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its charter or any of its written policy statements provides for discrimination against any person on the basis of race, color, or religion. Act of Oct. 20, 1976, Pub. L. No. 94-658, Section 2(a), 90 Stat. 2697. The accompanying S. Rep. No. 94-318, 94th Cong., 2d Sess. 7-8 & n.5 (1976), cites with approval the holding in Green v. Connally, affirmed by this Court, and expresses Congress' intent to apply to social clubs the same rule of nondiscrimination applied to private schools here. Equally, in subsequent congressional action which has temporarily stayed the employment of proposed new procedures to enforce the policy of the Internal Revenue Service, the Congress has expressly sanctioned the continuation of the substantive and procedural policies enforced in these cases. See Secs. 103 & 615, Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559. See also Rev. Rul. 71-447, supra; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

2. The court of appeals was also correct in its holdings that the application to petitioners of the nondiscrimination requirement did not violate rights guaranteed by the Religion Clauses of the First Amendment. The policy of the Internal Revenue Service, applied evenhandedly to sectarian and nonsectarian schools alike, avoids government entanglement in matters of church doctrine (see Gillette v. United States, 401 U.S. 437, 454-458 (1971); Brown v. Dade Christian Schools, Inc., 556 F. 2d 310, 323-324 (5th Cir. 1977) (en banc) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978)) and directly furthers the important government objective of ensuring that all racially discriminatory private schools, whether church related or not, be denied tax benefits designed to foster and encourage institutions promoting public benefits. Petitioners' right to espouse and inculcate religious doctrine is unquestioned--and the Service's rulings do not purport to interfere with that right or with the right of any student to adhere to such doctrine. But, as the decisions of this Court indicate, it does not follow that the practice of racial

discrimination is protected by the same principle or that petitioners are entitled to call on the Constitution to justify an exception from a neutrally-applied and uniform government policy. By requiring them to demonstrate racially nondiscriminatory policies as a condition to receiving federal tax exemption and eligibility for charitable contributions, the Internal Revenue Service did not encroach on any activity to which this Court has accorded affirmative constitutional protections. See Runyon v. McCrary, 427 U.S. 160, 176 (1976).

ARGUMENT

NONPROFIT ORGANIZATIONS OPERATING PRIVATE SCHOOLS THAT, ON THE BASIS OF RELIGIOUS DOCTRINE, MAINTAIN RACIALLY DISCRIMINATORY ADMISSIONS POLICIES AND OTHER RACIALLY DISCRIMINATORY POLICIES AND PRACTICES DO NOT QUALIFY AS TAX-EXEMPT ORGANIZATIONS UNDER SECTION 501(c)(3) OF THE INTERNAL REVENUE CODE OF 1954

A. Introduction

The court of appeals correctly held that the Internal Revenue Service had acted within its statutory authority in determining that petitioners did not qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954 or as eligible donees of charitable contributions deductible under Section 170(a) and (c)(2). That holding, and the position of the Service, are amply supported by the Constitution, by decisions of this Court, and by Acts of Congress evidencing a strong national policy against racial discrimination generally, and against racial discrimination in education, public and private, in particular. See, e.g., Amendments XIII, XIV, XV; 42 U.S.C. 1981; Runyon v. McCrary, 427 U.S. 160 (1976). They derive force also from the purpose of the charitable exemption provisions to foster those organizations whose operations further public benefit. See H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938).

Given those considerations, the court of appeals correctly followed the conclusion of the three-judge court in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971), that the Code does not countenance tax-exemption or deductible contributions for any organization operated for educational purposes that discriminates against students or applicants on the basis of race. Accord, Prince Edward School Foundation v. United States, 478 F. Supp. 107 (D.D.C.), aff'd by unpublished order, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981).

None of the arguments petitioners advance serves to excuse their failure to meet that requirement of nondiscrimination. The language and purpose of the Code's charitable exemption provisions prohibit tax benefits for organizations such as petitioners whose operations violate a fundamental national policy against racial discrimination sharply defined in many contexts, including education. Petitioner's contrary interpretation of the statutory scheme "tears Section 501(c)(3) from its roots" in the law of charitable trusts and in considerations of public benefit (81-3 Pet. App. A7). Nor does their unquestioned right to free religious belief and exercise carry with it a guarantee of tax-exempt status that would override constitutional values and statutory mandates. In the context of these cases, the educational functions that petitioners have undertaken and the religious ideas or beliefs that may shape the performance of those functions cannot be isolated from petitioners' discriminatory practices. By requiring petitioners to demonstrate racially nondiscriminatory policies as a condition to exemption and to eligibility for deductible contributions, the Internal Revenue Service did not encroach on any activity entitled to affirmative constitutional protection.

B. Organizations whose operations contravene the sharply defined policy of the federal government against racial discrimination by educational institutions do not qualify for federal tax exemption

1. Section 501(c)(3) of the Internal Revenue Code of 1954 (as in effect during the period relevant) exempted from income taxation--

> 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 * * *.

Section 170(c)(2) of the Code provides a deduction for income tax purposes for a "charitable contribution" to a "corporation, trust, or community chest, fund, or foundation * * * organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *." See also Sec. 2055 (estate tax charitable deduction), 2522 (gift tax charitable deduction). Those provisions are construed as in pari materia. Bob Jones University v. Simon, 416 U.S. 725, 727-728 & n.1; Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 29, n.1 (1976). In Bob Jones University v. Simon, supra, at 728-732, 749-750, this Court directed attention to the importance to the financial well-being of private schools of maintaining assurance of deductibility of contributions.

Since 1970, the Internal Revenue Service has consistently ruled that a private school, "whether church related or not," does not qualify as a tax-exempt organization under Section 501(c)(3), or as an eligible donee of charitable contributions deductible under Section 170(c)(2), unless it establishes that its admissions and educational policies are operated on a racially nondiscriminatory basis (81-3 J.A. A235-A239). _/ As explained in Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, "the statutory requirement of being 'organized and operated exclusively for religious, charitable * * * or educational purposes' was intended

_/ See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

to express the basic common law concept" of charity. This is borne out, the Ruling provides, "by [Congress'] description in section 170(c) of the Code of a deductible gift to 'a corporation trust, fund, or foundation * * * organized and operated exclusively for * * * educational purposes' as a 'charitable contribution.'" Since, according to the Ruling, "all charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy * * *," and there is "a national policy to discourage racial discrimination in education, whether public or private * * *," the Ruling holds that "a school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in section 170 and 501(c)(3) of the Code * * * and accordingly does not qualify as an organization exempt from Federal income tax."

That substantive position of the Service received the specific endorsement of the court in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam, 404 U.S. 997 (1971). There, the three-judge district court concluded that "[t]he Code must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public or private." Id. at 1163. It held that "[u]nder the conditions of today [the Internal Revenue Code's provisions on charitable exemptions and deductions] can no longer be construed so as to provide to private schools operating on a racially discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors." Id. at 1164.

In so holding, the court examined the sources and indicia of the "declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation." 330 F. Supp. at 1163. In its view, the ultimate source of that policy was "the strife-sprung national policy against slavery, culminating in its abolition in the Thirteenth Amendment." Ibid. It included also among the sources of that policy the Fourteenth Amendment, the Civil Rights Act of 1866, 42 U.S.C. 1982, the Civil Rights Act of 1964, 42 U.S.C. 2000c to 2000d-4, and Brown v. Board of Education, 347 U.S. 483 (1954), Bolling v. Sharpe, 347 U.S. 497, 500 (1954), and their numerous legal progeny. Id. at 1163-1164. That policy, it held, took precedence over the claims of the intervenors, representing a class of parents and their children attending segregated private schools in Mississippi, that the loss of the schools' exemptions would infringe their First Amendment associational freedom to educate their children, or to be educated, in the academic environment of their choice. In rejecting that claim, the court stated (id. at 1167):

> There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That government interest is dominant over other constitutional interests to the extent that there is complete and unavoidable conflict.

Upon appeal by the intervenors, seeking vindication of their claims to freedom of association, this Court summarily affirmed sub nom. Coit v. Green, 404 U.S. 997 (1971). See Prince Edward School Foundation v. United States, 478 F. Supp. 107 (D.D.C. 1979), aff'd by unpublished order, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981) (nonsectarian private school denied tax-exempt status for failure to show that it maintained a racially nondiscriminatory admissions policy; school officials' belief in value of segregated education, claimed to be protected by First Amendment, did not excuse failure to make requisite showing of nondiscriminatory policy).

2. The origin and structure of the exemption provisions, as well as the judicial gloss placed upon them, demonstrate a purpose to encourage organizations whose operations are beneficial to society--a purpose furthered by the requirement of nondiscrimination. Section 501(c)(3) has its roots in Sec. 32, Act of Aug. 27, 1894, 28 Stat. 556, and was carried forward, in substance unchanged, into the Corporation Excise Tax Act of Aug. 5,

1909, 36 Stat. 113, Sec. 38. _/ In its initial version, it exempted from tax "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes * * *." That enumeration accorded with Lord MacNaughten's authoritative collation of commmon law charities in Commissioners for Special Purpose of Income Tax v. Pemsel [1891] A.C. 531, 583 (quoted in Evans v. Newton, 382 U.S. 296, 307-308 (1966) (White, J., concurring)):

> "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

See also Jackson v. Phillips, 14 Allen (96 Mass.) 539, 556 (1867); IV Scott, The Law of Trusts (1967 ed.), Sec. 368. _/

The light Congress has shed upon the charitable exemption provisions demonstrates its intent to achieve the traditional charitable objects of national betterment and diminution of the burdens of government. As the sponsor of the 1909 exemption

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_/ Earlier income taxes were originally imposed only upon individuals, Sec. 49, Act of Aug. 5, 1861, 12 Stat. 292, 309, and subsequently only upon individuals and certain specified corporations, Secs. 116, 120-122, Act of June 30, 1864, 13 Stat. 218, 281, 283-285. Cf. Paul, Taxation in the United States 9-15 (1954). See Collector v. Hubbard, 12 Wall. 1 (1870).

_/ The terms of the exemption have been continued without basic change in all subsequent income taxing acts. The first modern income tax statute, Act of Oct. 3, 1913, c. 16, 38 Stat. 114, Sec. II(G)(a), contained an exemption in favor of "any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes * * *." The revenue acts of 1916 and of 1918 carried forward that exemption in identical terms. Sec. 11(a), Act of Sept. 8, 1916, 39 Stat. 756; Sec. 231(6), Revenue Act of 1918, 40 Stat. 1057. By Sec. 231 of the Revenue Act of 1921, 42 Stat. 227, Congress added to the statute the word "literary" and the phrase "or for the prevention of cruelty to children or animals." The phrase "testing for public safety" was inserted in 1954. Internal Revenue Code of 1954, Sec. 501(c)(3), 68A Stat. 163 (1954). And the Revenue Act of 1934, ch. 277, 48 Stat. 680, added the qualification that "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation."

The deduction for income tax purposes for charitable contributions has its origin in Sec. 1201(2), Act of Oct. 3, 1917, 40 Stat. 300. See Helvering v. Bliss, 293 U.S. 144, 147 (1943). It has been continued in each subsequent revenue enactment. See Reiling, Federal Taxation: What is a Charitable Organization?, 44 A.B.A.J. 525 (1958).

provision stated, it was designed to relieve from the corporate tax those institutions "devoted exclusively to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse." 44 Cong. Rec. 4150. Similarly, when Congress amended the provision for charitable deductions to confine its scope to gifts made to domestic institutions (by Sec. 23(o), Revenue Act of 1938, ch. 289, 52 Stat. 447), the accompanying H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938), provided:

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. The United States derives no such benefits from gifts to foreign institutions, and the proposed limitation is consistent with the above theory.

This Court has expressed a similar understanding of the purpose of the provisions. As it pointed out in Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924), "[e]vidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain." Accord, St. Louis Union Trust Company v. United States, 374 F. 2d 427, 432 (8th Cir. 1967). Its statement in Helvering v. Bliss, 293 U.S. 144, 147 (1934), reflects the grounding of the provisions in charitable trust concepts: "Congress, in order to encourage gifts to religious, educational and other charitable objects, granted the privilege of deducting such gifts from gross income * * *." The courts of appeals have likewise viewed the statutes against their background in the law of charitable trusts. See United States v. Proprietors of Social Law Library, 102 F. 2d 481, 483 (1st Cir. 1939) ("[t]he term 'charitable' is a generic term and includes literary, religious, scientific and educational institutions"); Pennsylvania Co. for Insurance on Lives v. Helvering, 66 F. 2d 284, 285 (D.C. Cir. 1933) ("we must look to establish [illegible] determine the meaning of the word 'charitable'"); accord, Girard Trust Co. v. Commissioner, 122 F. 2d 108 (3d Cir. 1941); cf. International Reform Fed. v. Dist. Unemployment Bd., 131 F. 2d 337, 339 (D.C. Cir. 1942); Slee v. Commissioner, 42 F. 2d 184 (2d Cir. 1930). _/

3. At no time, however, has Congress attempted to define the term "charitable," leaving the scope of that term for the Treasury to define in its administration of the revenue laws. See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 29 (1976). The term is "'so general * * * as to render an interpretive regulation appropriate.'" National Muffler Dealers Assn. v. United States, 440 U.S. 472, 476 (1979) (quoting Helvering v. Reynolds Co., 306 U.S. 110, 114 (1939)). In 1959, pursuant to the authority granted under Section 7805(a) of the Code to "prescribe all needful rules and regulations," the Treasury duly adopted new Regulations under Section 501(c)(3). 24 Fed. Reg. 5217, 5219. In pertinent part, Section 1.501(c)(3)-1(d)(2) of those Regulations provides:

> (2) Charitable defined. The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. * * *

The Internal Revenue Service has consistently construed that Regulation as importing into the Code the principles of the law of

_/ As the court of appeals below noted (Pet. App. A7-A8, n.6), the reading of the statute advanced by the Service conforms with the Code's use of the phrase "charitable contribution" to describe contributions to organizations serving religious, educational, or other purposes. Sec. 170(a) and (c)(2); see Secs. 545(b)(2), 556(b)(2), 873(b)(2), 882(c)(1)(B); Sec. 642(c) ("Deduction for Amounts * * * for a Charitable Purpose"). Cf. Secs. 501(h) and 4911, imposing a tax on the lobbying expenditures of certain "public charities," which place under that heading educational institutions, hospitals, and medical research organizations, among other organizations described in Section 501(c)(3).

charitable trusts. _/ See e.g., Rev. Rul. 71-447, supra; Rev. Rul. 67-325, 1967-2 Cum. Bull. 113; Rev. Rul. 69-545, 1969-2 Cum. Bull. 117; Rev. Rul. 76-442, 1976-2 Cum. Bull. 148. Cf. IV Scott, The Law of Trusts (1967 ed.), Sec. 377; Restatement of Trusts 2d, §377, comment c. _/ The court in Green v. Connally, supra, at 1157, agreed that "clearly, the term 'charitable' is used [in Section 501(c)(3)] 'in its generally accepted legal sense,' Treas. Reg. §1.501(c)(3)-1(d)(2), and not in a street or popular sense (such as, e.g., benevolence to the poor and suffering)." Accord, Eastern Kentucky Welfare Rights Org. v. Simon, 506 F. 2d 1278, 1286-1290 (D.C. Cir. 1974), vacated and rem'd on other grounds, 426 U.S. 26 (1976). See Reiling, Federal Taxation: What is a Charitable Organization?, 44 A.B.A.J. 525, 527 (1958). _/

_/ This is accordingly not a case in which no "'fair warning'" has been given "of the bounds of 'Federal public policy'" (81-3 Br. 34). The Regulations embodying charitable trust concepts have been in force since 1959 and, consistently since 1970, the Service has applied a requirement of nondiscrimination adopted pursuant to those Regulations.

_/ See also Rev. Rul. 78-68, 1968-1 Cum. Bull. 149 (organization designed to participate in implementing the Demonstration Cities in Metropolitan Development Act of 1966, 42 U.S.C. §3301, et seq., was exempt); Professional Standard Review v. Commissioner, 74 T.C. 240 (1980) (organization which promoted implementation of Social Security Amendments of 1972, 86 Stat. 1430, §249F(b), was exempt); Rev. Rul. 77-69, 1977-1 Cum. Bull. 143 (organization which assisted in implementing the National Health Planning and Resources Development Act of 1974, P.L. 93-641, 88 Stat. 2225, was exempt).

_/ As petitioners point out (81-1 Br. 20-25; 81-3 Br. 14-16), in prior Regulations under Section 501(c)(3) and its predecessors, and in certain rulings, no longer followed, the Internal Revenue Service took the position that "[c]orporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor." Treasury Regulations 118, Section 39.101(6)-1(b)) (1939 Code). See I.T. 1800, II-2 Cum. Bull. 152 (1923), declared obsolete by Rev. Rul. 69-43, 1969-1 Cum. Bull. 310; I.T. 1827, II-2 Cum. Bull. 154, declared obsolete by Rev. Rul. 69-43, supra. But cf. Sol. Op. 159, III-I Cum. Bull. 480 (1924), allowing a charitable deduction for a bequest for the construction of a community auditorium, on the basis that Congress intended that [the term 'charity'] should cover all bequests as might properly be classified as charitable at common law." The force of the outstanding Regulation, however, does not turn on precise consistency with its predecessors. As the outstanding Regulation clearly "'implement[s] the congressional mandate in some reasonable manner' * * *," its construction of the generalized term "charity" must be sustained. National Muffler Dealers Assn. v. United States, 440 U.S. 472, 476, 488 (1979) (quoting United States v. Cartwright, 411 U.S. 546, 550 (1973), quoting United States v. Correll, 389 U.S. 299, 307 (1967)). This Court has many times confirmed the Treasury's right to change its Regulations and rulings in light of its administrative experience. Morrissey v. Commissioner, 296 U.S. 344, 354-355 (1935); Helvering v. Wilshire Oil, Co., 308 U.S. 90, 99-103 (1939); Helvering v. Reynolds, 313

4. The correctness of the limitation applied below is further buttressed by decisions of this Court sustaining the disallowance of business deductions deemed contrary to national or state policy. In Textile Mills Corp. v. Commissioner, 314 U.S. 326 (1941), the Court upheld a Treasury Regulation pursuant to which the Commissioner had denied business deductions claimed by a corporation for sums expended to "promot[e] legislation." Id. at 336-338. Rejecting the argument that "the administrative agency usurped the legislative function * * *," the Court pointed out that "[c]ontracts to spread such insidious influences through legislative halls have long been condemned." It concluded (id. at 338-339), "[t]here is no reason why, in the absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction." See also Cammarano v. United States, 358 U.S. 498, 511-513 (1959); Slee v. Commissioner, 42 F. 2d 184 (2d Cir. 1930).

That holding "foreshadowed" the decision in Tank Truck Rentals v. Commissioner, 356 U.S. 30, 33-34 (1958), sustaining a disallowance of business deductions for fines arising from violations of a policy of several states. "A finding of 'necessity' cannot be made," the Court ruled, "if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." It reached the same result in the companion case, Hoover Express Co. v. United States, 356 U.S. 38 (1958); McDonald v. Commissioner, 323 U.S. 57 (1944);

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U.S. 428, 431-433 (1941); Commissioner v. P.G. Lake, Inc., 356 U.S. 260, 265-266, n.5 (1958); National Muffler Dealers Assn. v. United States, 440 U.S. 472, 485-486 (1979); Dixon v. United States, 381 U.S. 68, 73-76 (1965); Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 184-186 (1957) cf. Commissioner v. Heininger, 320 U.S. 467, 473-475 (1943); Commissioner v. Sullivan, 356 U.S. 27 (1958); see Mazzei v. Commissioner, 61 T.C. 497 (1974); Turnipseed v. Commissioner, 27 T.C. 758 (1957).

Petitioner Bob Jones University seeks to distinguish that line of cases because it applies a policy limitation to disallow business deductions, not charitable deductions or tax-exempt status (Br. 18-19). But that limitation applies here a fortiorari. The principle that the income tax is levied on net income--a countervailing consideration reflected in certain of the Court's holdings allowing business deductions, e.g., Commissioner v. Tellier, 383 U.S. 687, 691-693 (1966); Commissioner v. Sullivan, 356 U.S. 27, 29 (1958)--does not strengthen petitioners' claims to tax-exempt status. Since the object of the charitable exemption provisions is to aid organizations that serve the public interest, national policy operates as a necessary limitation upon petitioners' eligibility for federal tax benefits. _/

5. Petitioners lay stress on their prediction that if the government prevails in these cases, the Service will be empowered to substitute "subjective and arbitrary judgments * * * for objective standards enacted by Congress * * * " (81-1 Br. 31; see 81-3 Br. 19-20, 22, 27). Their argument is not unlike that advanced in Bob Jones University v. Simon, 416 U.S. 725, 749-750 (1974), where the Court noted that "[t]he degree of bureaucratic control that, practically speaking, has been placed in the Service * * * is susceptible of abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities * * *," but that the remedy lay in enactment of procedures to expedite judicial review

_/ There is an extensive literature on the charitable exemption and deduction, and alternative methods of accomplishing the desired ends of public benefit. See, e.g., Sacks, The Role of Philanthropy: An Institutional View, 46 Va. L. Rev. 516 (1960); Stone, Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy, 1968 S. Calif. Inst. 2-7, and additional authorities cited therein; 4 Report of the Royal Commissioners on Taxation of the Service's determinations. _/

The first answer to petitioners' argument is that their conduct violated a specific federal statute, 42 U.S.C. 1981, as this Court has held. Runyon v. McCrary, 427 U.S. 160 (1976). That fact removes these cases from the area of subjective administrative judgment.

Moreover, in contending that it follows from the Service's position that "violation by a Section 501(c)(3) organization of zoning laws, building codes and myriad other state proscriptive laws would necessitate revocation of federal tax exemption * * * " (81-3 Br. 20), petitioners leave wholly out of account the peculiar strength of the federal government's commitment to the eradication of racial discrimination in education. That commitment springs from the principle that "'[d]istinctions between citizens solely because of their ancestry' [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.'" Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). It reflects also the importance of education to a democratic society and the peculiarly injurious effect of discrimination in the context of the classroom. In the landmark decisions of Brown v. Board of Education, 347 U.S. 483 (1954), and Bolling v. Sharpe, 347 U.S. 497 (1954), this Court established that the maintenance of a racially dual school system by a state or federal authority abridges the constitutional right of black schoolchildren to the equal protection of the laws. In so holding, the Court stressed that education "is required in the performance of our most basic

_/ By Sec. 1306(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, Congress added Section 7428 tc the Code in response to the Court's suggestion (416 U.S. at 750) that "[s]pecific treatment of not-for-profit organizations to allow them to seek pre-enforcement review may well merit consideration." See H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 282, 283-284 (1976-3 Cum. Bull. (Vol. 2) 974, 975-976); S. Rep. No. 94-938, 94th Cong., 2d Sess. 585-587 (1976-3 Cum. Bull. (Vol. 3) 623-625). It provides a declaratory judgment procedure whereby an organization can obtain judicial review of an adverse Section 501(c)(3) ruling without awaiting a formal assertion of a tax deficiency. In cases involving a revocation of exempt status, contributions from individuals (up to $1,000 per individual) received by the organization during the pendency of the proceeding in the trial court are treated as tax-deductible regardless of the eventual outcome of the litigation.

responsibilities, even service in the armed forces. It is the very foundation of good citizenship." Brown, supra, at 493. It found that the stigma engendered by segregated educational facilities rendered them inherently unequal. "To separate [black children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494. Thus, the Court concluded that "[s]egregation in public education is not reasonably related to any proper governmental objective * * *." Bolling v. Sharpe, supra, at 500. See McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Cooper v. Aaron, 358 U.S. 1, 19 (1958); Norwood v. Harrison, 413 U.S. 455, 464 n.7, 468-470 (1973).

Indeed, petitioners' racially discriminatory practices contravene not only the constitutional values that determine national and state action articulated in Brown and in succeeding cases, but also the statutory right of "[a]ll persons within the jurisdiction of the United States * * * [to] have the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens * * *." Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1981. In Runyon v. McCrary, 427 U.S. 160 (1976), the Court held that Section 1981 prohibits private nonsectarian schools that are open to the public from denying admission to prospective students because they are Negroes. It there rejected the contention that Section 1981, as so applied, violates constitutionally protected rights of free association and privacy, or a parent's right to direct the education of his children. Id. at 175-179. The assertion of petitioner Bob Jones University (Br. 20, n.19; 29) that it is not "charged with violation of any * * * federal statute * * *," may therefore reflect only the fortuity that none of its applicants excluded on racial grounds (see J.A. A89-A90), nor any student expelled for participation in, or advocacy of, an interracial association (see 81-3 Pet. App. A4), elected to press a cause of action. _/ See Fiedler v. Marumsco Christian School, 631 F. 2d 1144, 1150-1151 (4th Cir. 1980). Cf. Tillman v. Wheaton-Haven Recreational Assn., 410 U.S. 431 (1973).

Nor did petitioner Bob Jones University's 1975 revision of its admissions and disciplinary rules either place it outside the proscription of Section 1981, or render it more eligible for the benefits of federal tax exemption. It did not then adopt "a completely open admissions policy * * *," as it asserts (Br. 3, n.2). It continued to deny admission to anyone who was a partner in an interracial marriage, who engaged in interracial dating, or who advocated, or belonged to a group that advocated, interracial marriage or dating (J.A. A53-A54, A208-A209, A277). Furthermore, as the court of appeals correctly pointed out (Pet. App. A9-A10), its policy of excluding partners in an interracial marriage and of expelling students who date or marry outside of their race rests, as did its prior policies, upon invidious distinctions drawn according to race. _/ See Loving v. Virginia, 388 U.S. 1, 11-12 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Tillman v. Wheaton-Haven Recreational Association, 410 U.S. 431 (1973) (expulsion of white club member for bringing black guests held violative of 42 U.S.C. 1981); Fiedler v. Marumsco Christian School, 631 F. 2d 1144 (4th Cir. 1980) (42 U.S.C. 1981 held to prohibit a

_/ The Court pointed out in Runyan v. McCrary, supra, at 167, that "[those cases] do not present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds." (Emphasis in original.) But that language has been properly read only as delineating the issue presented, not as an implication that the statute would not apply to such schools. Fiedler v. Marumsco Christian School, 631 F. 2d 1144, 1150-1151 (4th Cir. 1980). Religious doctrine would bear upon petitioners' liability under Section 1981 only to the extent it gives rise to a constitutional defense; it would not alter the fact that the statute is fully applicable to them in the first instance. Ibid.; see Brown v. Dade Christian Schools, Inc., 556 F. 2d 310, 312, 326 (5th Cir. 1977) (Roney, Circuit Judge, dissenting), cert. denied, 434 U.S. 1063 (1978).

_/ Petitioner Goldsboro Christian Schools concedes (Pet. 6; Br. 6) that it "has maintained a racially discriminatory admissions policy since its founding." Thus, the fact of its racially discriminatory policy is beyond dispute. Cf. Prince Edward School Foundation v. United States, cert. denied, No. 80-484 (Feb. 23, 1981) (Rehnquist, J., dissenting).

commercially operated, private, sectarian school from expelling a white student because of her association with a black student). Cf. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641-642 (1950) (rules and regulations applied by a state-supported university that "impair[ed] and inhibited[ed] [a black student's] ability to * * * engage in discussions and exchange views with other students, * * *," and that "depriv[ed] [him] of the opportunity to secure acceptance by his fellow students on his own merits" held violative of the equal protection guarantee).

6. Indeed, contrary to petitioners' contentions (81-1 Br. 27-29 & n.15; 81-3 Br. 16, n.15), recent congressional actions confirm that the nondiscrimination principle applied to private schools by the courts and by the Internal Revenue Service does not conflict with Congress' understanding of the requirements imposed by the Internal Revenue Code with respect to racial discrimination. By the Act of Oct. 20, 1976, Pub. L. No. 94-658, Section 2(a), 90 Stat. 2697, Congress added to the Code, "[i]n view of national policy," the provision now contained in Section 501(i), which explicitly denies exempt status to a social club if its charter or any of its written policy statements provides for "discrimination against any person on the basis of race, color, or religion." _/ The accompanying S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7-8 & n.5 (1976), reflects Congress' intent to apply to social clubs the same antidiscrimination rule involved here. It refers specifically to the holding of Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd, 404 U.S. 997 (1971), that discrimination on account of race is inconsistent with an educational institution's tax-exempt status under Section 501(c)(3) and also with its status as a donee of charitable contributions deductible under Section 170(c)(2).

_/ The provision was added in direct response to a ruling by a three-judge court in McGlotten v. Connally, 338 F. Supp. 448, 457-459, 462 (D.D.C. 1972), that recognition of racially segregated social clubs as tax-exempt entities under Section 501(c)(7) of the code did not violate the Code, the Constitution, or Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. See S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7-8 (1976).

As the court of appeals correctly pointed out (81-3 Pet. App. A5-A6, n.3), the subsequent enactment by Congress of the Ashbrook Amendment (Section 103) and Dornan Amendment (Section 615) to the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, was clearly prospective in operation and had no effect on the substantive or procedural policies enforced in these cases. See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587. The object of the Amendments, as petitioner Goldsboro Christian Schools acknowledges (81-1 Br. 28, n.13), was to "maintain the status quo" by temporarily barring the employment of proposed new procedures to enforce the policy of the Internal Revenue Service. See 43 Fed. Reg. 37296-37298 (Aug. 22, 1978); 44 Fed. Reg. 9451-9455 (Feb. 9, 1979). _/ The accompanying legislative history reflects Congress' intent to leave fully intact, and, indeed, to sanction, the existing nondiscrimination policies of the Service. _/

_/ The Internal Revenue Service proposals of 1978 and 1979 were designed to supplement its existing procedures for verifying whether the actual practices of certain schools conform to their certifications of nondiscrimination. In Section 615 (93 Stat. 577) of the Treasury, Postal Service, and General Government Appropriations Act, supra, Congress stipulated that none of the funds made available by the Act be used to carry out the proposed revenue procedures of 1978 and 1979. In Section 615 (93 Stat. 562), of the same Act, Congress provided that none of the funds made available by the Act be used "to formulate or carry out any * * * procedure, guideline * * * or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978."

_/ On presenting his amendment, Representative Dornan stated (125 Cong. Rec. H5982 (daily ed. July 16, 1979)), "[l]et me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50." Similarly, when Senator Helms later introduced the Ashbrook Amendment in the Senate, he emphasized that it would not impair the effectiveness of outstanding procedures for enforcing a requirement of nondiscrimination (125 Cong. Rec. S11979-S11980 (daily ed. Sept. 6, 1979)): "In fact, IRS has denied the tax-exempt status of over 100 schools which it, or a court, has found to be discriminatory. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of IRS to act against offending schools on a case-by-case basis."

C. <u>The denial of federal tax exemption to petitioners does not violate any right guaranteed by the Religion Clauses of the First Amendment</u>

Petitioners further contend (81-1 Br. 31-44; 81-3 Br. 23-34) that application of the nondiscrimination requirement violates rights guaranteed by the Religion Clauses of the First Amendment. The court of appeals correctly held that it did not. The policy of the Internal Revenue Service, applied evenhandedly to sectarian and nonsectarian schools alike, avoids government entanglement in matters of church doctrine. Moreover, it achieves the important government end of denying federal tax benefits designed to aid qualified institutions to those schools that practice invidious discrimination. Although petitioners' right to inculcate religious doctrine is unquestioned, it does not follow that the practice of racial exclusion is protected by the same principle, or that they are entitled to call on the Constitution to justify an exception from a uniform government policy, neutrally applied. By requiring that petitioners demonstrate nondiscriminatory policies in order to secure federal tax benefits, the Service did not infringe on any activity to which this Court has accorded affirmative constitutional protection.

1. It is, of course, well settled that the Free Exercise Clause of the First Amendment affords substantial protection for the diverse religious beliefs and practices in this country. Thus, this Court has held that the Free Exercise Clause prohibits governmental regulation of religious beliefs as such (<u>Cantwell</u> v. <u>Connecticut</u>, 310 U.S. 296, 303 (1940)), governmental interference with the dissemination of religious ideas (see <u>Fowler</u> v. <u>Rhode Island</u>, 345 U.S. 67 (1953); <u>Follett</u> v. <u>Town of McCormick</u>, 321 U.S. 573 (1944)), or use of secular governmental programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." <u>Braunfeld</u> v. <u>Brown</u>, 366 U.S. 599, 607 (1961). But, as the Court has also noted, "neutral prohibitory or regulatory laws having secular aims" may

impose certain "incidental burdens" on free exercise when "the burden on First Amendment values is * * * justifiable in terms of the Government's valid aims." Gillette v. United States, 401 U.S. 437, 462 (1971); see, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972).

Thus, a person is not protected from every burden on the exercise of his religion resulting from the implementation of a neutral, secular governmental interest. Braunfeld v. Brown, supra, 366 U.S. at 603; Johnson v. Robison, 415 U.S. 361, 383-386 (1974); Gillette v. United States, supra, 401 U.S. at 461-462; see Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878); Jacobson v. Massachusetts, 197 U.S. 11 (1905). In determining whether a particular statute is supported by a governmental interest that outweighs free exercise of rights, it is necessary (McDaniel v. Paty, 435 U.S. 618, 635, n.8 (1978) (Brennan, J., concurring in the judgment))--

> to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the objection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand.

See Wisconsin v. Yoder, supra, 406 U.S. at 214 (the interest of the government is subject to "a balancing process when it impinges on fundamental rights * * * such as those specifically protected by the Free Exercise of the First Amendment"); Johnson v. Robison, supra; Gillette v. United States, supra. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." Braunfeld v. Brown, supra, 366 U.S. at 606. Accordingly, this Court has repeatedly observed that a generally imposed income tax does not have a prohibited coercive effect on religious practices or beliefs. Follett v. Town of McCormick, supra, 321 U.S. at 577-578; Murdock v. Pennsylvania, 319 U.S.

105, 112 (1943); see Braunfeld v. Brown, supra, 366 U.S. at 606; cf. United States v. Lee, 479 F. Supp. 180 (W.D. Pa. 1980), pending, Sup. Ct., No. 80-767.

In these cases, notwithstanding petitioners' assertions to the contrary (81-1 Br. 36; 81-3 Br. 9), the Service's rulings do not place more than an indirect and limited burden upon any person's or any corporation's right to free religious belief or exercise. _/ Rather, the focus of the policies at issue here is on racially discriminatory practices, not on beliefs. They do not purport to interfere with petitioners' right to espouse or inculcate a doctrine against interracial marriage, or with any student's right to adhere to such a doctrine. See Brown v. Dade Christian Schools, Inc., 556 F. 2d 310, 321-322 (5th Cir. 1977) (en banc) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978). _/ Indeed, as this Court has noted (Runyon v. McCrary, 427 U.S. 160, 176 (1976)), even though the right of parents to have their children educated in schools fostering a belief in racial discrimination may well be protected by the First Amendment, the First Amendment does not protect a school's practice of racial discrimination:

> [I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in Norwood v. Harrison, 413 U.S. 455, "the Constitution * * * places no value on discrimination," id., at 469, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment * * * it has never been accorded affirmative constitutional protections." * * * Id. at 470. (Emphasis in original.)

_/ Petitioner Bob Jones University's allegation (Br. 9) that "the decision below * * * would destroy the entire religious enterprise known as Bob Jones University * * * " is without support in the record (cf. J.A. A241, A256-A257).

_/ Nor do the Service's actions implicate the interests of a church in maintaining the intimacy of its activities, as petitioner Bob Jones University urges (81-3 Br. 23-25). Petitioners offer to the public on a commercial basis educational services that compete with programs of instruction in public schools and in public colleges (Pet. App. A3; J.A. A88-A89). "'Their actual and potential constituency * * * is more public than private.'" Runyon v. McCrary, 427 U.S. 160, 172, n. 10 (1976) (quoting 515 F. 2d 1082, 1089).

Moreover, the burden on petitioners from the determinations of the Service is more than justified by the substantial government interest in ensuring that all racially discriminatory private schools, "whether church related or not," be denied federal tax benefits that foster and encourage the institutions that receive them (81-3 J.A. A239). As we have shown, supra, pp. 23-26, the federal government has a peculiarly strong commitment to eradicating racial discrimination in education, public or private, and the nondiscrimination requirement manifestly serves that end. See Green v. Connally, 330 F. Supp. 1150, 1167 (D.D.C.), aff'd, 404 U.S. 997 (1971); _/ Bob Jones University v. Johnson, 396 F. Supp. 597, 604-608 (D.S.C. 1974), aff'd without published opinion, 529 F. 2d 514 (4th Cir. 1975); E.E.O.C. v. Mississippi College, 626 F. 2d 477, 488-489 (5th Cir. 1980), cert. denied, No. 80-1703 (June 29, 1981); Brown v. Dade Christian Schools, Inc., supra, 556 F. 2d at 323-324 (Goldberg J., concurring). Thus, not only is it clear that the First Amendment does not constitute an absolute bar to regulation which may indirectly impinge upon religion (see Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1889); Mormon Church v. United States, 136 U.S. 1 (1890); Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944); McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gillette v. United States, 401 U.S. 437, 461-462 (1971)), but also that the federal interest in eradicating the vestiges of racial discrimination represents such a fundamental interest that it will justify federal regulation which may so impinge on religious rights.

_/ The Green court, id. at 1169, was not "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." But it noted, ibid., that "if [such a problem] ever does arise, it will have to be considered in the light of the particular facts and issue presented, and in light of the established rule, see Mormon Church v. United States, 136 U.S. 1 * * * (1890), that the law may prohibit an individual from taking certain actions even though his religion commands or prescribes them."

The cases upon which petitioners rely (81-1 Br. 33-34; 81-3 Br. 23 et seq.) are not to the contrary. In Wisconsin v. Yoder, 406 U.S. 205 (1972), this Court found that the Wisconsin mandatory school attendance statute threatened the very existence of the Old Order Amish sect because its adherents could not compromise the belief in question without being "assimilated into society at large." Wisconsin v. Yoder, supra, 406 U.S. at 218. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim of the Old Order Amish that exposing their children to public education during the "crucial adolescent period of religious development," "would gravely endanger if not destroy the free exercise of respondents' [Old Order Amish] religious beliefs." Wisconsin v. Yoder, supra, 406 U.S. at 219, 223. The choice faced by the Amish parents in Yoder was either to risk losing their children from their faith, a process that in the long run would eliminate the sect, or to violate the law. On the other hand, the state's mandatory attendance statute, as applied to the Old Order Amish, would do little to further the reasons for enacting the statute (406 U.S. at 222). The admitted interests of the state there were to prepare its citizens to be productive members of society and to prepare them to participate in our political system. Those interests were fully satisfied both by the earlier public education accepted by the Amish and by the alternative education the children received in the Amish community. Here, by contrast, the centrality of the federal interest in eliminating racial discrimination and the efficacy of the method chosen cannot be questioned.

Sherbert v. Verner, 374 U.S. 398 (1963), and Thomas v. Review Board, No. 79-952 (April 6, 1981) are similarly distinguishable. In neither case was the regulatory interest of the sovereign there involved so central as the interest here. And in neither case was the burden upon the exercise of religion so indirect as would be the loss of tax exemptions here.

2. As the court of appeals concluded (81-3 Pet. App. A15-A16), the principle of neutrality embodied in the Establishment Clause does not prevent the government from enforcing fundamental interests by means of a uniform policy neutrally applied. Not only is the affirmative purpose underlying the requirement of nondiscrimination neutral and secular, but there are valid administrative reasons for applying it to organizations such as petitioners whose "educational programs consist of secular subjects of the same scope and type commonly dealt with in the public schools or in private schools that are not religiously oriented." Rev. Rul. 75-231, 1975-1 Cum. Bull. 158. The Service acts well within its statutory discretion in choosing to forego the enterprise of determining whether a racially discriminatory practice stems from conscientiously held religious precepts. See _Gillette_ v. _United States_, 401 U.S. 437, 454-458 (1971). Cf. _Brown_ v. _Dade Christian Schools, Inc._, _supra_, 556 F. 2d at 323-324 (Goldberg J., concurring); _Fiedler_ v. _Marumsco Christian School_, 631 F. 2d 1144 (4th Cir. 1980). Such evenhanded application of the Service's policy properly involves minimum intrusion into the operation of private schools while at the same time correctly serving important government interests.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1981

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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

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether non-profit corporations operating private schools that, on the basis of religious doctrine, maintain racially discriminatory admissions policies or other racially discriminatory practices, qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954, eligible to receive charitable contributions deductible by the donor under Section 170.

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v.

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OPINIONS BELOW

No. 81-1. The order of the district court (Pet. App. 5a-18a) is reported at 436 F. Supp. 1314. The opinion of the court of appeals (Pet. App. 1a-3a) is not reported.

No. 81-3. The opinion and order of the district court dated December 26, 1978 (Pet. App. A38-A71) are reported at 468 F. Supp. 890. The opinion and order of the district court dated May 14, 1979 (Pet. App. A72-A86) are not reported. The opinion of the court of appeals (Pet. App. A1-A37) is reported at 639 F.2d 147.

JURISDICTION

No. 81-1. The judgment of the court of appeals (Pet. App. 53a) was entered on February 24, 1981, and the court of appeals denied a timely petition for rehearing and suggestion for rehearing en banc on April 7, 1981 (Pet. App. 55a). The petition for a writ of certiorari was filed on July 2, 1981, and was granted on October 13, 1981, to be consolidated with No. 81-3. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

No. 81-3. The judgment of the court of appeals was entered on December 30, 1980 (Pet. App. A1). The order denying a petition for rehearing was entered on April 8, 1981 (Pet. App. A100-A101). The petition for a writ of certiorari was filed on July 1, 1981, and was granted on October 13, 1981, to be consolidated with No. 81-1. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 170(a), 170(c), 501(a), 501(c)(3), 312(b)(8)(B) and 3306(c)(8) of the Internal Revenue Code of 1954 (26 U.S.C.), and of Section 1.501(c)(3)-1(d) of the Treasury Regulations on Income Tax (26 C.F.R.) are set forth at Appendix, infra, 1a-5a.

STATEMENT

A. Goldsboro Christian Schools - No. 81-1

1. Petitioner Goldsboro Christian Schools, Inc. is a nonprofit organization incorporated in 1963 under the laws of North Carolina. Its articles of incorporation provide that its purpose is "'to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures * * *" (Pet. App. 6a). At least since 1969, petitioner has maintained a regularly scheduled curriculum, a regular faculty, and a regularly enrolled student body for kindergarten and grades one through twelve (J.A. 6). During that period, petitioner has satisfied the requirements of North Carolina for secular

education in private schools. _/ For the school year 1973-1974, petitioner enrolled approximately 750 students (Pet. App. 7a; J.A. 6-7). Submissions to the State indicate that petitioner requires its high school students to take one Bible-related course during each semester. The remaining course requirements and offerings, as reflected on those submissions, are indicative of secular subjects. Whether the subject of the course is secular or Bible-related, petitioner's practice is to begin each class with a prayer. This practice is in keeping with petitioner's overall purpose, and the desire of its founders, to provide a secular private school education in a religious setting (Pet. App. 6a-7a). _/

Based upon an interpretation of the Bible that it purports to follow, petitioner has maintained a racially discriminatory admissions policy since the time of its incorporation. The policy reflects a belief that God intended a "separation of the nations and races" and that it is necessary to discourage "any kind of social intermingling by * * * students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God (J.A. 10). Although the policy would seem to require the exclusion of all noncaucasians, petitioner has accepted noncaucasions. Its

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_/ Pursuant to N.C. Gen. Stat. §115-255 (1978 repl.), the State of North Carolina regulates and supervises all nonpublic schools within the State serving children of secondary-school age, or younger, "to the end that all children shall become citizens wh possess certain basic competencies necessary to properly discharge the responsibilities of American citizenship." In accordance with that statute, all such nonpublic schools --

> shall meet the State minimum standards as prescribed in the court of study, and the children therein shall be taught the branches of education which are taught to the children of corresponding age and grade in the public schools * * *.

_/ Athough the Second Baptist Church of Goldsboro was active in petitioner's founding and operation, petitioner was incorporated policy in practice requires the exclusion only of members of the Negro race (Pet. App. 7a). Petitioner's president and principal believe that black students would be disinclined to abide by its tenets and practices because of the racial climate prevailing in the country and the pressures exerted by the positions of certain "militant" organizations (J.A. 81-93).

Petitioner has never received recognition from the Internal Revenue Service as a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) On July 10, 1970, the Internal Revenue Service announced publicly that it could no longer justify its prior allowance of tax-exempt statuts to private schools maintaining racially discriminatory admissions policies, nor could it continue to treat gifts to such schools as charitable contributions that are deductible by the donor for income tax purposes (No. 81-3 - J.A. A235-236). _/ On audit, the Commissioner of Internal Revenue thereafter determined that petitioner did not qualify for exemption from federal social security taxes (FICA) under Section 3121(b)(8)(B) of the Code, or for exemption from federal unemployment taxes (FUTA) under Section 3306(c)(8) of the Code. In 1974, the Commissioner accordingly assessed FICA and FUTA taxes against petitioner. After making partial payment, petitioner instituted this action in the United States District Court for the Eastern District of

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_/ As a result of its announced policy, which was formally published in Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, the Internal Revenue Service did not appeal from the order of a three-judge district court in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), prohibiting the Commissioner from conferring tax-exempt status of private schools in Mississippi maintaining racially discriminatory admissions policies, and allowing the deductibility of contributions to such schools as charitable contributions. The Green suit had been brought by a group of Mississippi parents and their children attending the public schools. In response to an appeal of the district court's order by intervenors seeking to vindicate their asserted First Amendment right to freedom of association, the government filed a motion to dismiss or affirm, October Term, 1970 - No. 820. This Court affirmed without opinion. Coit v. Green, 404 U.S. 997 (1971).

North Carolina seeking a refund of $3,459.93 in federal withholding, FICA, and FUTA taxes for 1969 through 1972. The government counterclaimed for $160,073.96 in taxes for that period (Pet. App. 5a, 7a-8a).

2. On the parties' cross motions for summary judgment, the district court ruled that the Internal Revenue Service had properly denied petitioner exempt status under Section 501(c)(3), and the tax benefits associated with qualification as a Section 501(c)(3) organization, because petitioner's of racially discriminatory admissions policy violated the declared public policy of the United States (Pet. App. 14a). For purposes of adjudicating the motion, the court assumed that petitioner's racially discriminatory admissions policy was based upon a valid religious belief (Pet. App. 7a). It concluded, however, that denying petitioner the benefits of a Section 501(c)(3) tax exemption did not abridge any rights guaranteed petitioner under the Fifth Amendment to the Constitution or under the Establishment or Free Exercise Clauses of the First Amendment (Pet. App. 12a-13a). _/

The court of appeals affirmed, with one judge dissenting. Treating the case as "identical" with Bob Jones University, the court of appeals upheld the Internal Revenue Service's action on the authority of its decision in that case (Pet. App. 1a-3a). The court observed (Pet. App. 2a):

_/ During the pendency of the proceedings in the district court, the government agreed to abate all FUTA assessments against petitioner for periods ending on or before December 31, 1970, and to abate all FICA assessments against petitioner for periods ending before November 30, 1970 (J.A. 104, 111-112). The government made this concession because the Internal Revenue Service's announcement that it would no longer accord the benefits of tax exemption and deductibility of contributions to racially discriminatory private schools was effective as of November 30, 1970 (J.A. 104, 111-112). See Internal Revenue Code of 1954, Section 7805(b) (26 U.S.C.). The government accordingly stipulated that it was entitled to recover only $116,190.99 upon its counterclaim, and the district court entered judgment in its favor in that amount (J.A. 109-110, 115).

It is rare that any two cases are identical twins. Nevertheless, as it happens, there is identity for present purposes between the instant case and the case of Bob Jones University * * * which has just been handed down. There the taxpayer was held not to be entitled to the §501(c)(3) exemption. In some respects, insofar as decision here is concerned, the resemblance of Goldsboro to Bob Jones University is stronger than would be the case the other way round. That is so since Goldsboro altogether prohibits admission of blacks. The University permits them to enter, but forbids certain inter-racial associations, especially dating and marriage.

The complete and impeccable treatment by Judge Hall in Bob Jones University makes it supererogatory for us to discuss the issue of tax exempt status under §501(c)(3). For that aspect we simly affirm the district court for the reasons advanced in the Bob Jones University case.

B. Bob Jones University - No. 81-3

1. Petitioner is a non-profit organization incorporated in 1952 under the laws of South Carolina. As set forth in its certificate of incorporation, its purpose is "'to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures * * *'" (Pet. App. A2-A3, A40-A41). Petitioner provides instruction for students from kindergarten through college and graduate school (Pet. App. A3, A41; J.A. A63, A153, A211-A223). At the college level, it operates a school of education, school of fine arts, a school of religion, a college of arts and sciences, and a school of business administration (J.A. A63, A127-128). In its graduate schools, it offers courses in art, music, speech, radio and television, cinema, religion, and education (J.A. A227). It enrolls more than 5,000 students and offers more than 50 accredited degrees in secular subjects (Pet. App. A3, A41; J.A. A63, A127-A128). Its

various degrees (including its teaching degree which satisfied state law requirements) generally enable its graduates to qualify in the professional world on the same basis as graduates from other recognized educational institutions (J.A. A76, A88-A89, A269-A271). _/ Petitioner also offers a separate nondegree, noncredit program entitled Institute of Christian Service, for persons who do not wish to undergo the rigors of academic pursuit (J.A. A75). The purpose of that program is to teach the principles of the Bible and to train Christian character (Pet. App. A3, A41). All courses are taught in accordance with the dictates of Biblical Scripture. Teachers are required to be "born again" Christians. Students are screened as to their religious beliefs and their conduct is strictly regulated (Pet. App. A3-A4).

From its inception, petitioner has, based upon religious doctrine, maintained a racially restrictive policy forbidding its students to engage in interracial dating and interracial marriage. These policies were based upon the belief that God intended the various races to live apart, and that intermarriage

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_/ Until 1972, the Veterans Administration recognized petitioner as an educational institution offering courses of study suitable for the education of veterans who were recipients of subsidies under the educational benefits program administered by the Veterans Administration. See Bob Jones University v. Johnson, 396 F. Supp. 597, 600-601 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). During this period, petitioner's courses of study were certified to be suitable for the education of veterans by the South Carolina State Board of Education, using criteria prescribed by federal statute. Ibid. See 38 U.S.C. Sec. 1771 et seq. In November 1972, the Veterans Administration terminated the right of otherwise eligible veterans to receive veterans' benefits for education at Bob Jones University based upon a determination by the Veterans Administration that petitioner had failed to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000d et seq.) and with the Veterans Administration regulations implementing the statutory requirement of nondiscrimination in federally assisted programs. See Bob Jones University v. Johnson, supra, 396 F. Supp. at 598-599. Upon petitioner's complaint for review, the district court and the court of appeals sustained the administrative order of termination. Bob Jones University v. Johnson, supra.

of different races is contrary to God's will and to the scriptures (Pet. App. A43). Prior to 1971, petitioner excluded blacks entirely from enrollment. From 1971 until 1975, married black persons and members of other minority races or ethnic groups were not excluded from enrollment, but petitioner continued to deny admission to unmarried blacks unless the applicant had been a staff member of petitioner for at least four years (Pet. App. A4, A43). See Bob Jones University v. Johnson, 396 F. Supp. 597, 600 & n.9 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). During this latter period, petitioner's doctrinal policy did not specifically require the exclusion of blacks, but denying admission to unmarried blacks was, in petitioner's judgment, the best means of implementing its prohibition against interracial dating and marriage _/ (Pet. App. A43), J.A. A71-A72, A81-A82, A250; A209-210, 212). _/

In response to the court of appeals' decisions in April and May 1975, in Bob Jones University v. Johnson, 529 F.2d 514 (4th Cir. 1975), and in McCrary v. Runyon, 515 F.2d 1082 (4th Cir.

_/ Petitioner's president explained the connection between its racially discriminatory admissions policy and interracial dating and marriage, in the following terms (A. 210):

> We accept a few Oriental students, but we do so with a definite understanding that they will not date outside of their own race. If we took Negro students here on this same basis today, they would resent that restriction and would cry that they were being discriminated against because they were not allowed to date Orientals or Caucasians. If we had to expel a black student today for the worst possible offense -- stealing, attempted rape, or something of that sort -- he would cry that he was being persecuted because he was black; and we would be picketed, annoyed, and harassed. The very attitude of the integrationist today makes it impossible for us to find any basis on which we can accept Negro students without violating Christian and Scriptural principles and without being put in a position where we could be harassed, annoyed, and threatened.

_/ "A." refers to the separately bound record appendix filed in the court of appeals, Nos. 79-1215 and 79-1216.