No. 81-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER GOLDSBORO CHRISTIAN SCHOOLS, INC.

WILLIAM G. MCNAIRY*
CLAUDE C. PIERCE
EDWARD C. WINSLOW
JOHN H. SMALL
S. LEIGH RODENBOUGH IV
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD
Post Office Drawer U
Greensboro, NC 27402
(919) 373-8850
Counsel for Petitioner
*Counsel of Record

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SUMMARY OF ARGUMENT

The exclusive authority to amend the requirements for qualification as a tax-exempt educational organization resides with Congress and not the executive branch. In addition, the "frustration of public policy" doctrine first enunciated in *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U.S. 30 (1958), does not require the denial of tax-exempt status to Petitioner Goldsboro Christian Schools, Inc. (hereinafter "Goldsboro"). Finally, the extension of tax-exempt status to Goldsboro is not barred by the equal protection component of the Fifth Amendment.

ARGUMENT

I. ANY CHANGE IN THE REQUIREMENTS FOR QUALIFICATION AS A TAX-EXEMPT EDUCATIONAL ORGANIZATION UNDER SECTION 501(c)(3) MUST BE MADE BY CONGRESS.

Goldsboro satisfies each requirement for qualification as a tax-exempt educational organization under Section 501(c)(3). Assuming *arguendo* that the statute incorporates the common law of charitable trusts, Goldsboro provides a "public benefit" and thus qualifies as a common law charity. Moreover, Congress has never ratified the IRS's denial of tax-exempt status to schools which, like Goldsboro, maintain racially discriminatory policies. Finally, only Congress, and not the IRS, has the authority to amend the requirements for qualifying as a tax-exempt educational organization.

Amicus Curiae Coleman (hereinafter "Coleman") argues at length that Section 501(c)(3) incorporates the common law of charitable trusts. Coleman Br. at 24-28. Coleman then argues that Goldsboro should be denied tax-exempt status under that common law doctrine because its racially discriminatory admissions policy is violative of "a clear federal public policy condemning racial discrimination in education." Coleman Br.

at 40.[1] The contentions made by Coleman are not supported by either the languge of Section 501(c)(3) or its legislative history. *See* Goldsboro Br. at 10-24. Moreover, even assuming *arguendo* that Congress intended to weave the common law of charitable trusts into Section 501(c)(3), Coleman's application of the standard to be followed at common law is misguided.

Goldsboro agrees with Coleman that an organization must provide some "public benefit" in order to qualify as charitable at common law. Coleman Br. at 26-27. Goldsboro also agrees with Coleman that an obvious corollary of this "public benefit" standard is that "the *purpose* of a charitable trust, educational or otherwise, may not be unlawful or against public policy." Coleman Br. at 28 (emphasis added). Indeed, this corollary has been uniformly recognized by both the commentators, *see, e.g.*, 4 A. Scott, *The Law of Trusts* § 377 (3d ed. 1967), and the courts, *see, e.g.*, *Ould* v. *Washington Hospital for Foundlings*, 95 U.S. 303, 311 (1877). The focus of this corollary, however, is on the "purpose" of the organization rather than on some policy of the organization incidental to the fulfillment of that purpose. *See Girard Trust Co.* v. *Commissioner*, 122 F.2d 108, 110 (3d Cir. 1941).

The now infamous Fagin's school for pickpockets, of course, does not qualify as a charitable organization under this standard because the *purpose* of the organization—to educate young boys in the fine art of picking pockets—flies in the face of a public policy that no doubt has been incorporated into the criminal code of every culture since the beginning of civilization.

The *purpose* of Goldsboro, on the other hand, 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

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[1] Federal policy with respect to racial discrimination, however, is anything but "clear" in the context of sectarian schools that practice racial discrimination on the basis of their sincerely held religious beliefs. *See* Goldsboro Br. at 38-41.

the ethics revealed in the Holy scriptures." (J.A. 6). This laudable purpose has been fulfilled by a school that maintains a regularly enrolled student body for kindergarten and grades one through twelve of approximately 750 students. (J.A. 6). In addition, throughout the tax years in question in this case, Goldsboro was certified by the North Carolina Department of Public Instruction as an "approved nonpublic school" which met the requirements of N.C. Gen. Stat. § 115-255. (J.A. 7). Clearly, Goldsboro satisfies the threshold requirement of providing that degree of "public benefit" or good to humanity necessary to qualify as a common law charity.

The "public benefit" resulting from Goldsboro's educational *purpose* is not destroyed by its incidental practice of racial discrimination in admissions. This point can best be illustrated by analogy. The Catholic Church is inalterably opposed to abortions. Federal public policy on this subject, as defined in *Roe* v. *Wade*, 410 U.S. 113 (1973), is just the opposite—a woman, in certain circumstances, has a constitutional right to an abortion if she so desires. Yet if a Catholic hospital refuses to permit abortions to be performed in its operating rooms, would the hospital lose its status as a common law charity because its policy on abortions violates federal public policy? The answer must be in the negative. Even though the hospital refuses to comply with federal public policy on abortions, it nevertheless qualifies as a charitable organization because of the obvious public benefit that arises from its care for the sick and infirm.

This distinction between "public policy" and "public benefit" was recognized many years ago by the Court of Appeals for the District of Columbia in *Pennsylvania Co. for Insurance on Lives and Granting of Annuities* v. *Helvering*, 66 F.2d 284 (D.C.Cir. 1933). In that case the government argued that a bequest to the American Anti-Vivisection Society of Philadelphia could not be treated as "charitable" because the tenets of the organization were in opposition to the governmentally approved practice of vivisection. In rejecting this proposition, the court stated:

> We are asked . . . to take judicial notice of the fact that the government itself approves the practice of vivisection in the interest of the public health . . . . But this . . . does not mean that we must condemn as outlaws those of contrary view. The question is not so narrow as this. The test is rather whether in the manner of the pursuit of the object sought by those associated in the society some good to humanity may not result.

Id. at 288-89. Similarly, the widespread condemnation of the racially discriminatory admissions policy followed by Goldsboro does not invalidate its qualification as a common law charity. If compliance with the majority view were a condition of tax-exempt status, the government would destroy the pluralism that the concept of common law charity, as well as Section 501(c)(3), is designed to foster. Whether Goldsboro should, nevertheless, be denied tax-exempt status because its admissions policy conflicts with federal public policy is a matter that should be left to Congress.[2]

Contrary to the assertion of Coleman, Congress has never explicitly ratified or approved the actions of the IRS with respect to the denial of tax-exempt status to racially discriminatory schools. Coleman attributes great significance to the eleven bills that have been introduced in Congress in an

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[2] Indeed, in its promulgation of Rev. Rul. 71-447, 1971-2 C.B. 230, and Rev. Rul. 75-231, 1975-1 C.B. 158, the IRS has resolved not one, but two, controversial social and political issues. First, in concluding that there is a federal public policy against the practice of racial discrimination by sectarian schools on the basis of their sincerely held religious beliefs, the IRS has ventured beyond its area of expertise to perform a delicate balancing of the First Amendment, on the one hand, and civil rights legislation born out of various constitutional provisions on the other. Second, the Service has proceeded outside its authority to determine that tax-exempt status should be denied to sectarian schools that practice racial discrimination. In resolving the first issue, the IRS has usurped the authority of the legislative and judicial branches to define federal public policy, and, in resolving the second issue, the IRS has effectively amended Section 501(c)(3)—a step only Congress can take.

effort to overturn the IRS's construction of Section 501(c)(3). Coleman Br. at 48. These ill-fated efforts, however, should carry little weight in this Court. In the leading decision on the subject of congressional ratification, this Court opined that "unsuccessful attempts at legislation are *not* the best of guides to legislative intent." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 382 n. 11 (1969) (emphasis added). *See also Waterman Steamship Corp.* v. *United States*, 381 U.S. 252, 269 (1965); *United States* v. *Wise*, 370 U.S. 405, 411 (1962).

Moreover, Coleman fails to mention the countervailing, and far more significant, failure of Congress to enact legislation affirming the IRS's position. On January 18, 1982, President Reagan forwarded to Congress a proposed bill to prohibit the granting of tax-exempt status to organizations maintaining schools with racially discriminatory policies, together with a letter urging prompt passage of the bill. Supp. Mem. of U.S. at 6a-11a. Congress received this bill at a time when the decision of the government to revoke Rev. Ruls. 71-447 and 75-231 had provoked great debate, both among the public and in Congress, about the propriety of denying tax-exempt status to racially discriminatory private schools. Congress' failure to take any action on this proposed legislation, therefore, speaks far more about congressional intent than the consideration of previous bills by no more than a congressional committee.

Coleman also relies on Congress' 1976 enactment of Section 501(i), Act of Oct. 20, 1976, Pub. L. No. 94-568, § 2(a), 90 Stat. 2697, as evidence of congressional approval of the IRS's treatment of racially discriminatory schools. Coleman Br. at 50-51. This amendment served only to deny tax-exempt status to social clubs otherwise entitled to exemption under Section 501(c)(7). Yet, Coleman finds in it congressional affirmation of the IRS policy now before this Court in a footnote reference to this Court's decision in *Coit* v. *Green* 404 U.S. 997 (1971) in the Senate Report, S. Rep. No. 94-1318, 94th Cong., 2d Sess. 8 (1976), *reprinted in* [1976] U.S. Cong. & Ad. News 6051. To the extent that this reference reflects anything more than simple awareness of, without reliance on, *Coit* v. *Green*, it is unfound-

ed because, at the time of the enactment of Section 501(i), this Court had already stated that its "affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy." *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n. 11 (1974). Therefore, the passage of Section 501(i) has absolutely no bearing on the separate issue of whether the IRS has the authority to deny tax-exempt status to racially discriminatory private schools.

Remarkably, Coleman finds congressional approval of Rev. Ruls. 71-447 and 75-231 in even the Dornan and Ashbrook Amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559 (1979). Coleman points to statements made by the congressional sponsors of the amendments concerning their prospective effect as evidence of congressional acquiescence in the action of the IRS prior to the formulation of its proposed procedures. Coleman Br. at 53-54. This argument is clearly disingenuous because the statements cited by Coleman reflect nothing more than a desire to maintain the status quo pending congressional consideration of the existing IRS revenue rulings. The statements in no way indicate approval of the existing rulings by the congressional sponsors of the Dornan and Ashbrook Amendments.

Indeed, in the course of congressional debate on the amendments, Congressman Dornan stated that the position of the IRS "flies in the face of original congressional intent." 125 Cong. Rec. H5980 (daily ed. July 16, 1979). In a speech preceding the vote on the Ashbrook and Dornan Amendment extensions, Congressman Ashbrook similarly concluded that Section 501(c)(3) made no provision for the denial of tax-exempt status to racially discriminatory private schools. *See* 126 Cong. Rec. H5200 (daily ed. June 18, 1980). Finally, Senator Helms, who introduced the Dornan Amendment in the Senate, stated that "the IRS has responded to the absence of specific statutory authority from Congress by constructing a theory which substantially distorts the legislative intent and clear meaning of section 501(c)(3) of the Internal Revenue Code." 125 Cong. Rec. S11835 (daily ed. Sept. 5, 1979).

Moreover, while Coleman argues that the legislative history of the Ashbrook and Dornan Amendments "reflects overwhelming congressional support, across a remarkably broad spectrum, for the IRS's continued authority to deny tax exemptions to schools engaged in racial discrimination," Coleman Br. at 54, every remark in favor of the IRS's position cited by Coleman can be countered by an equally eloquent and compelling remark in opposition to that position.[3] Thus, a review of the congressional response to the decision of the IRS to deny tax-exempt status to racially discriminatory private schools reveals a Congress deeply torn over an issue of enormous complexity and volatility.

This raging congressional debate makes such cases as *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981), *Haig* v. *Agee*, 453 U.S. 280 (1981), and *United States* v. *Rutherford*, 442 U.S. 544 (1979), inapposite because ratification arose in those cases out of complete silence and total inaction on the part of Congress. Moreover, unlike those cases, in the present case the only legislation to be passed into law as a result of Congress' examination of the questioned agency interpretation—the Dornan and Ashbrook Amendments—served to curb further implementation of the interpretation. Indeed, were this Court to find congressional ratification in the present case, it would effectively make the executive branch the tie-breaker on any issue over which Congress was divided.

In addition, the agency interpretations considered in *CBS, Inc.*, *Agee* and *Rutherford* were rendered with respect to

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[3] *See, e.g.*, 125 Cong. Rec. H5981 (daily ed. July 16, 1979) (remarks of Congressman Crane); 125 Cong. Rec. H5982 (daily ed. July 16, 1979) (remarks of Congressman Goldwater); 125 Cong. Rec. H5884 (daily ed. July 13, 1979) (remarks of Congressman Grassley); 125 Cong. Rec. H5885 (daily ed. July 13, 1979) (remarks of Congressman Duncan) (statement inserted in the record); 125 Cong. Rec. S11837 (daily ed. Sept. 5, 1979) (remarks of Senator Thurmond); 125 Cong. Rec. S11852 (daily ed. Sept. 5, 1979) (remarks of Senator Stennis) (statement inserted in the record).

issues squarely within the expertise of the respective agencies. In stark contrast, the IRS in the present case has proceeded far afield of its revenue collecting expertise to render an interpretation resolving complex considerations of both constitutional law and civil rights legislation that finds no support in the plain language of a tax statute. Therefore, the ratification cases relied upon by Coleman have no application in the present case.

The plain language of Section 501(c)(3) makes no provision for the denial of tax-exempt status to private schools that discriminate on the basis of race. While the imposition of this additional requirement for tax-exempt status may or may not be a wise one, the decision on that issue lies outside the province of the IRS. Instead, the task is one to be undertaken by Congress, and this Court has consistently recognized that fact. *See, e.g., United States* v. *Larionoff*, 431 U.S. 864, 873 n. 12 (1977); *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134-35 (1936). This axiom should apply with especial force in a case such as the present one, which involves a delicate balancing of competing social values.

By the same token, under the constitutional concept of the separation of powers, it is not up to this Court to remedy what it perceives to be the shortcomings of Congress. The Chief Justice succinctly stated this proposition in *Plyler* v. *Doe*, 457 U.S. ____, ____, 102 S.Ct. 2382, 2413 (1982) (dissenting opinion):

> The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem. Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy.

(Citations omitted). That the grant or denial of tax-exempt status to racially discriminatory private schools, may, and

probably will, have far-reaching social consequences, places this controversial issue squarely in the lap of Congress. As this Court recognized in *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272 (1979), "[t]he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility."

Moreover, this responsibility is one that Congress in the past has readily accepted with respect to the denial of tax-exempt status. Upon Congress' determination that certain Communist organizations were inimical to the preservation of our form of government, it acted to deny those organizations tax-exempt status. The mechanism for this action, however, was the enactment of a provision in the Internal Security Act of 1950, which is now codified as 50 U.S.C. § 790, denying tax-exempt status to any organization registered as a Communist organization or determined by the Subversive Activities Control Board to be a Communist-action, Communist-front, or Communist-infiltrated organization. This provision was later incorporated by a cross-reference in the Internal Revenue Code of 1954, which is now codified as 26 U.S.C. § 501(j). Thus, Congress directed the IRS to deny tax-exempt status to such organizations and left the internal security aspect of its decision to an administrative agency with expertise in that area. A similar course may be chosen with respect to racially discriminatory private schools. That choice, however, is one that Congress, and not the IRS or this Court, must make.

II. THE "FRUSTRATION OF PUBLIC POLICY" DOCTRINE DOES NOT REQUIRE THE DENIAL OF TAX-EXEMPT STATUS TO GOLDSBORO.

Coleman argues that the extension of tax-exempt status to Goldsboro violates the "frustration of public policy" doctrine delineated by this Court in *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U.S. 30 (1958). That doctrine, however, is a narrow one that this Court has never applied in cases analogous to the present one. More importantly, even were the doctrine applicable in the present context, it would not compel the denial of tax-exempt status to Goldsboro.

In *Tank Truck*, this Court refused to permit a taxpayer to deduct, as an ordinary and necessary business expense, fines paid for violating state maximum weight laws on public highways. The Court reasoned that the allowance of such a deduction would frustrate the public policy underlying the maximum weight laws by softening the punitive impact of the fines imposed for the violations. *Id.* at 35. This Court stated that it would "not presume that Congress, *in allowing deductions* for income tax purposes, intended to encourage a *business enterprise* to violate the declared policy of a State." *Id.* (emphasis added).

In *Commissioner* v. *Sullivan*, 356 U.S. 27 (1958), a companion case to *Tank Truck*, this Court considered the question of whether business expenses, such as wages and rent, incurred by a taxpayer in conducting an illegal gambling enterprise were deductible as ordinary and necessary business expenses. Even though the gambling activity engaged in by the taxpayer violated the criminal law and was clearly against public policy, the Court nevertheless held the expenses to be deductible, stating that the allowance of the wages and rent as deductions was not a "device to avoid the consequences of violation of the [gambling laws]." *Id.* at 29.

Coleman urges the Court to extend the *Tank Truck* doctrine to the determination of an organization's tax-exempt status, stating that "*Tank Truck* was not simply an interpretation of the deduction for 'ordinary and necessary' business expenses allowed under § 162 of the Code," but rather a broad-based proscription against the extension of tax benefits to any individual or entity that violates some public policy. Coleman Br. at 45. This proposition, however, finds no support in either *Tank Truck* itself or the other decisions in which this Court has considered the doctrine.

This Court has considered the *Tank Truck* doctrine only in cases involving the deductibility of business expenses. *See, e.g.*, *Commissioner* v. *Tellier*, 383 U.S. 687 (1966); *Hoover Motor Express Co.* v. *United States*, 356 U.S. 38 (1958); *Lilly*

v. *Commissioner*, 343 U.S. 90 (1952); *Commissioner* v. *Heininger*, 320 U.S. 467 (1943). Moreover, in *Tank Truck* and the other business expense deduction cases in which this Court has applied the doctrine, it has served to prevent an unintentioned reduction in the severity of the financial penalty imposed upon a wrongdoer by *some other state or federal law*. If applied to deny tax-exempt status, however, the doctrine would make the taxation imposed by the Internal Revenue Code the financial penalty. That result would violate the maxim laid down by this Court in *Commissioner* v. *Tellier*, 383 U.S. at 691, that "the federal income tax is . . . not a sanction against wrongdoing."

Furthermore, if the *Tank Truck* doctrine were to be applied to deny Goldsboro tax-exempt status, Goldsboro would then be subject to the federal income tax imposed on corporations. Goldsboro would receive tax benefits from deducting business expenses such as teacher salaries and from taking investment tax credits for the purchase of equipment such as buses. Coleman's argument taken to its logical conclusion would also require the denial of those tax benefits. Thus, Goldsboro would be subject to tax on its gross income. Neither this Court nor any other court has ever imposed such a penalty. In fact, such a result was clearly rejected by this Court in *Sullivan* and *Tellier*. Accordingly, the frustration of public policy doctrine should be left in the business expense deduction setting for which it was formulated.

In addition to considering the *Tank Truck* doctrine only in cases involving a business expense deduction, this Court has applied this doctrine only when the deduction would frustrate some public policy that has been "sharply defined" in a *criminal or punitive statute*. *See, e.g.*, *Hoover Motor Express Co.* v. *United States*, 356 U.S. at 39; *Tank Truck*, 356 U.S. at 34. Even in the lower court cases cited by Coleman, the taxpayer's action had violated some public policy defined in a criminal statute. *Holt* v. *Commissioner*, 69 T.C. 75 (1977), *aff'd*, 611 F.2d 1160 (5th Cir. 1980) (importation, distribution and sale of marijuana); *Mazzei* v. *Commissioner*, 61 T.C. 497 (1974)

(counterfeiting); *Turnipseed* v. *Commissioner*, 27 T.C. 758 (1957) (adulterous cohabitation).

Congress has similarly circumscribed the scope of the *Tank Truck* doctrine. In its 1969 and 1971 amendments to Section 162, Congress confined the doctrine to fines paid for violations of law and to illegal bribes, kickbacks and similar payments. *See* 26 U.S.C. § 162(c) & (f).

Goldsboro clearly has not violated any criminal provision. Indeed, the IRS, in the very revenue ruling on which Coleman places such great reliance, has conceded that "the operation of private schools on a discriminatory basis is not prohibited by Federal statutory law." Rev. Rul. 71-447, 1971-2 C.B. 230. Therefore, this Court should not apply the *Tank Truck* doctrine in this case.

Even if the *Tank Truck* doctrine is applicable in the present case, it does not support the denial of tax-exempt status to Goldsboro. Two conditions must be present before the "frustration of public policy" doctrine is applicable. First, a tax benefit may be denied only "if allowance of the [tax benefit] would frustrate sharply defined national or state policies proscribing particular types of conduct." *Tank Truck*, 356 U.S. at 33. There is no "sharply defined" public policy proscribing sectarian schools that discriminate on the basis of sincerely held religious beliefs. *See* Goldsboro Br. at 38-41.

Second, the allowance of the tax benefit must cause severe and immediate frustration of the sharply defined public policy. *See, e.g.*, *Commissioner* v. *Tellier*, 383 U.S. at 694; *Tank Truck*, 356 U.S. at 35. Unlike the tax deduction that was denied in *Tank Truck*, however, tax-exempt status would not be given to Goldsboro in return for or as a result of its racially discriminatory admissions policy—the conduct that Coleman argues violates public policy. Under Coleman's argument, Goldsboro's adherence to its racially discriminatory admissions policy would be more comparable to the operation of the illegal gambling enterprise considered in *Sullivan*, in which the gambling activities were clearly contrary to public policy.

But in that case, this Court nevertheless permitted the deduction of the business expenses incurred in the course of those activities. If Goldsboro were to be denied tax-exempt status, then it clearly could deduct wages and other operating expenses under *Sullivan*. There is no distinction, from a policy standpoint, between permitting Goldsboro to take business expense deductions and granting it tax-exempt status. Neither tax deductions, tax credits, nor tax exemptions cause severe and immediate frustration of any public policy against racial discrimination.

Moreover, as the district court noted in *Bob Jones University* v. *United States*, 468 F. Supp. 890, 903 (D.S.C. 1978), the petitioners' racial views result from their immutable religious beliefs and therefore are not encouraged by the extension to them of tax-exempt status. Thus, it must be concluded that there is no nexus between the benefit that Goldsboro derives from tax-exempt status and any public policy against racial discrimination.

III. THE FIFTH AMENDMENT DOES NOT BAR THE EXTENSION OF TAX-EXEMPT STATUS TO GOLDSBORO.

The extension of tax-exempt status to Goldsboro under Section 501(c)(3) does not violate the equal protection component of the Fifth Amendment that this Court has applied to prohibit "state action" on the part of the federal government in such cases as *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Thus, it is not unconstitutional to afford racially discriminatory schools tax-exempt status under Section 501(c)(3).[4]

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[4] This Court should not, however, even consider the Fifth Amendment contentions of Coleman because those contentions are raised for the first time in this Court. In No. 81-1, the United States stated in its brief to the district court that "the tax benefits attendant upon qualification as a Section 501(c)(3) organization do not constitute such federal financial expenditures as to be subject to constitutional limitations or limitations upon expenditures by Title VI of the Civil

Coleman argues that granting tax-exempt status to Goldsboro constitutes impermissible government aid under this Court's decision in *Norwood* v. *Harrison*, 413 U.S. 455 (1973). He emphasizes the economic equivalency of direct subsidies and tax exemptions. Coleman Br. at 58-59. This argument, however, misses the mark; the fact that the extension of tax-exempt status produces an economic benefit to Goldsboro does not establish "state action."

The concept of "state action" does not outlaw the extension of every benefit or service provided by a government to a racially discriminatory entity. Rather, as this Court noted in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), the relevant inquiry is whether the state has "so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a *joint participant* in the challenged activity." (Emphasis added). Thus, this Court has recognized that, unless the doctrine of "state action" is to be applied to the actions of virtually every individual and entity in this day of pervasive governmental influence and regulation, it must draw a line between that governmental conduct which is so tangible and significant that the state must be regarded as a supporter of private conduct and that governmental assistance which is so indirect and remote that it

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Rights Act of 1964." Brief of United States in Support of Motion for Partial Summary Judgment at 26 n.10, *Goldsboro Christian Schools, Inc.* v. *United States*, 436 F.Supp. 1314 (E.D.N.C. 1977). Based upon this disclaimer, neither Goldsboro nor the United States has made any argument that the Constitution compels the denial of tax-exempt status either in the courts below or in the briefs filed on petition for writ of certiorari to this Court. Under Supreme Court Rule 34.1(a), a "brief may not raise additional questions or change the substance of the questions already presented" in the petition for writ of certiorari. Accordingly, this Court has refused to consider constitutional claims raised for the first time in a brief filed in this Court. *See, e.g., Dothard* v. *Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975).

does not place the mantle of governmental authorization on the private conduct. *See, e.g., Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173-76 (1972).

This Court should draw that line between tax exemptions, which "constitute mere passive state involvement," and the "affirmative involvement characteristic of outright governmental subsidy." *Walz* v. *Tax Commission*, 397 U.S. 664, 691 (1970) (Brennan, J., concurring). The decisive difference between tax exemptions and direct subsidies has been eloquently stated by Justice Brennan in his oft-quoted concurring opinion in *Walz*, *id.* at 690:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfers. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.

This Court recognized a similar dividing line in both *Norwood* v. *Harrison*, 413 U.S. at 465, and *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 568 (1974), when it required a showing of "tangible financial assistance" and excepted from that standard "generalized services government might provide . . . in common with others" such as police and fire protection. The extension of tax-exempt status clearly falls within this exception because, as Professor Boris I. Bittker has noted, so-called "tax subsidies," such as tax exemptions, "are as ubiquitous as fire and police protection." Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 Yale L.J. 51, 68 (1972).

Indeed, given the universality of the tax benefits that might otherwise be regarded as impermissible state aid to discrimination and the several forms of discrimination prohibited by the Fifth Amendment, a line drawn to exclude all forms of tax benefits from the prohibitions of the Fifth Amendment is

essential. If the line is not drawn at that point, no principled distinction can be drawn between the extension of tax-exempt status to Goldsboro and the bestowal of any other tax benefit provided by the Internal Revenue Code upon any other taxpayer or between race discrimination and the other forms of discrimination prohibited by the Equal Protection Clause. For example, an insurance company that discriminates on the basis of wealth by denying coverage to any person below a certain income level would be denied any business expense deduction; a farmer's cooperative that discriminates on the basis of national origin by denying membership to persons of a particular ethnic group would lose that status; a mutual savings bank that discriminates on the basis of sex in its hiring practices would be denied the tax benefits granted to banking institutions under Subchapter H of the Code; and the private school in Texas that denies admission to alien children would be denied tax-exempt status.

Moreover, the taxpayer who discriminates would be denied all benefits to which it would otherwise be entitled under the Internal Revenue Code. For example, were Goldsboro denied tax-exempt status on Fifth Amendment grounds, and thereby subjected to taxation as a corporation, could it then claim an investment tax credit on the purchase of buses? The logical extension of the denial of tax-exempt status to Goldsboro on Fifth Amendment grounds would compel an affirmative answer to this question because an investment tax credit would be a more direct benefit to Goldsboro than the extension of tax-exempt status is now. While these examples are frightening, they are but the thin edge of the wedge for "the Internal Revenue Code is a pudding with plums for everyone," Bittker & Kaufman, *supra*, at 86, and the forms of discrimination prohibited by this Court are many. In fact, the incorporation of the equal protection component of the Fifth Amendment into the Internal Revenue Code would make the conduct of any private entity, including an individual taxpayer, "state action" subject to review by this Court.

Coleman attempts to minimize the far-reaching effect of any decision premised on Fifth Amendment grounds. First, he attempts to distinguish the Section 501(c)(3) exemption from other tax benefits, such as business expense deductions, on the ground that the former carries with it the imprimatur of governmental approval while the latter is merely a "neutral measurement of income . . . whose availability does not imply that the taxpayer measures up to a public interest standard of any sort." Coleman Br. at 62. This distinction, however, is a specious one. As one commentator has noted,

> [t]he government "approval" of the tax exempt organization does not necessarily indicate government approval of the discriminatory practice. The grant of § 501(c)(3) status is a recognition that the organization satisfies the requirements of being religious, charitable, or educational; it does not represent affirmative government approval of all aspects of the organization's programs.

Note, *The Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations*, 54 Notre Dame Law. 925, 937 (1979); *accord*, Bittker & Kaufman, *supra*, at 71. Indeed, the extension of tax-exempt status by the IRS no more indicates governmental approval of Goldsboro's admissions policies than it does governmental approval of a church's theology, a hospital's abortion policy or a school's curriculum.

Moreover, the distinction between various types of tax benefits on the basis of whether they constitute nothing more than a "neutral measurement of income" would leave such taxpayers as insurance companies, mutual savings banks, real estate investment trusts, Subchapter S corporations, cooperatives, farmers, qualified pension plans and underdeveloped-country corporations subject to the strictures of the Fifth Amendment because those taxpayers all benefit from tax statutes designed to do more than merely measure income. *See* Bittker & Kaufman, *supra*, at 73. Even the example of business expense deductions relied upon by Coleman is a poorly chosen one. The allowance of a business expense deduction is conditioned on a finding that that deduction does not frustrate

any sharply defined public policy. *See Tank Truck*, 356 U.S. at 33. Therefore, any recipient of a business expense deduction has clearly received a stamp of government approval according to the analysis suggested by Coleman.

Second, Coleman asserts that racial discrimination and tax-exempt status should be carved out of the Fifth Amendment for special treatment and that "other forms of discrimination or other deductions or exemptions" can then be determined on a case-by-case basis. Coleman Br. at 62. Yet he has not offered this Court any principled basis on which to make any distinction between racial discrimination and other forms of discrimination or between tax-exempt status and other tax deductions and exemptions. This failure is certainly not an oversight. At the very least, any decision premised upon the Fifth Amendment in the present case would apply in the context of gender-based discrimination because "[c]lassifications based upon gender, not unlike those based upon race," have been viewed with a jaundiced eye by this Court. *Personnel Administrator* v. *Feeney*, 442 U.S. at 273. Moreover, the case-by-case approach suggested by Coleman is inappropriate "[f]or in the long run constitutional adjudication that is premised on a case-by-case appraisal . . . cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause." *Rogers* v. *Lodge*, 458 U.S. ____, ____, 102 S.Ct. 3272, 3289 (1982) (Stevens, J., dissenting).

Accordingly, the efforts of Coleman to confine any decision based on the Fifth Amendment to racial discrimination practiced by organizations that have acquired tax-exempt status under Section 501(c)(3) ultimately come to naught. Therefore, this Court must consider the far-reaching consequences that any decision premised on the Fifth Amendment would have. The contemplation of that prospect compels the drawing of a line that leaves unconstitutional "state action" on one side and any tax benefit arising under the Internal Revenue Code on the other.

CONCLUSION

For the foregoing reasons the judgment of the Fourth Circuit should be reversed; this case should be remanded to the Fourth Circuit with directions to remand it to the district court for the entry of summary judgment in favor of Goldsboro on the issue of its qualification as a tax-exempt educational organization under Section 501(c)(3).

Respectfully submitted,

WILLIAM G. MCNAIRY*
CLAUDE C. PIERCE
EDWARD C. WINSLOW
JOHN H. SMALL
S. LEIGH RODENBOUGH IV
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD
Post Office Drawer U
Greensboro, NC 27402
(919) 373-8850

Counsel for Petitioner
*Counsel of Record