACTION.—A person may assert an actual or threatened violation of this title as a claim or defense in a judicial or administrative proceeding and obtain

compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief against the Federal Government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) ADMINISTRATIVE REMEDIES NOT REQUIRED.—Notwithstanding any other provision of law, an action under this section may be commenced, and relief may be granted, in a district court of the United States without regard to whether the person commencing the action has sought or exhausted available administrative remedies.

(c) ATTORNEYS' FEES.—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended by inserting "title II of the Respect for Marriage Act," after "the Religious Land Use and Institutionalized Persons Act of 2000,".

(d) AUTHORITY OF UNITED STATES TO ENFORCE THIS TITLE.—The Attorney General may bring an action for injunctive or declaratory relief against an independent establishment described in section 104(1) of title 5, United States Code, or an officer or employee of that independent establishment, to enforce compliance with this title. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or em-

ployee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

SEC. 203. RULES OF CONSTRUCTION.

(a) NO PREEMPTION, REPEAL, OR NARROW CONSTRUCTION.—Nothing in this title shall be construed to preempt State law, or repeal Federal law, that is equally or more protective of free exercise of religious beliefs and moral convictions. Nothing in this title shall be construed to narrow the meaning or application of any State or Federal law protecting free exercise of religious beliefs and moral convictions.

(b) NO PREVENTION OF PROVIDING BENEFITS OR SERVICES.—Nothing in this title shall be construed to prevent the Federal Government from providing, either directly or through a person not seeking protection under this title, any benefit or service authorized under Federal law.

(c) NO AFFIRMATION OR ENDORSEMENT OF VIEWS.—Nothing in this title shall be construed to affirm or otherwise endorse a person's belief, speech, or action about marriage.

(d) SEVERABILITY.—If any provision of this title or any application of such provision to any person or circumstance is held to be unconstitutional, the remainder

of this title and the application of the provision to any other person or circumstance shall not be affected.

SEC. 204. DEFINITIONS.

In this title:

(1) FEDERAL BENEFIT PROGRAM.—The term "Federal benefit program" has the meaning given that term in section 552a of title 5, United States Code.

(2) FEDERAL; FEDERAL GOVERNMENT.—The terms "Federal" and "Federal Government" relate to and include—

(A) any department, commission, board, or other agency of the Federal Government;

(B) any officer, employee, or agent of the Federal Government; and

(C) the District of Columbia and all Federal territories and possessions.

(3) PERSON.—The term "person" means a person as defined in section 1 of title 1, United States Code, except that such term shall not include—

(A) publicly traded for-profit entities;

(B) Federal employees acting within the scope of their employment;

(C) Federal for-profit contractors acting within the scope of their contract; or

(D) hospitals, clinics, hospices, nursing homes, or other medical or residential custodial facilities with respect to visitation, recognition of a designated representative for health care decisionmaking, or refusal to provide medical treatment necessary to cure an illness or injury.

LOCAL : NEWS

Ancaster Redeemer University student calls for change on how education institution addresses LGBTQ+ students

By Kevin Werner Reporter

Mon., Dec. 5, 2022 | 4 min. read

Article was updated Dec. 14, 2022

Redeemer University student Bekett Noble strongly believed the education institution could change.

For years, Noble had been writing to staff and faculty about the daily microaggressions targeting LGBTQ+ students at the university. Noble participated in meetings with staff, raising the issue and desperately asking for help. They started Genesis, a group to support queer students, and they participated on a committee for LGBTQ+ relations with faculty and student Senate members.

“I have advocated in every way I knew how, despite the fact that all those ways put me well outside my comfort zone,” Noble stated in an email.

They had “gently and carefully” worked with Redeemer officials to “look at the detrimental effects of the way LGBTQ+ students are treated and how to effect positive change.”

They found some staff and faculty were willing to listen, but no change occurred because Redeemer officials “are unwilling to change” for the benefit of donors.

Eventually, Noble looked around and found it was “clear to me that nothing meaningful was going to happen.” They quickly learned about the “detrimental effects” that conservative religious organizations have on the mental, physical and academic health of queer people. To potentially effect change in the culture at the university, Noble stated “things need to be shared more bluntly because they are incredibly serious” and that if change didn’t happen soon, “someone was going to die.”

But change didn’t happen, and on Nov. 23, Noble took their own life in the university’s counsellor’s office. An extensive email message was sent to various university officials on Nov. 24 at 8 a.m. that outlined Noble’s beliefs, fears and suggestions to help queer and trans students still attending Redeemer University.

“I never thought it would be me who was finally the first to collapse under the weight of everything we go through to try and get a Christian education while embracing who God created us to be,” they stated.

Noble in the email stated they had “dealt with suicide a lot in my life” and was “capable” of addressing. “But evidently, I was wrong.”

Ancaster resident Megg Markettos, whose family embraced Noble, was devastated by the loss.

“Bekett was like one of our family members,” said Markettos. “One of the best people you will ever meet and get to know. Their loss is profound for us and the community.”

Markettos, who was preparing a Celebration of Life for Noble, says she hopes their death “gives Genesis a voice” in the community.

Shannon McBride, Redeemer University’s communications manager, stated in an email the institution learned of the “tragic death” of a student on campus.

“The community is deeply saddened by this tremendous loss,” she stated.

Classes were cancelled on Nov. 24 and the university’s flag was lowered to half-staff. Next of kin were notified and the university is co-operating with police.

The university, stated McBride, is unable to release any further information at this time.

Hamilton police did not provide information to Hamilton Community News about the investigation after repeated requests.

McBride said Redeemer has made available mental health supports for students, faculty and staff and "the community is grieving and supporting one another through various opportunities."

The Canadian Medical Association Journal of June 2022 identifies that transgender and sexual minority adolescents were at an increased risk of suicidal ideation and attempts.

A Trans Pulse study found trans youth have a high risk of suicide, with 47 per cent of trans people aged 16-24 considering suicide in the past, while 19 per cent attempted suicide. Reasons for considering suicide include family rejection, violence and harassment.

Noble, in their email, suggested ideas for the university to start supporting its LGBTQ+ students, including creating a safe space similar to Mohawk College's Social Inc., where "marginalized groups can go" such as a room for students to hang out and build community; training for staff and faculty on trauma-informed care of marginalized population; proper counselling services; changing policies that currently promotes the idea that LGBTQ+ people are sinners based on their sexual orientation or gender identity; address queer student complaints about harassment and have "real consequences" for the perpetrators.

"They are the bare minimum in my opinion," for the university to adopt, said Noble.

Noble said in the email the counselling services before the university changed from Shalem Mental Health Network to Christian Counselling Centre was a "lifeline and when it got cut with no talk about how it might be able to exist again that was the beginning of the end."

"I hope at the very least that this will force people to take this issue seriously and implement change to properly support LGBTQ+ students from a trauma-informed lens," they said.

Noble called on the university community to support President Dr. David Zietsma "to implement some of his visions" for Redeemer's future, calling some of his ideas "positive" to unite a divided university.

"It didn't have to come to suicide to lose a student, but it did," stated Noble. "Don't let it happen again."

If you are having suicidal thoughts, there is help. The Canada Suicide Prevention Service can be reached at 1-833-456-4566 24 hours a day, seven days a week, 365 days a year or online at www.crisisservicescanada.ca. If you or someone you know is in immediate danger, call 911.

LOCAL : ANCASTER NEWS **OPINION**

A new year will bring new challenges for Ontarians

2 hrs ago

1981 WL 769745 (U.S.) (Appellate Brief)
Supreme Court of the United States.

BOB JONES UNIVERSITY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

No. 81-3.
October Term, 1981.
November 25, 1981.

ON 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 Petitioner.

Forest D. Montgomery, 1430 K Street, N.W., Washington, D.C. 20005, (202) 628-7911, for amicus curiae.

***i** TABLE OF CONTENTS

***ii** TABLE OF CASES

***1** The National Association of Evangelicals, with the consent of the parties, submits this brief as amicus curiae in support of Petitioner. The parties have consented to the filing of this brief and their letters of consent have been filed with the clerk pursuant to Rule 36.2.

***2** 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. NAE serves a constituency of 10-15 million people through its commissions and affiliates. These affiliates include the National Religious Broadcasters, the World Relief Corporation, and the Evangelical Foreign Missions Association. Because of its separatist character and strict theological views, Bob Jones University would consider the limited doctrinal tenets of NAE too "liberal" and thus is not a member or affiliate of NAE.

Evangelicals can and do differ with one another in the interpretation of Scripture. (Most evangelicals would not agree with the view of Bob Jones University that interracial dating and marriage is contrary to Scripture.) But they are united in their affirmation of the truth and inspiration of the Bible, as well as ***3** the Lordship and Diety of Jesus Christ.

The ominous threat to religious freedom posed by the decision of the court below compels us to submit this brief. No case has gone to such extremes in applying the public policy against 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.

Bob Jones University believes that the Bible forbids interracial marriage. In order to enforce this religious view, the University barred admission of black students prior to September, 1971. After that date married black students were admitted, and since May, 1975, a completely open admissions policy has been in effect. The earlier policy excluding all or most blacks was foil owed as the easiest and most reliable way to protect its religious conviction against interracial dating and marriage. Restrict ions designed to enforce this view continue to exist; discipline is applied with an even hand.

***4** The court below has ignored crucial factual differences in the cases it relies upon, such as the total exclusion of blacks from educational institutions. In so doing, it erroneously applies a public policy intended to rid this nation 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.

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."

***5** 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 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 deeply 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 ***6** for withdrawing tax exemption. What the Government might view as a violation of the public policy against sex discrimination, evangelicals would consider faithful adherence to Scriptual teaching with respect to the proper roles of women within the church. For example, many evangelical churches do not believe in the ordination of women as pastors or elders. Left intact, the decision of the court below will inevitably be used to justify subordination of religious belief to current notions of public policy, and the compass of §503(c)(3) of the Internal Revenue Code will be merely a function of an ever changing public policy continuum.

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 approximately $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 ***7** the University's exemption as an organization described in §503(c)(3) of the Internal Revenue Code. IRS contends that §503(c)(3) only exempts organizations which are "charitable" in character; that whether the University is religious in purpose and character is irrelevant; that an organization which violates the 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--violates federal public policy.

The District Court found the University to be a religious organization and therefore the Government's procedure for denying tax exempt status to educational organizations engaging in racial discrimination was inapplicable to it. The District Court also 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:

***8** 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. The University is not a "charitable" organization because enforcement of its rules relating to interracial dating and marriage violates the government policy against subsidizing racial discrimination in education, public or private. *Id.* at 151.

3. Assuming the revocation of the University's tax exemption impinges upon its Free Exercise rights, the government's interest in eliminating all forms of racial discrimination in education is compelling. *Id.* at 153.

4. The principle of Government neutrality toward religion embodied in the Establishment Clause does not prevent governmental act ion 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 the Government would make of the University would be whether the institution maintains racially neutral ***9** policies, no excessive entanglements would be created. *Id.* at 154-155.

THE QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED

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 religious-educational organization which has an open admissions policy but enforces religiously based rules against interracial dating and marriage.

Whether the *Tank Truck Rentals* public policy doctrine is applicable where a school's rules against interracial dating and marriage are based on sincere religious belief.

SUMMARY OF ARGUMENT

The "balancing" process employed by the court below in weighing public policy with respect to invidious racial discrimination against the Free Exercise rights ***10** 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,* 101 S. Ct. 1425 (1981). It lacks a careful assessment of the extent of the frustration of public policy against

the University's rights under the Free Exercise Clause. Compare the delicate balancing in "weighing the costs to the national antitrust policies against the needs of free religious exercise" of the court in *Costello Publishing Co. v. Rotelle,* No. 80-2147, slip op. at 26 (D.C. Cir. Nov. 10, 1981). In short, the rationale of the court below is essentially 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 that the religious belief of the University is sincere and its racial policy *immutable.* 639 F.2d at 148. Yet it finds a pressing need to fashion a "prophylactic rule" to prevent indirect support by Americans of a religious-educational ***11** organization that believes Scripture forbids interracial dating and marriage. The enforcement of that belief, standing alone, is apparently fatal to any claim to exemption, no matter how color blind the University may be in all other respects. (The University has an open admissions policy and there is no evidence on the record of any inequality of treatment between white students and black students.)

The "balance" the lower court has struck in this case fosters speculation that the court must have been unconvinced of the sincerity of the University's religious belief, its rhetoric notwithstanding. 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 ***12** 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 rank prejudice or from a devout desire to obey the perceived 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. There is no pressing 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 Appea Is.

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 ***13** 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 contrary to this Court's decision in *Commissioner v. Tellier,* 383 U.S. 687, 693-694 (1966), which indicates that, if anything, the *Tank Truck* doctrine is 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 rights under the Free Exercise Clause and the receipt of a government benefit otherwise available. While the freedom to act in pursuit of religious beliefs is admittedly not absolute, as is the freedom to believe, only a compelling state interest justifies an abridgement of that freedom. We submit that the court below has failed to accord certain decisions of this Court interpreting the Free Exercise Clause the weight they deserve.

***14** In *Thomas v. Review Board,* 101 S. Ct. 1425, 1431 (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 receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because ***15** 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." 101 S. Ct. at 1432.

In revoking the tax exemption of the University, the Government has put severe financial pressure on the University to modify its behavior and to violate its religious 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 conviction ***16** 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 exempt ion.

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 were 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 racially motivated laws from a bygone white supremacy era were obviously prompted by blatant racial prejudice. We fail to see their ***17** relevance where a University's disciplinary rule is based upon sincerely held religious beliefs.

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. That is correct. As Justice Rehnquist states in his dissenting opinion in *Prince Edward School Foundation v. United States,* cert. denied, 101 S. Ct. 1408 n.1 (1981): "This court summarily affirmed the District Court's decision *sub nom.* in *Coit v. Green,* 404 U.S. 997 (1971), but we later explained in *Bob Jones University v. Simon,* 416 U.S. 725, 740, n. 11 ******* that this affirmance lacks precedential weight because no adversarial controversy remained in *Green* by the time the case reached the Court." Moreover, the district court in *Green* observed: "We are not now called upon to consider the hypothetical inquiry whether tax-exemption or tax-deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion." ***18** *Green v. Connally,* 330 F. Supp. 1150, 1169 (D.D.C. 1981). 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.

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 ***19** 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 §503(c)(3) exempt organization area of *Tank Truck Rentals.*

The severe financial impact of the *Tank Truck Rentals* doctrine as applied to the unique facts of this case is only symptomatic of a greater problem. We do not relish 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 ***20** in these other public policy areas? As former Commissioner of Internal Revenue Kurtz has stated with respect to the racial discrimination issue, questions in this area are sensitive and put the IRS "on the cutting edge of developing national policy." Remarks before the PLI Seventh Biennial Conference, Jan. 9, 1978, excerpts reprinted in 127 Cong. Rec. H5396 (daily ed. July 30, 1981) (remarks of Rep. Philip Crane).

In our view, the Commissioner should not be "on the cutting edge of developing national policy." We share the concerns of Justice Blackmun expressed in his dissenting opinion in *Alexander v. "American United,"* 416 U.S. 752, 774-775 (1974): "[W]here the philanthropic organization is concerned, there appears to be little to circumscribe the almost unfettered power of the Commissioner. This may be very well so long as one subscribes to the particular brand of social policy the Commissioner happens to be advocating at the time ***, but application of our tax laws should not operate in so fickle a fashion. Surely, social policy in the first instance is a matter for legislative ***21** concern." (Footnote omitted.) Similar sentiments were expressed in *Runyon v. McCrary,* 427 U.S. 160, 212 (1976) (Justice White, joined by Justice Rehnquist, dissenting).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

FOREST D. MONTGOMERY,

Attorney for Amicus Curiae.

November 1981

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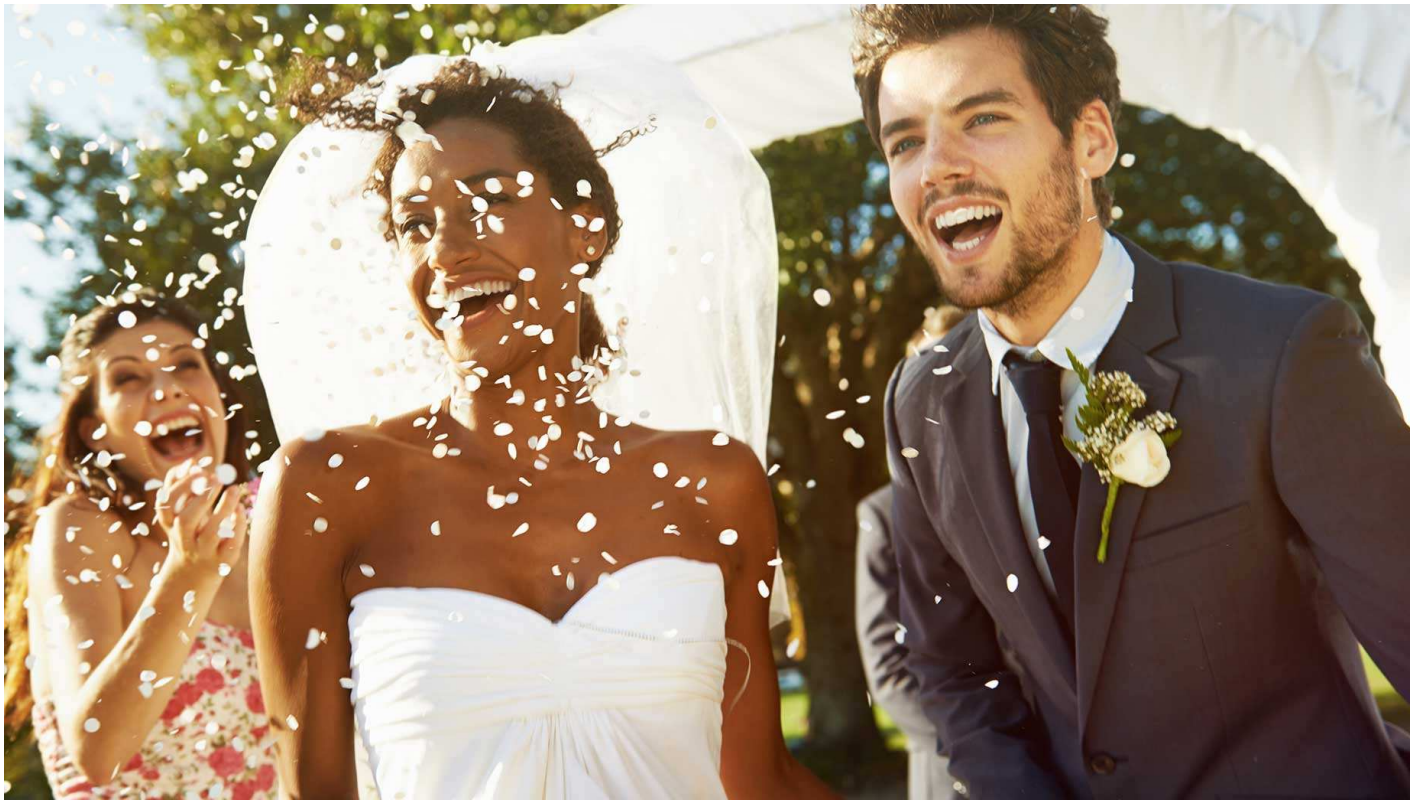
GALLUP®

SEPTEMBER 10, 2021

U.S. Approval of Interracial Marriage at New High of 94%

BY **JUSTIN MCCARTHY**

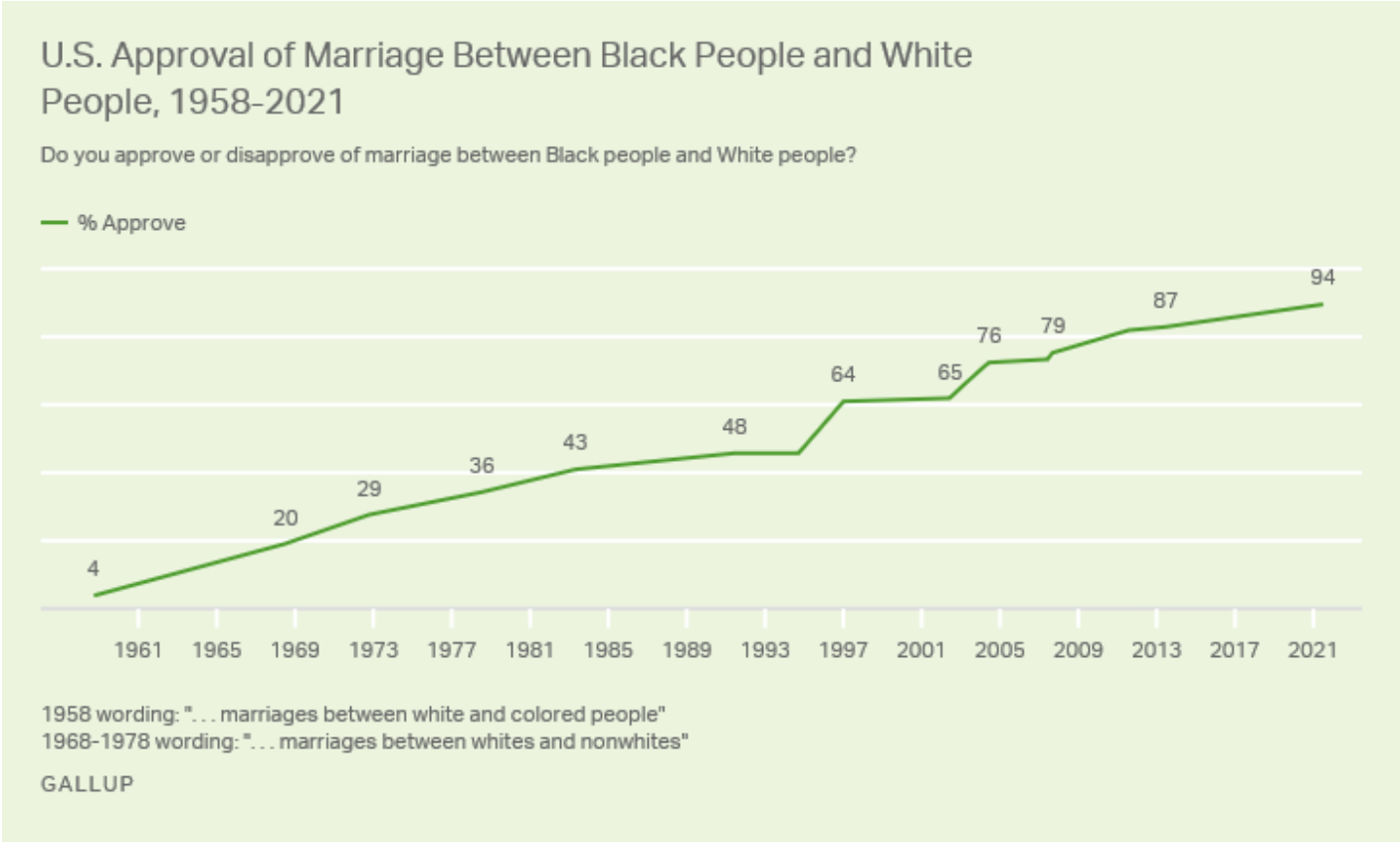


STORY HIGHLIGHTS

- Approval was at just 4% in 1958, when Gallup first polled on the question
- The racial gap in approval of interracial marriage has nearly closed

- Age and regional gaps in approval have also shrunk

WASHINGTON, D.C. -- Ninety-four percent of U.S. adults now approve of marriages between Black people and White people, up from 87% in the prior reading from 2013. The current figure marks a new high in Gallup's trend, which spans more than six decades. Just 4% approved when Gallup first asked the question in 1958.



The latest figure is from a Gallup poll conducted July 6-21. Shifts in the 63-year-old trend represent one of the largest transformations in public opinion in Gallup's history -- beginning at a time when interracial marriage was nearly universally opposed and continuing to its nearly universal approval today.

The U.S. Supreme Court legalized interracial marriage nationwide in the 1967 *Loving v. Virginia* case. A year after that decision, Gallup found support for the practice increasing, but still only a small minority of 20% approved.

Approval of interracial marriage continued to grow in the U.S. in periodic readings Gallup took over the following decades, finally reaching majority level in 1997, when support jumped from 48% to 64%. Support has increased in subsequent measures, surpassing 70% in 2003, 80% in 2011 and 90% in the current reading.

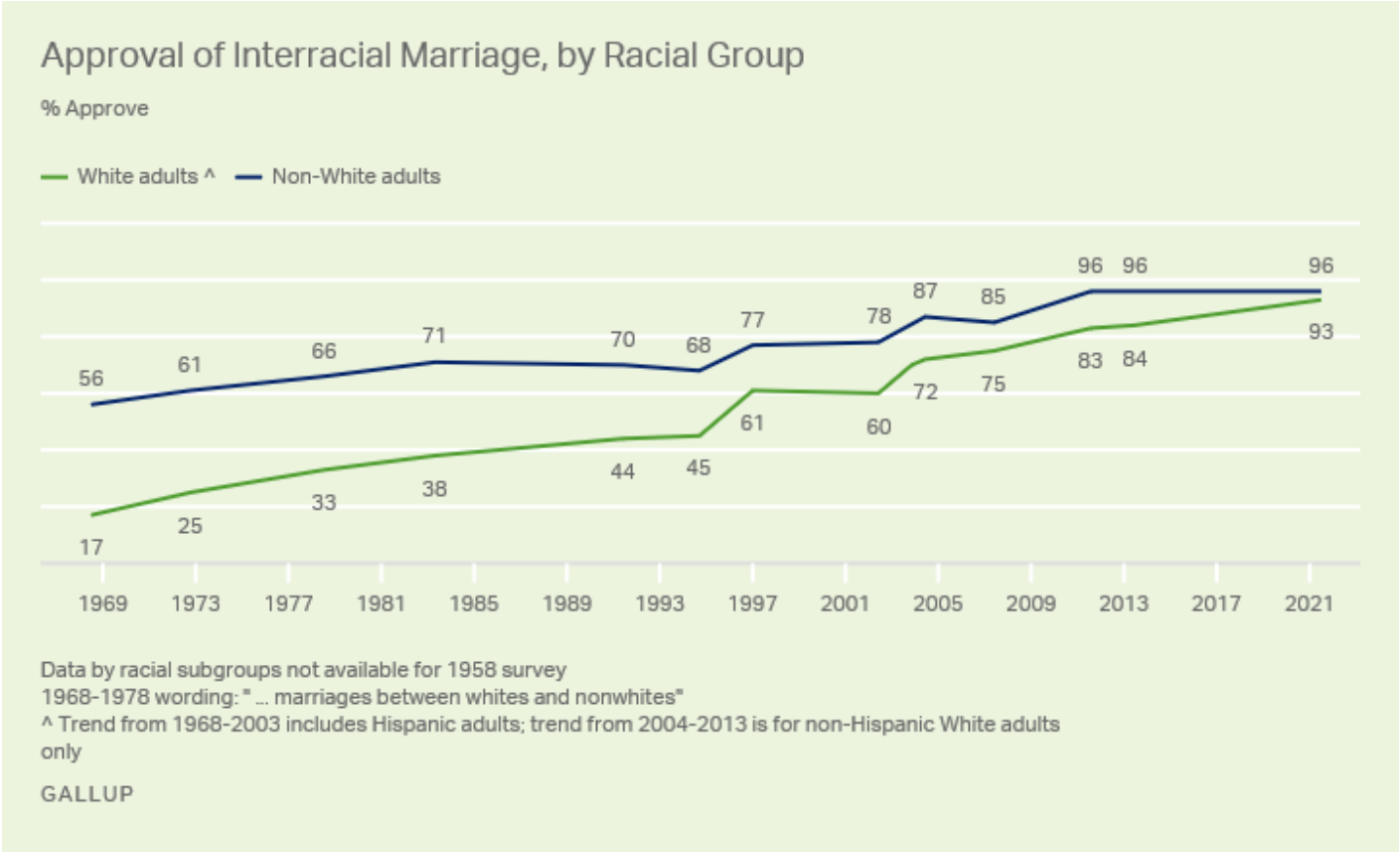
White, Non-White Americans Now Similarly Approve of Interracial Marriage

Non-White Americans have been consistently more approving of interracial marriages than White Americans -- but that gap has narrowed over time and, in the latest reading, has nearly closed.

Previous measures from 1968 to 2013 found double-digit gaps in approval between White and Non-White adults. Today, the three percentage points that separate approval among White (93%) and Non-White adults (96%) is within the poll's margin of error.

Recent growth at the national level has been driven by increasing approval among White Americans, as approval among Non-White Americans has been unchanged over the past decade.

Majorities of non-White adults since 1968 have approved of interracial marriage. It was not until 1997 that a majority of White adults held that opinion.



Generational Differences in Views on Interracial Marriage Shrink

Younger adults in the U.S. have consistently been more likely than their older peers to approve of marriages between Black people and White people. But these generational differences have shrunk, as older adults are now nearly as supportive of interracial marriages as younger adults are.

But Americans in all age groups today are more supportive of Black-White marriages than adults in the same age group were in the past, particularly among older adults. In 1991, 27% of U.S. adults aged 50 and older approved of interracial marriages, compared with 91% today.

Approval of Interracial Marriage, by Age Group

	1991	2002	2011	2021
	% Approve	% Approve	% Approve	% Approve
18-29	64	86	97	98
30-49	56	75	91	97
50+	27	44	78	91

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Regional Differences in Views on Interracial Marriage Now Gone

In previous decades, Americans living in the East, Midwest and West were generally more approving of marriages between Black people and White people than those living in the South.

At this point in the trend, however, approval of interracial marriage is nearly universal across all regions, almost closing the regional gaps that existed in earlier parts of the trend.

Approval of Interracial Marriage, by Region

	1991	2002	2011	2021
	% Approve	% Approve	% Approve	% Approve
East	54	67	90	94
Midwest	50	60	86	93
South	33	59	79	93
West	60	79	91	97

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Bottom Line

Americans are now nearly unanimous in their approval of marriages between Black people and White people. The shifts over time document changes in U.S. social mores as well as differing attitudes between current and past generations of Americans.

A similar gradual change can be seen in willingness to vote for a Black presidential candidate, a trend that spans just as much time as Gallup's trend on interracial marriage. While voting for a Black candidate was unpopular in the 1950s, nearly all Americans say they would be willing to do so today. Americans' ideas about marriage, too, have changed. Solid majorities now support same-sex marriage, and larger majorities than in the past view divorce as morally acceptable.

At the same time, Americans have become less likely to say that civil rights for Black Americans have improved, and they have recently become more likely to say that new civil rights laws are needed to reduce discrimination against Black people.

Opposition to interracial marriage still exists, but it is quite small. Future measures will indicate whether 94% is the ceiling for approval, or if there is still room for growth in acceptance.

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SURVEY METHODS

RELEASE DATE: September 10, 2021
SOURCE: Gallup https://news.gallup.com/poll/354638/approval-interracial-marriage-new-high.aspx
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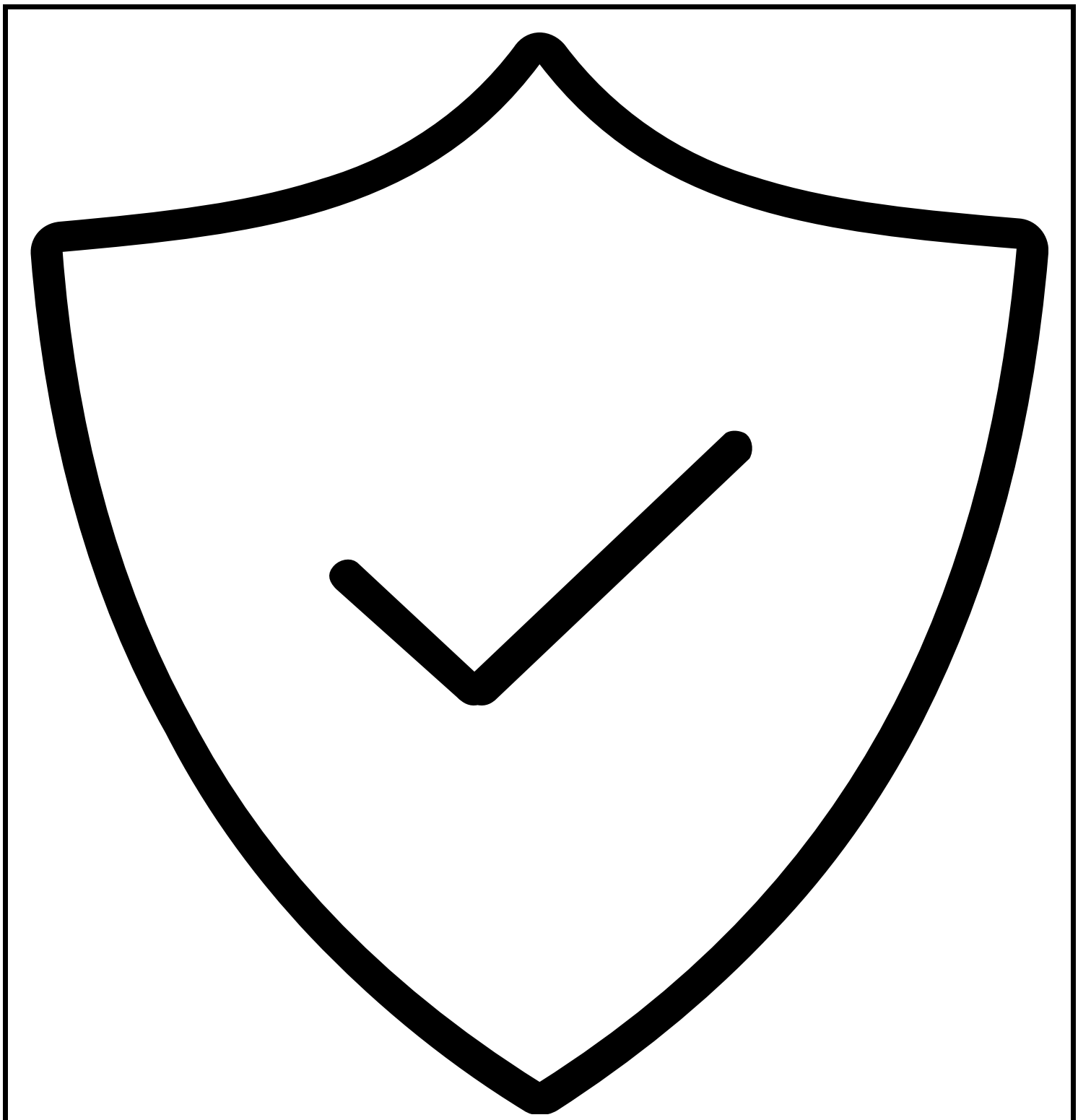

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