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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

LAWRENCE G. WALLACE
Acting Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

ROBERT S. POMERANCE
Attorneys

Department of Justice
Washington, D. C. 20530
(202) 633-2217

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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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 as a separate legal entity (Pet. App. 6a-7a: J.A. 5-6)

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. [illegible] (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 enterel judgment in its favor in that amount (J.A. [illegible]).

various degress (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

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

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

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_/ 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 (J.A. A89-A90).

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 avoids 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, Congress intended to deny petitioners tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 or status as eligible donees of charitable contributions deductible under Section 170(a) and (c)(2) of the Code. Constitutional provisions and federal statutes frowning on racial discrimination antedated the enactment of the predecessors to these twin tax laws, and since 1970, the Service has uniformly ruled that a private school will not qualify for their federal tax benefits unless it establishes that its admissions and educational policies are operated on a racially nondiscriminatory basis. 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. Equal protection precepts of the Constitution recognize 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)). As early as 1866, Congress acted in furtherance of these cherished precepts by ordaining racial equality in the

making and enforcing of private contracts. See Runyon v. McCrary, supra; 42 U.S.C. 1981.

Given the unequivocal constitutional and statutory policy against racially segregated education, the Commissioner of Internal Revenue acted permissibly 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 deny the benefits of tax exemption and deductibilty of contributions to organizations whose operations flouted norms of racial equality championed by the Constitution and federal statutes. See generally Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924); Helvering v. Bliss, 293 U.S. 144, 147 (1934). H.R. Rep. No. 1860,7th 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). It is implausible to impute to Congress an intent to confer prized tax benefits on organizations that defy the Nation's legal quest to conciliate rather than aggrevate racial divisions.

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Recent congressional actions confirm that the non discrimination principle comports with Congress and intent. "In view of national policy," in 1976 Congress added to the Code the provision now contined 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 discriminationagainst 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, 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 status permits donors

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.

ARGUMENT

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)" Bob Jones University v. Simon, 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" (id. at 729-730).

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.

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.

The reason for conferring tax exemptions and benefits upon private philanthropy was Congress' believe that "the Government is compensatd 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), and this understanding should inform the analysis of whether petitioners qualified as beneficiaries of 501(c)(3) and 170 of the Internal Revenue Code.

2. Here, petitioner Goldsboro Christian Schools concedes (Pet. 6) that it "has maintained a racially discriminatory admissions policy since its founding." It simply refused 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 they offend longstanding legal edicts. They are accordingly not "charitable" organizations within the intent 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 the 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. Florida, 379 U.S. 184 (1964) (law prohibiting interracial cohabitation held unconstitutional._/

_/ See footnote

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.

3. In light of the Constitutional and federal statutory prohibitions denouncing racial discrimination, 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). Congress intended to deny tax-exempt status under Section 501(c)(3) to organizations engaged in practices that profoundly conflict with the Nation's multiple legal norms of color-blindness. Educational institutions such as petitioners that engage in racially discriminatory practices fall outside the concept of "charitable" envisioned by Congress.

Petitioners' assertions that their discriminatory practices are the product of sincere religious faith are unavailing. 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 entitlement to tax-exempt status. As the court below properly pointed out in Bob Jones University (No. 81-3 Pet App. A15-A16), the Service's policy avoids excessive entanglement with religion by applying its policy to all religiously operated schools (as well as to nonreligious schools). The Service has not violated the Establishment Clause by preferring some religious groups over others. Moreover, the Service's policy does not compel petitioners or any other relgious institution to alter their religious beliefs. Requiring petitioners to show, as a condition to qualifying for the benefits of tax exemption and eligibility for deductible charitable contributions, that they are operating under racially non-discriminatory policies, does not encroach upon religious belief or otherwise offend the First Amendment.

B. Congress intended to deny tax-exempt status under Section 501(c)(3) and eligibility to receive deductible charitable contributions under Section; 170 to organizations that flagrantly violate longstanding legal policies of racial neutrality.

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 ex-

> 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. P[illegible]

purposes' as a 'charitable contribution.'" (1971-1 Cum. Bull. at 230). Since all charitable trusts, educational or otherwise, are subject to the requirement that the operation of the trust may not defy public policy as voiced in the Constitution or federal statutes, the Ruling holds that "a school not having a racially nondiscriminatory policy as to students is not charitable within the meaning of sections 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. 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 footnote this page

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 Public

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

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,

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).

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.

/ 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 organi[illegible]

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 opeated for "charitable" purposes.

1. Congress intended that an organization seeking tax-exempt status under Section 501(c)(3) and eligibility for deductible charitable contributions must be "chareitable". It is plain, however, that a private school that maintains a racially discriminatory admissions policy or other racially restrictive practices, is not "charitable" as envisioned by Congress because of deep and longstanding Constitutional and statutory prescriptions of racial equality. This conclusion is reinforced by the common law of educational trusts. After reviewing the common law decisions dealing with trust established for the purpose of providing for racially discriminatory private education, the three-judge district court in Green v. Connally, 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)" (id. at 1160). Thus the district court in Green pointed out that the courts have nullified racially

scriminatory 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).

The Commission of Internal Revenue thus properly discerned Congressional intent in concluding 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).

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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, non-sectarian 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.

* * * 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, _/ 42 U.S.C. 1981, as construed by Runyon, incorporated a federal policy frowning on racial discrimination. Petitioners' trespass on the aspirations 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 inconsistent with federal civil rights statutes was not envisioned byCongress as "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 disprove their exclusion from tax-exempt status.

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

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).

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Contrary to Bob Jones University's assertion (Br. 20), the Commissioner's position does not put in jeopardy the Section 501(c)(3) tax exemption of organizations that "discrimination on account of age, maintain unsafe or unhealthful working conditions, create any financial barrier to education, based on sex, or create any environmental disharmony." Nor does it suggest that "violation by a 501(c)(3) organization of zoning laws, building codes and myriad other state proscriptive laws would necessitate revocation of federal tax exemption" (ibid.; footnote omitted). The sole issue in this case is whether petitioners' racially discriminatory policies prevent them from qualifying as tax-exempt "charitable" organizations under Section 501(c)(3) of the Internal Revenue Code. And, we have shown that the broad and longstanding constitutional and statutory policies against racial discrimination supports the Commissioner's ruling that organizations that flout such policies are 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,

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

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-

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

of church doctrine, 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

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 -

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

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.

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.

LAWRENCE G. WALLACE */
Acting Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

ROBERT S. POMERANCE
Attorney

DECEMBER 1981

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*/ The Solicitor General is disqualified in these cases.