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1975), aff'd, 427 U.S. 160 (1976), petitioner once again revised its admissions policy (Pet. App. A4, A430A44; J.A. A250-A253). After May 29, 1975, petitioner generally permitted unmarried blacks as well as married blacks to enroll as students. It continued to deny admission, however, to any applicant known to be a partner in an interracial marriage (Pet. App. A4, A43-A44). _/ It also established disciplinary rules requiring the expulsion of any student (1) who was a partner in an interracial marriage, (2) who was affiliated with a group or organization advocating interracial marriage, (3) who engaged in interracial dating, or (4) who encouraged others to violate petitioner's rules and prohibitions against interracial dating (Pet. App. A4, A44); J.A. A53-A54, A77-A80, A197-A98, A208-A209, A277). Those rules adopted a broad definition of "dating," encompassing a wide range of associations (J.A. A155-A177, A197-A199). Petitioner required each student to attend a "rules meeting" at which the several disciplinary rules were reviewed, and further required each student to sign a statement promising to abide by these racial restrictions (Pet. App. A42-A43-; J.A. A132-A133).

Until 1970, the Internal Revenue Service recognized petitioner as a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.). See Bob Jones University v. Simon, 416 U.S. 725, 735 (1974). On November 30, 1970, the Internal Revenue Service sent letters to approximately 5,000 organizations operating private schools, including petitioner, announcing that it would no longer recognize as legally entitled to tax exemption, or to receive deductible charitable contributions, any private school that

_/ Applicants to petitioner specified their race and marital status on their applications for admissions (J.A. A122-A133). If an application form indicated that an applicant was black, but did not reveal the race of the applicant's spouse, petitioner requested that additional information [illegible] maintained a racially discriminatory admissions policy (J.A. A232-A234). See Green v. Connally, 330 F. Supp. 1150, 1173 (D.D.C.), aff'd, 404 U.S. 997 (1971). The letter requested proof of a nondiscriminatory admissions policy and advised that tax-exempt ruling letters would be reviewed in light of the information provided. At the end of 1970, petitioner responded that it did not admit black students and, in September 1971, further stated that it had no intention of altering that policy. The Internal Revenue Service therefore commenced administrative proceedings leading to the revocation of petitioner's tax exemption. and of its advance assurance of deductibility. After petitioner's attempt to enjoin those proceedings had failed in this Court (see Bob Jones University v. Simon, 416 U.S. 735 (1974), _/ January 1976, the Internal Revenue Service issued a final notice of revocation to petitioner, effective as of December 1, 1970 (Pet. App. A40, A87-A88, A89).

2. Seeking to reinstate its exemption, petitioner brought this action in the United States District Court for the District of South Carolina for refund of $21 in federal unemployment taxes for the year 1975 (Pet. App. A3, A40). _/ The government counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975 (ibid.). Following a trial, the district court held that petitioner qualfied for tax

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_/ While the administrative proceedings preliminary to the revocation of its exemption were pending, petitioner sought injunctive relief to prevent the Internal Revenue Service from taking final action on the revocation. Bob Jones University v. Simon, supra, 416 U.S. 725. This Court unanimously held that the action was barred by the Anti-Injunction Act (26 U.S.C. (& Supp. III) 7421(a)) and by the Declaratory Judgment Act (28 U.S.C. (& Supp. III) 2201), but suggested (416 U.S. at 746) the refund suit procedure ultimately employed by petitioners here.

_/ Petitioner's qualification for an exemption from federal unemployment taxes (FUTA) under 26 U.S.C. 3306(c)(8) turns on its entitlement to status as a tax-exempt organization under Section 501(c)(3). See Bob Jones University v. Simon, supra, 416 U.S. at 727-728.

exemption under Section 501(c)(3) of the Code as an institution organized and operated exclusively for religious and educational purposes, and that petitioner was not required to demonstrate a nondiscriminatory racial policy in order to so qualify (Pet. App. A45-A71). In a separate suit against the Secretary of the Treasury and the Commissioner of Internal Revenue instituted by petitioner, the district court thereafter ordered those officials to restore petitioner's tax exempt status and to publish advance assurances of deductibility of contributions to petitioner (Pet. App. A72-A86).

The court of appeals reversed (Pet. App. A1-A17), with one judge dissenting (Pet. App. A18-A37). _/ It rejected the district court's hypothesis that petitioner was entitled to tax exempt status because it is a "religious" institution and qualifies under the separately enumerated "religious" category of Section 501(c)(3). The court rejected "[t]his simplistic reading of the statute" as the one that "tears section 501(c)(3) from its roots" (Pet. App. A7). Citing with approval the three-judge district court's decision in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam, 404 U.S. 997 (1971), the court concluded that Section 501(c)(3) must be viewed against its background in the law of charitable trusts. Thus, the court of appeals agreed with the Green decision (330 F. Supp. at 1156-1160) that to be eligible for tax exempt status, "an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy" (footnote omitted) (Pet. App. A7-A8; footnote omitted). It observed that "[t]his view finds additional support in the statutory framework itself: Section 170 of the Code, the companion provision to Section 501(c)(3), places the separately enumerated purposes in that section under

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_/ The court of appeals stayed the district court's injunctive order pending appeal and consolidated both suits into a single appeal (Pet. App. A97-A99).

the broad heading of 'charitable'" (Pet. App. A7-A8, n.6). Here, it stated, petitioner's racial policies violated clearly defined public policy, rooted in the Constitution and the decisions of this Court condemning racial discrimination. Since there is a government policy against subsidizing racial discrimination in education, public or private, the court of appeals held that "the Service acted within its statutory authority in revoking [petitioner's] tax exempt status * * *" (Pet. App. A10).

In so holding, the court rejected petitioner's argument that the application of the Service's nondiscrimination policy to petitioner violates the Free Exercise and Establishment Clauses of the First Amendment. Assuming that petitioner's racial discrimination is motivated by sincere religious beliefs, the court noted that the Internal Revenue Service's policy would not prohibit petitioner from adhering to its teachings or force any individual student to violate his beliefs (Pet. App. A13-A14). The court further concluded that "the uniform application of the [Service's] rule to all religiously operated schools <u>avoids</u> the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (Pet. App. A16; emphasis in original).

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that the Commissioner of Internal Revenue acted within his statutory authority in determining, that because of their undisputed racially restrictive admissions policies and other discriminatory policies, petitioners failed to 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) of the Code. Since 1970, the Service has uniformly ruled that a private school will not qualify for those federal tax benefits unless it establishes that its admissions and educational policies are operated on a racially nondiscriminatory basis. That ruling and the decision below upholding it, are amply supported by the Constitution, by decisions of this Court, and by Acts of Congress evidencing a strong national commitment to the eradication of racial discrimination generally, and, in particular, racial discrimination by educational institutions, public and private. See, e.g., Amendments XIII, XIV, XV; Runyon v. McCrary, 427 U.S. 160 (1976); Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1981; Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d. 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 centrality of education to a democratic society and the peculiarly injurious effects of the stigma engendered by discrimination in the classroom. Brown v. Board of Education, 347 U.S. 483, 493-495 (1954); Bolling v. Sharpe, 347 U.S. 497, 500 (1954). Indeed, this Court's opinion

in Runyon v. McCrary, 427 U.S. 160 (1976) suggests that while petitioners may have a right to teach doctrines of racial separation, they maintain racially discriminatory admissions policies and other similar practices if they are commercially operated and otherwise open to the general public. Such conduct violates 42 U.S.C. 1981, which provides that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens.

Given the highly articulated national policy against racially segregated education, the Commissioner of Internal Revenue was amply justified in concluding that petitioners were not "charitable" organizations within the meaning of Section 501(c)(3) or eligible for "charitable contributions" deductible under Section 170(c) of the Code. The origin, structure, and legislative history of those provisions demonstrate that Congress intended to grant the benefits of tax exemption and to permit deductibility of contributions only to those organizations whose operations are "charitable," as that is used at common law. Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924); Helvering v. Bliss, 293 U.S. 144, 147 (1934). H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). As the sponsor of a predecessor to the current exemption provision explained, the exemption was designed to aid institutions devoted exclusively to the relief of suffering and to all things which commend themselves to every charitable and just impulse. 44 Cong. Rec. 4150 (1909). Accordingly, both the Internal Revenue Service and the courts have viewed the tax statutes against their background in the law of charitable trusts, and have properly ascribed primacy to the term "charitable" in the tax provisions. See Treasury Regulations on Income Tax (1954 Code), Sec. 1.501(c)(3)-1(d)(2).

The Service has accordingly ruled that, since private schools which practice racial discrimination are not classified as charities under the law of charitable trusts and violate sharply defined public policies, they provide no public benefit warranting the granting of a tax exemption and eligibility for deductible "charitable contributions" under Section 170. Rev. Rul. 71-447, 1971-2 Cum. Bull. 230. That position was first upheld in the seminal opinion of the three-judge district court in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), upon whose analysis we rely. There, the court found that there is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground. It accordingly held that exemptions under the Internal Revenue Code might properly be denied to any institution serving educational purposes that discriminates against students or applicants on the basis of race.

Apart from the decision below, the Green ruling has been followed in Prince Edward School Foundation v. United States, 478 F. Supp. 107 (D.D.C. 1979), aff'd, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981). These decisions are in accord with rulings of this Court sustaining the disallowance of tax deductions that would frustrate sharply defined state or national policy. Tank Truck Rentals v. Commissioner, 356 U.S. 30, 33-34 (1958); Textile Mills Corp. v. Commissioner, 314 U.S. 326 (1941). Indeed, since tax exemption and eligibility for deductible contributions constitute an indirect government subsidy in the form of matching grants, the Commissioner could well conclude that conferring tax exempt status upon racially discriminatory private schools would pose constitutional problems that could be avoided by requiring nondiscrimination as a prequisite to tax exemption. "Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish'" Norwood v. Harrison, 413 U.S. 455, 465 (1973), quoting Lee v. Macon County Board of Education, 267 F. Supp. 458, 475-476 (M.D. Ala. 1967).

Recent congressional actions confirm that the nondiscrimination principle comports with Congress' understanding of the Code's requirements. "In view of national policy," in 1976 Congress added to the Code 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. Act of Oct. 20, 1976, Pub. L. No. 94-658, Section 2(a), 90 Stat. 2697. The accompanying Senate Report, 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. Although subsequent congressional action has temporarily stayed the employment of proposed new procedures to enforce the policy of the Internal Revenue Service, Congress has expressly sanctioned the continuation of the substantive and procedural policies enforced in these cases. See Sections 103 and 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. Both Goldsboro Christian Schools and Bob Jones University seek to excuse their failure to satisfy the

nondiscrimination principle on the ground that their discriminatory practices are the outgrowth of sincere religious faith. But as the court of appeals correctly concluded, the unquestioned First Amendment right to free religious belief and exercise does not carry with it a guarantee of any person's or corporation's entitlement to tax-exempt status. The Internal Revenue Service's ruling does not purport to interfere with petitioner's right to espouse and teach religious doctrine, or with the right of any student to adhere to such doctrine. 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 Norwood v. Harrison, 413 U.S. 455, 464 n.7, 468-470; Runyan v. McCrary, 427 U.S. 160, 175-179 (1976). Hence, the Service's ruling does not violate the Free Exercise Clause of the First Amendment.

Nor does the nondiscrimination principle of the Internal Revenue Service transgress values under the Establishment Clause. As the court below properly observed (No. 81-3 Pet. App. A15-A16), "the uniform application of the rule to all religiously operated schools [as well as nonreligious schools] avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief (emphasis supplied)." Hence, the Service's policy does not prefer one religion over another or provoke entanglement in matters of church doctrine that would implicate the Establishment Clause.

NONPROFIT PRIVATE SCHOOLS THAT, ON THE BASIS OF RELIGIOUS DOCTRINE, PRACTICE RACIAL DISCRIMINATION, DO NOT QUALIFY AS TAX-EXEMPT ORGANIZATIONS UNDER THE INTERNAL REVENUE CODE

A. The Commissioner of Internal Revenue acted within his statutory authority in ruling that racially discriminatory private schools are not tax-exempt under Section 501(c)(3) and are therefore not eligible for charitable contributions deductible under Section 170

1. These consolidated cases present an important question with respect to the Internal Revenue Service's statutory authority to administer the law governing the tax-exempt status of private schools. As this Court observed in an earlier procedural chapter of this litigation involving petitioner Bob Jones University, an organization's receipt of tax-exempt status under Section 501(c)(3) of the Internal Revenue Code and its consequent inclusion in the Internal Revenue Service's Cumulative List of Organizations described in Section 170(c) "assures potential donors in advance that contributions to the organization will qualify as charitable deductions under §170(c)(2)" <u>Bob Jones University</u> v. <u>Simon</u>, 416 U.S. 725, 729 (1974). Because the Service generally permits a donor to rely on the Cumulative List, "appearance on the Cumulative List is a prerequisite to successful fund raising or most charitable organizations" (<u>id</u>. at 729-730).

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Tax-exempt status under Section 501(c)(3) and eligibility for tax deductible charitable contributions constitutes a substantial financial benefit [and form of government support]. To begin with, such status confers exemption from income taxes on net income, the federal social security taxes (26 U.S.C. 3121(b)(8)(B)), and the federal unemployment taxes (26 U.S.C. 3306(c)(8)). But more importantly, an organization's tax-exempt status permits donors to reduce their tax liability by means of charitable contributions to the organization. Thus, the net cost of every dollar given to a Section 501(c)(3) organization by a donor in the 50% marginal tax bracket is only 50 cents. In real economic terms, the ability of such a donor to make a $1 contribution at a net cost of 50 cents therefore represents a form of indirect government support or "contribution" of 50 cents to the donee organization.

Thus, the tax laws make the government a partner in the multiple forms of private philanthropy that abound in the Nation. And such charitable pluralism is widely regarded as a healthy phenomenon providing important benefits to society as a whole. _/ Private philanthropy can accomplish tasks that are unsuited for the government to perform. But not all forms of private philanthropy are eligible for tax benefits. As we shall show in greater detail, the basis for conferring tax exemptions and benefits upon such private philanthropy was Congress' belief 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 other public funds, and by the benefits resulting from the promotion of the general welfare" H.R. Rept. No. 1820, 75th Cong., 3d Sess., p. 19 (1939).

Tax exemption under Section 501(c)(3) and eligibility for deductible contributions under Section 170 therefore rest on the sound congressional policy that a qualifying organization must promote the general welfare. This limitation, as we shall show, is consistent with the law of charitable trusts, that a "charitable" trust is one formed to serve the general welfare and

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_/ See Saks, The Role of Philanthropy: An Institutional View, 46 Va. L. Rev. 516, 524 (1960); Stone, Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy, 1968 S. Calif. Tax Inst. 2-7; 4 Report of the Royal Commissioners on Taxation [Canada], p. 132 (1967).

100 years ago in *Ould* v. *Washington Hospital for Foundlings*, 95 U.S. 303, 311 (1877), "A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."

2. Here, petitioner Goldsboro Christian Schools concedes (Pet. 6) that it "has maintained a racially discriminatory admissions policy since its founding." It simply refuses to admit black students. Although petitioner Bob Jones University maintained a similar discriminatory admissions policy prior to 1971, it now denies admission to any applicant known to be a partner in an interracial marriage, and enforces strict disciplinary rules against interracial dating (see pp. , *supra*). Thus, Bob Jones University imposes rules upon its student body based upon racial classifications.

Given petitioners' racially restrictive policies, it is plain that their activities do not promote the general welfare and the community at large. They are accordingly not "charitable" organizations within the meaning of the federal tax laws. Indeed, if Goldsboro's discriminatory practices had been committed by a nonsectarian institution with no claim that its racial policies were based on religious doctrine, it is settled that its exclusion of blacks would violate the equal right to contract provisions of Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1981, and subject it to a cause of action under that federal statute. *Runyon* v. *McCrary*, 427 U.S. 160 (1976). Putting aside petitioner Bob Jones University's similar claim based on religious doctrine, its policy of denying admission to partners in an interracial marriage and of expelling students who date or many outside their race likewise rests upon an invidious distinction drawn according to race that would violate 42 U.S.C. 1981, and render it liable to a similar suit.

Tillman v. Wheaton Haven Recreational Association, 410 U.S. 431 (1973) (white club member has cause of action under 42 U.S.C. 1981 and 1982 for expulsion for bringing black guests); Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975), cert. denied, 422 U.S. 1006 (1976) (white man denied employment because wife was black has cause of action under 42 U.S.C. 1981); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) (42 U.S.C. 1981 prohibits 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 inhibit[ed] [a black student's] ability to * * * engage in discussions and exchange views with other students * * * and "depriv[ed] [him] of the opportunity to secure acceptance by his fellow students on his own merits" held to violate right to equal protection). See also Loving v. Virginia, 388 U.S. 1 (1967) (law prohibiting interracial marriage held unconstitutional); McLaughlin v.

Florida, 379 U.S. 184 (1964) (law prohibiting interracial cohabitation held unconstitutional). _/

3. In light of the federal statutory prohibitions and public policy against racial discrimination by private schools, the court of appeals correctly held that the Commissioner of Internal Revenue acted within his statutory authority in determining that petitioners did not qualify as tax-exempt organizations under Section 501(c)(3). As we shall show, qualification for tax-exempt status under Section 501(c)(3) requires an organization to show that it is "charitable" as that term is understood at common law, i.e. that it benefits the community as a whole. But educational institutions such as petitioners that engage in racially discriminatory practices are not "charitable" in the common law sense. Accordingly, the exemption provisions under Section 501(c)(3) and the deduction for charitable contributions under Section 170 do not countenance the indirect government support in the form of federal tax

_/ Petitioner Bob Jones University's 1975 revision of its admissions and disciplinary rules rendered it no 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). On the contrary, 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 dating or marriage (J.A. A53-A54, A208-A209). Accordingly, the court of appeals correctly pointed out (81-3 Pet. App. A9-A-10), petitioner's policy of denying admission to partners in an interracial marriage and of expelling students who date or marry outside of their race rests, as did its prior policies, upon an invidious distinction drawn according to race. See Loving v. Virginia, supra, 379 U.S. 184. For present purposes, petitioner Bob Jones University's racial restrictions are therefore comparable to petitioner Goldsboro's absolute ban on the admission of blacks. Thus, the fact of petitioners' racially discriminatory policies is beyond dispute. Cf. 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) (Rehnquist, J., dissenting) (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).

clusively 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 Section 2055 (estate tax charitable deduction), 2522 (gift tax charitable deduction). Those provisions are construed in pari materia. Bob Jones University v. Simon, supra, 416 U.S. at 727-728 & n.1; Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 29, n.1; (1976).

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 the Commissioner 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 to express the basic common law concept" of charity. The primacy of the charitable requirement is further shown "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

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_/ 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.

charitable contribution." (1971-1 Cum. Bull. at 230). Since "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" (id. at 230-231). _/

2. The history of the tax exemption provisions lend strong support to the Commissioner's ruling position. They show that in enacting the exemption for charitable organizations, Congress intended to benefit only those organizations whose operations are beneficial to society as a whole, i.e., "charitable," as that term was understood at common law. Section 501(c)(3) has its roots in Section 32, Act of August 27, 1894, 28 Stat. 556, and was carried forward, unchanged in substance, into the Corporation Excise Tax Act of Aug. 5, 1909, 36 Stat. 113, Section 38. _/ In its initial version, the statute exempted from tax "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes * * *." That enumeration was in accord with Lord MacNaughten's authoritative collation of common law charities in Commissioners for Special

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_/ See Restatement, Trusts (Second), Section 377, comment (1959): "A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid."

_/ Earlier income taxes were originally imposed only upon individuals, Section 49, Act of Aug. 5, 1861, 12 Stat. 292, 309, and subsequently only upon individuals and certain specified corporations, Sections 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).

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.), Section 368. _/ Thus, the term "charitable" is used "in its generally accepted legal sense" (Treasury Regulations, Section 1.501(c)(3)-1(d)(2), and not in the popular sense such as benevolence to the poor. Accord, Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278, 1286-1290 (D.C. Cir. 1974), vacated and remanded on other grounds, 426 (1976), see Reiling, Federal Taxation: What is a Charitable Organization, 44 A.B.A.J. 525, 527 (1958).

The legislative history of the tax exemption provisions likewise demonstrates that Congress intended to limit their

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_/ The terms of the exemption have been continued without basic change in all subsequent income tax acts. The first modern income tax statute, Act of Oct. 3, 1913, c. 16, 8 Stat. 114, Section 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 1918 carried forward that exemption in identical terms. Section 11(a), Act of Sept. 8, 1916, 39 Stat. 756, Section 231(6), Revenue Act of 1918, 40 Stat. 1057. By Section 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. 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 income deduction for charitable contributions originated in Section 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, supra, Federal Taxation: What is a Charitable Organization?, 44 A.B.A.J. 525.

application to those organizations that further the traditional charitable objects of society as a whole and thereby diminish the burdens of government. As the sponsor of the 1909 tax exemption statute observed, the provision 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" (emphasis supplied). 44 Cong. Rec. 4150 (1909). Similarly, when Congress amended the provision for charitable deductions to confine its application to gifts made to domestic institutions (by Section 23(o), Revenue Act of 1938, ch. 289, 52 Stat. 447), the accompanying House Committee Report (H.R. Rep. No. 1860) 75th Cong., 3d Sess. 19 (1938), explained:

> 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.

3. The decisions of this Court confirm the primacy of the "charitable" requirement under Section 501(c)(3). In Helvering v. Bliss, 293 U.S. 144 (1934), the Court emphasized the "charitable" requirement by observing that "Congress, in order to encourage gifts to religious, educational and other charitable objects, granted "Congress, in order to encourage gifts to religious, educational and other charitable objects, granted the privilege of deducting such gifts from gross income * * * (emphasis supplied). Thus, the fact that the statute speaks of "corporations * * * organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes" does not, as petitioners would

have it, mean that each one of those terms describes a mutually exclusive tax-exempt category. Accordingly, an organization is eligible for tax-exempt status under Section 501(c)(3) only if its operations are "charitable," i.e., of benefit to society as a whole. See Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924) ("* * * [e]vidently the exemption [was] made in recognition of the benefit which the public derives from corporate activities of the class named, and [was] 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). Otherwise, a school organized to train political assassins or to teach genocide, an organization preaching a religion devoted to the illegal shipment of arms or based upon other sacraments that constitute crimes, or a scientific organization devoted to the development and distribution of illegal drugs, all would be exempt from tax and eligible for deductible charitable contributions as respectively "educational," "religious," "scientific" organizations. Congress surely never intended the government to provide indirect financial support for criminal activities or for organization whose aims are contrary to public policy. _/

The courts of appeals have likewise viewed the tax exemption provisions as consistent with the common 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

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_/ As the three judge district court in Green v. Connally, supra, 33 F. Supp. at 1160, put it: "This public policy doctrine operates as a necessary exception to or qualifier of the precept that in general trusts for education are considered to be for the benefit of the community. Otherwise, for example, Fagin's school for pickpockets would qualify for a charitable trust."

look to established [trust] law to determine the meaning of the word charitable.'"). Accord: International Reform Federation v. District Unemployment Board, 131 F.2d 337 (D.C. Cir. 1942). _/

Finally, as the court below in Bob Jones University pointed out (No. 81-3 - Pet. App. A7-A8, n.6), the structure of the statutory framework itself supports the correctness of the Commissioner's ruling position that an organization seeking tax-exempt status under Section 501(c)(3) must show that it is "charitable," whatever the particular nature of its activities (educational, religious, scientific, etc.) might be. Thus, Section 170(a) and (c) the companion provision that confers an income tax deduction to donors to Section 501(c)(3) organizations, characterizes the deduction as for a "charitable contribution." Indeed, the language of Section 170(c)(2)(B), which defines in part the type of organization eligible for gifts of deductible "charitable contributions," tracks almost verbatim the text of Section 501(c)(3). In these circumstances, it is plain that the "charitable" requirement is the primary threshold test for qualification for tax exemption under Section 501(c)(3) and eligibility for deductible contributions under Section 170. _/

_/ In International Reform Federation, the District of Columbia Circuit stated: (131 F.2d at 339):

> "That Congress had in mind these broader definitions is confirmed by the words used in the Act, for by its terms it embraces, religious, charitable, scientific, literary, or educational corporations, thus including within the exemption clause every nonprofit organization designed and operating for the benefit and enlightenment of the community, the State, or the Nation--in short, to apply the exemption to those organizations commonly designated charitable in the law of trusts."

_/ See also Sections 545(b)(2), 556(b)(2), 873(b)(2), 882c)(1)(B), all of which use the term "charitable contribution. Section 642(c) confers a deduction to an estate or trust for "Amounts Paid or Permanently Set Aside for a Charitable Purpose" Cf. Sections 501(h) and 4911, which impose 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).

C. A private school that practices racial discrimination does not qualify for tax exempt status under Section 501(c)(3) and eligibility for deductible charitable contributions under Section 170 because it is not organized and operated for "charitable" purposes as that term is understood at common law

1. As we have shown (<u>supra</u>, pp.), Congress intended that an organization seeking tax-exempt status under Section 501(c)(3) and eligibility for deductible charitable contributions must be "charitable" in the broad common law sense of that term, <u>i.e.</u>, it must benefit society as a whole. It is plain, however, that a private school that maintains a racially discriminatory admissions policy or other racially restrictive practices, is not beneficial to the community at large and is therefore not "charitable" as that term is understood at common law.

This proposition follows from the fundamental principle of the law of trusts that all charitable trusts, eduational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy. <u>Ould</u> v. <u>Washington Hospital for Foundlings</u>, <u>supra</u>, 95 U.S. 303; Restatement, Trusts (Second), Section 377, Comment c (1959). Accordingly, the development of a clearly articulated public policy against racial discrimination in education has led to a corresponding change in the common law of educational trusts. After reviewing the common law decisions dealing with trusts established for the purpose of providing for racially discriminatory private education, the three-judge district court in <u>Green</u> v. <u>Connally</u>, 330 F. Supp. 1150 (D.D.C. 1971), concluded that "The cases indicate a trend that racially discriminatory institutions may not validly be established or maintained even under the common law pertaining to educational charities (footnote omitted)" (<u>id</u>. at 1160). Thus, the district court in <u>Green</u> pointed out that the courts have nullified racially discriminatory bequests to educational institutions (Howard Savings Institution of Newark, New Jersey v. Peep, 34 N.J. 494, 170 A.2d 39 (1961)), have freed university trustees from racial restrictions in their charter (Coffee v. William Marsh Rice University, 408 S.W.2d 269 (Tex. Civ. App. 1966)), and have generally thwarted enforcement of racially discriminatory bequests in private education. See, e.g., Evans v. Abney, 396 U.S. 435 (1970); Commonwealth of Pennsylvania v. Brown, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968); Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967).

In these circumstances, it was well within the statutory authority of the Commissioner of Internal Revenue to conclude that a private school that practices racial discrimination either in its admissions policy or in its other governing rules cannot qualify for tax exempt status under Section 501(c)(3). Tax exemption under Section 501(c)(3) requires organization and operation for "charitable" purposes as that term is understood at common law. Thus, once the common law courts developed a virtually unanimous body of decisional law holding that racially discriminatory bequests and trusts in the context of private education were not "charitable," the Commissioner of Internal Revenue had ample legal basis to exercise his authority to "prescribe all needful rules and regulations" (26 U.S.C. 7805(a)) to issue a comparable ruling for federal tax purposes.

Indeed, the Commissioner's ruling in 1970 that racially discriminatory private schools were not "charitable" and therefore not eligible for tax-exempt status and deductible charitable contributions was presaged by the 1959 revision (24 Fed. Reg. 5217.5219) of the Treasury Regulations under Section 501(c)(3). In promulgating Section 1.501(c)(3)-1(d)(2) of those Regulations, the Treasury recognized that the term "charitable" is "'so general * * * as to render an interpretative 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). See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 29 (1976). Thus, the Regulations provide in pertinent part:

170(c)(2). _/ Given the highly articulated body of common law rejecting racially discriminatory bequests trusts as "charitable" and the Treasury's implementation of those principles in construing the federal tax exemption provisions, it cannot be

_/ Petitioners point out (81-1 Br. 20-25; 81-3 Br. 14-16) that 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 contribution deduction for a bequest for the construction of a community auditorium, on the basis that Congress might properly be classified as charitable at common law."

But the authoritative force of the outstanding Regulation is not undermined by the fact that it represents a change from its predecessors. The outstanding Regulation "'implement[s] the congressional mandate in some reasonable manner' * * *." Hence, 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 and correct its position 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 US. 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).

said that no "'fair warning'" has been given "of the bounds of 'Federal public policy'" (No. 81-3 34). _/

2. The Commissioner's ruling finds further support in the statutory right "[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), this Court held that Section 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are blacks. As the Court there concluded (id. at 172-173), "It is apparent that the racial exclusion practiced by the [schools] amounts to a classic violation of §1981. The parents * * * sought to enter into contractual relationships.

_/ See, e.g., Rev. Rul. 71-447, supra; Rev. Rul. 67-325, 1967-2 Cum. Bull. 113 (organization providing free recreational facilities restricted to less than the entire community on the basis of race is not entitled to Section 501(c)(3) exemption or to deducitibility of charitable contributions); Rev. Rul. 69-545, 1969-2 Cum. Bull. 117 (organization providing hospital care on a nonprofit basis for members of its community furthers purpose considered charitable in the generally accepted legal sense and therefore is eligible for Section 501(c)(3) exemption; see Simon v. Eastern Kentucky Welfare Rights Org., supra, 426 U.S. 26); Rev. Rul. 76-442, 1976-2 Cum. Bull. 148 (organization providing free tax and estate planning services to encourage donations to charitable organizations is not engaged in a charitable activity in the generally accepted legal sense and therefore is not entitled to Section 501(c)(3) exemption). 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, Sections 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).

* * * for educational services * * *. But neither school offered services on an equal basis to white and nonwhite students. * * * The * * * conclusion that §1981 was thereby violated follows inexorably from the language of that statute as construed in Jones [v. Alfred H. Mayer Co., 392 U.S. 409 (19)] Tillman [v. Wheaton-Haven Recreation Assn., 410 U.S. 431 (1973)], and Johnson [v. Railway Express Agency, 421 U.S. 454 (19)]." In so holding, the Court rejected the schools' 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).

Putting aside petitioners' claims that their racial policies were based on religious doctrine, _/ it seems clear that 42 U.S.C. 1981, as construed by Runyon, makes illegal their racially discriminatory practices and subjects them to damage suits by parties injured by such practices. And surely petitioners'

_/ We discuss petitioners' First Amendment claims at pages ____, infra.

To be sure, the Court pointed out in Runyon that the case did not "present the application of §1981 to private sectarian schools that practice racial exclusion on religious grounds (emphasis supplied; footnote omitted) (427 U.S. at 167). Thus, Runyon does not speak to petitioners' First Amendment claims. But if, as we submit, the decision below properly rejected petitioners' First amendment claims, those claims would not constitute an effective defense in a Section 1981 suit, and the statute would therefore be fully applicable. Thus, the Court's statement in Runyon serves only to identify the issue there presented; it does not imply, as petitioners assert (   ) that Section 1981 is not applicable to a sectarian school. See Fielder v. Marumsco Christian School, 631 F.2d 1144, 1150-1151 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 326 (5th Cir. 1977) (Roney, J., dissenting), cert. denied, 434 U.S. 1063 (1978).

Moreover, the Court in Runyon did reject a comparable First Amendment claim based upon freedom of association. As the Court there stated (427 U.S. at 176):

> From this principle it 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. And even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts." Id. at 470. In any event, as the Court of Appeals noted, "there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma." 515 F.2d, at 1087.

violation of 42 U.S.C. 1981 is relevant in any determination whether they are "charitable" for purposes of tax exemption under Section 501(c)(3) and eligibility for deductible charitable contributions under Section 170(c). An educational institution that maintains policies that are prohibited by federal civil rights statutes cannot be deemed to benefit society as a whole and is therefore not "charitable" under the Internal Revenue Code. Thus, Bob Jones University's claim (Br. 20 n. 19; 29) that it has not been charged with violation of any federal statute does not mitigate the illegality of their conduct under Section 1981. Rather, it simply reflects the fortuity that none of its applicants excluded on racial grounds (see J.S. A89-A90), nor any student expelled for participation in, or advocacy of, an interracial association (see 81-3 Pet. App. A4), sought to press their claim in a suit under Section 1981. See Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1150-1151 (4th Cir. 1980).

too far — what about sexual discrimination

3. In our view, the common law decisions rejecting petitioners' racially restrictive policies as the proper subject of a charitable educational trust and the illegality of such policies under Section 1981 offer sufficient justification for the Commissioner's ruling that such practices are incompatible with tax exempt status and eligibility for deductible charitable contributions. But the fact that tax exemption and eligibility for deductible charitable contributions represent a form of indirect government subsidy of an educational institution is another independently compelling ground in support of the decision below.

do we need want to make this argument?

does this mean gov. is supporting religious schools? will it give Civil Rights groups handles to get at all 501(c)(3)s?

In Brown v. Board of Education, 347 U.S. 483 (1954), and Bolling v. Sharpe, 347 U.S. 497 (1954), this Court proclaimed that the maintenance of a racially segregated school system by a state or federal authority abridges the constitutional right of

501(c)(3) if school discriminates against women/men does that mean it is federally supported + must follow civil rights laws when it receives no other federal aid?

black school children to the equal protection of the laws. In so holding, this Court stated that education "is required in the performance of our most basic responsibilities, even services in the armed forces. It is the very foundation of good citizenship" (id. at 493). In Bolling v. Sharpe, supra, 347 U.S. at 500, the companion case to Brown applying the prohibition against school segregation to the federal government through the Fifth Amendment, this Court declared that "[s]egregation in public education is not reasonably related to any proper governmental objective."

Although Brown involved segregated public education, its equal protection rationale prohibits state aid to racially restricted private education. Thus, the Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools. See cases cited in Norwood v. Harrison, 413 U.S. 455, 463 n.6 (1973). There, the Court struck down a state program under which students borrowed textbooks without regard to whether the students attended private schools with racially discriminatory policies. As the Court stated in Norwood, "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish' Lee v. Macon County Board of Education, 267 F. Supp. 458, 475-476 (M.D. Ala. 1967). See also Griffin v. County School Board, 377 U.S. 218 (1964).

Here, it is beyond question that the federal government could not provide direct financial aid to petitioners. Their private bias cannot call on material aid from the state. But as we have pointed out (supra, p.   ), federal tax exempt status and eligibility for deductible charitable contributions represent significant indirect material aid in the form of matching grants. Petitioners dispute the effect of a tax exemption and claim (No. 81-1 Br. 42) that it "constitutes mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy" Walz v. Tax Commission, 397 U.S. 664, 691 (1970) (Brennan, J., concurring). See also id. at 676. This case, however, does not simply involve passive tax exemptions of the type involved in Walz in which the government arguably withdraws from the affairs of the affected institutions. As the three-judge district court correctly observed in Green v. Kennedy, 309 F. Supp. 1127, 1134 (D.D.C. 1970), "The support which is significant in the context of this controversy is not the exemption of the schools from taxes laid on their income, but rather the deductions from income tax available to the individual, and corporations, making contributions supporting the school." See also 81-3 Pet. App. A10-A11 n.7.

While we do not suggest that such indirect aid is, in all circumstances, constitutionally equivalent to the direct state aid that both the Constitution and federal statutes prohibit, _/ the Commissioner of Internal Revenue could well have concluded that prohibiting tax exemptions and eligibility for deductible charitable contributions for racially discriminatory private schools would avoid constitutional problems. In short, while the Commissioner's ruling position may not be constitutionally

_/ See Sections 401(c) and 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000c, 2000d. These statutes respectively call upon the government to terminate segregation in private schools "operated * * * predominantly from or through the use of governmental funds or property" and prohibit racial discrimination in "any program or activity receiving Federal financial assistance." By their terms, these statutes do not prohibit the indirect assistance provided by tax-exempt status and eligibility for deductible charitable contributions. Otherwise, there would be no need to identify the particular program or activity receiving federal financial assistance.

compelled, it forecloses the constititional challenge that would inevitably occur had he not so ruled. _/ Surely the Commissioner's statutory authority to promulgate "all needful rules and regulations" (26 U.S.C. 7805(a)) under the internal revenue laws encompass the power to construe the Internal Revenue Code in a manner that will insure that the government will not "induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish" (267 F. Supp. at 475-476).

4. Furthermore, as the court below pointed out (No. 81-3 Pet. App. A8), the Commissioner's ruling is buttressed by the well-settled rule that federal tax benefits are generally not allowable if they would frustrate public 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 rulemaking 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).

_/ Indeed, the Commissioner's ruling was issued after adopting the plaintiffs' position in the midst of the Green litigation. See p. , n. , supra.

Similarly, in <u>Tank Truck Rentals</u> v. <u>Commissioner</u>, 356 U.S. 30, 33-34 (1958), the Court held that fines paid for violations of state highway weight limits were not deductible as "ordinary and necessary" business expenses. "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." Accord: <u>Hoover Express Co.</u> v. <u>United States</u>, 356 U.S. 38 (1958); <u>McDonald</u> v. <u>Commissioner</u>, 323 U.S. 57 (1944); cf. <u>Commissioner</u> v. <u>Heininger</u>, 320 U.S. 467, 473-475 (1943), <u>Commissioner</u> v. <u>Sullivan</u>, 356 U.S. 27 (1958); see <u>Mazzei</u> v. <u>Commissioner</u>, 61 T.C. 497 (1974); <u>Turnipseed</u> v. <u>Commissioner</u>, 27 T.C. 758 (1957).

The rationale of the <u>Tank Truck Rentals</u> decision is equally applicable here. Just as the Court refused to permit a tax deduction for a fine because the deduction would lessen the economic impact of the fine and thereby "frustrate sharply defined national or state policies proscribing particular types of conduct," here, too, allowance of tax exemptions and eligibility for deductible charitable contributions for racially restrictive private schools such as petitioners would undermine the national policy against support for racial segregation of schools, public or private. Since the prupose of the tax exemption provisions for charitable organizations is to aid those institutions that are "charitable" as that term is used at common law and serve society as a whole, the national policy against segregated education necessarily forecloses petitioners' eligibility for these benefits.

Contrary to Bob Jones University's assertion (Br. 20), the Commissioner's position based upon the <u>Green</u> rationale does not put in jeopardy the Section 501(c)(3) tax exemption of organizations that "discriminate on account of age, maintain discrimination in education supports the Commissioner's ruling that such discrimination is not "charitable." _/

5. Contrary to petitioner Bob Jones University's argument (Pet. 9), 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, "in 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,

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_/ Thus for example, in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*., which otherwise prohibits discrimination in employment on the basis of race and sex, contains an exception for employment of members of a particular sex based upon a bona fide occupational qualification. There is, however, no similar exception with respect to race. Similarly, there are a number of exceptions applicable to the federal prohibitions against sex discrimination in education set forth in Title IX of the Civil Rights Act of 1964. The federal statute bars sex discrimination in any "education program or activity receiving Federal financial assistance" (20 U.S.C. 1681(a)). But it applies in regard to admissions "only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education" (20 U.S.C. 1681(a)(1)). There are other exceptions for educational institutions of religious organizations with contrary religious tenets (20 U.S.C. 1681(a)(3)), educational institutions training individuals for the military (20 U.S.C. 1681(a)(4)), and for "any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex" (20 U.S.C. 1681(a)(5)). There are, however, no comparable exceptions in Title VI of the civil rights laws prohibiting racial discrimination. Hence, 42 U.S.C. 1981 absolutely prohibits the abridgment of the right of contract on account of race. Indeed, the Court has itself drawn distinctions between race discrimination and sex discrimination. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), it ruled that Section 2 of the Civil Rights Act of 1871, 42 U.S.C. 1985(c) provides a cause of action for damages caused by private conspiracies arising in a context of racial discrimination. However, the Court has also held that the same statute may not be invoked to redress violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*., in a case involving a claim of discriminatory employment practices on account of sex. See *Great American Fed. S&L Assn.* v. *Novotny*, 442 U.S. 366 (1979).

or religion." This 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) did not violate the Code, the Constitution, or Titlve VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. 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. Indeed, the Senate Report cites with approval the three-judge district court's decision in Green v. Connally, supra. _/ Congress was therefore well aware of the Service's policy implemented six years earlier 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 deductible charitable contributions under Section 170(c)(2). There is accordingly no basis for petitioner Bob Jones University's claim (Br. 22) that "The Green opinion calls for a plain usurpation of congressional law making powers by the non-elected public servants of the Internal Revenue Service".

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, does

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_/ Petitioner Bob Jones University (Br. 16 n.15) argues that the "mere reference [to Green] is not remotely an endorsement of Green's construction of §501(c)(3)." But the Senate Committee Report's citation of Green was clearly done in order to assimulate Congress' adoption of the nondiscrimination principle to social clubs to the Court's ruling with respect to private schools. The fact that the affirmance of Green by this Court "lacks the precedential weight of a case involving a truly adversary controversy" (Bob Jones University v. Simon, 416 U.S. at 740 n.11) does not detract from the force of the district court's opinion in Green.

not affect the resolution of these cases. By its terms, the Ashbrook Amendment prohibits the Internal Revenue Service from using any funds appropriated to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious, or church operated schools under section 501(c)(3) * * * unless in effect prior to August 22, 1978." The Dornan Amendment prohibits the funding of two proposed revenue procedures announced in 1978 _/ and 1979. Hence, by their terms, both the Ashbrook and Dornan Amendments are prospective in operation and have 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 confirms our reading of the legislation and Congress' intent to leave fully intact, and, indeed, to sanction, the existing nondiscrimination policies of the Service. On presenting his amendment, Representative Dornan stated (125 Cong. Rec. H5982 (daily ed. July 16, 1979)), "[l]et

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_/ 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 6155 (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."

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." That is precisely what is involved in the instant litigation.

D. The Commissioner's denial of petitioners' tax exemption because of their racially restrictive policies does not violate their right to free religious belief and exercise under the First Amendment

Both Goldsboro Christian Schools (Br. 31-44) and Bob Jones University (Br. 23-34) seek to excuse their failure to satisfy the nondiscrimination principle on the ground that their racially discriminatory practices are the outgrowth of sincere religious faith. But as the court of appeals correctly held (81-3 Pet. App. A13-A14; footnote omitted), "the government's rule would not prohibit [petitioners] from adhering to [other policy]. Abandonment of the policy would not prevent [petitioners] from teaching the Scriptural doctrine of nonmiscegenation. Nor is any individual student * * * forced to personally violate his beliefs; no student is forced to date or marry outside of his race. We think that these factors tip the balance in favor of the Service's nondiscrimination doctrine." Moreover, the Service's policy, applied evenhandedly to sectarian and nonsectarian schools, avoids government entangelement in matters

... and does not involve preference of one sect or doctrine over another. Hence, the court of appeals concluded that "the nondiscrimination policy also passes muster under the Establishment Clause" (*id.* at A14).

1. a. 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 (*Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940)), governmental interference with the dissemination of religious ideas (see *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Follett* v. *Town of McCormick*, 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." *Braunfeld* v. *Brown*, 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), appeal pending, No. 80-767, argued November 2, 1981. _/

Here, despite petitioners' claims 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

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_/ Thus, for example, we submit that the First Amendment would not protect from the tax on unrelated business income (see Sections 511-513 of the Code) a church which believed that it was its religious duty to conduct a business in competition with a particular company. See particularly Sections 512(b)(14) and 7605(c) of the Code.

corporation's right to free religious belief or exercise. Petitioners do not seek on religious grounds to limit their student body to members of a particular sect or to those who espouse particular beliefs. Rather, the focus of the policies at issue here is on racially discriminatory practices, not on beliefs. In requiring that petitioners maintain racially non-discriminatory policies as a prerequisite to tax-exempt status, the Service does not not purport to interfere with their right to espouse or teach 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

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_/ 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). Hence, "'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).

constitutional protections." * * * *Id*. at 470.
(Emphasis in original.)

b. *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, *supra*, upon which petitioners (81-1 Br. 33-34, 81-3 Br. 23 *et seq*.), are therefore distinguishable. In both of these cases, the infringement on the exercise of the individual's religion was far more burdensome than here. In *Sherbert*, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant in *Sherbert* was faced with a constitutionally unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. A similar choice was involved in *Thomas* v. *Review Board* No. 79-952 (Apr. 6, 1981), in which the petitioner terminated his employment when he was assigned to armament production. Petitioners face no similar choice here.

Similarly, in *Yoder*, this Court upheld the claim of members of the Old Order Amish sect that enforcement against them of a state compulsory formal education requirment after the eighth grade would violate the free exercise of their religion. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim that state formal education during the crucial adolescent years would expose the children to worldly influences, and thereby threaten the religious survival of the Old Order

Amish parents as well as their children. The choice faced by the Amish parents in *Yoder* thus was either to risk losing their children from their faith or to violate the law. No such choice need be made here. Although petitioners claim that their discriminatory practices are the product of religious belief, they are free to continue to maintain their racial restrictions and relinquish their claim to tax exemption and deductible charitable contributions. Unlike *Sherbert* and *Yoder*, the Service's policy does not threaten the integrity of petitioner's religious beliefs or obsevances. See also *McDaniel* v. *Paty*, *supra*; *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

2. Finally, the court of appeals correctly held (81-3 Pet. App. A15-A16) that the Service's policy did not transgress Establishment Clause values because it avoids excessive entanglement with religion by appyling its policy to all religiously operated schools (as well as nonreligious schools). Thus, contrary to petitioner Bob Jones University's contention (Br. 32) the Service's policy does not have "the effect of creating a religious preference" and "official hostility toward non-preferred religions." In enforcing its ruling, the only inquiry that the Service uniformly undertakes is the relatively narrow inquiry whether the school maintains racially neutral policies. Such an inquiry does not involve the government in preferring one religion over another, or even concerning itself with whether racial discrimination is motivated by religious belief. All private schools must demonstrate compliance with the nondiscrimination principle. Hence, the Service's policy does not violate the Establishment Clause. As the court of appeals pointed out (81-3 Pet. App. A16), "the principle of neutrality embodied in this Establishment Clause does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied." See

Gillette v. United States, 401 U.S. 437, 454-458 (1971). "And, the uniform application of the rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (81-3 Pet. App. A16; emphasis in original). Cf. Brown v. Dade Christian Schools, Inc., supra, 556 F.2d at 323-324 (Goldberg, J., concurring); Fiedler v. Marumsco Christian School, supra, 631 F.2d 1144. Accordingly, the minimum intrusion occasioned by the Commissioner's nondiscrimination policy does not violate the Establishment Clause.

CONCLUSION

The judgments of the court of appeals shoud be affirmed.

Respectfully submitted.

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*/ The Solicitor General is disqualified in these cases.