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,

Respondent.

BOB JONES UNIVERSITY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN JEWISH COMMITTEE, *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICI*

The American Civil Liberties Union ("ACLU") is a 250,000-member national organization dedicated to protecting the fundamental rights of the people of the United States, including two rights which would be abridged if the petitioners' arguments prevailed: the right to be free from government-supported racial discrimination, and the right to be free from governmental establishment of religion.

While recognizing the right to belong to and participate in private organizations, ACLU policy -- grounded in the Constitution's equal protection guarantee -- opposes the

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* The parties' letters consenting to the filing of this brief have been filed with the Clerk of the Court.

grant to any racially discriminatory organization of. . .

> ". . . public funds, tax exemption of income (investment or otherwise) or property, deduction of contributions, or any other governmental assistance, financial or otherwise (except for essential services available equally to all members of the community, such as police and fire protection and grants of corporate charters)."

As a champion of the rights protected by the First Amendment's religion clauses, ACLU maintains that the Free Exercise Clause does not require any exception from the foregoing policy for organizations whose racial discrimination is based upon sincere religious beliefs, and moreover that any such exception would violate the Establishment Clause.

The American Jewish Committee ("AJC") is a 50,000-member national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been AJC's conviction that the security and constitutional rights of American Jews can best be protected by helping to preserve the security and constitutional rights -- including specifically the right to equal educational opportunities -- of all Americans, irrespective of race, creed, or national origin. Therefore, AJC has participated in numerous cases before this Court involving racial discrimination by educational institutions. It is AJC's position that the denial of tax-exempt status to educational

institutions which are racially discriminatory as a matter of religious conviction does not violate the First Amendment's Free Exercise Clause.

Consistent with their policies, ACLU and AJC, amici curiae, urge this Court to affirm the decisions of the United States Court of Appeals for the Fourth Circuit in these now-consolidated cases.

SUMMARY OF ARGUMENT

The I.R.S. rule at issue here -- which denies tax-exempt status to all racially discriminatory schools -- is constitutionally mandated. The Fifth Amendment's equal protection guarantee prohibits the federal government from providing any tan-

gible assistance, including tax-exempt status, to any private schools that discriminate on the basis of race. Nor does the Constitution permit an exception to this absolute prohibition for sectarian schools whose racial discrimination derives from religious beliefs.

Even assuming arguendo that the I.R.S. rule imposed any burden on petitioners' religious practices, any such burden would be heavily outweighed, in the balancing analysis applicable to petitioners' free exercise claims, by the compelling, constitutionally mandated national interest in eliminating government-supported race discrimination in education.

In any event, the denial of government tax benefits does not

impose even an indirect burden upon any religious belief or practice asserted by petitioners; they remain completely free to inculcate whatever values they choose, including racial segregation, and their tax-exempt status is not conditioned on the violation of any practices dictated by the asserted religious beliefs. Bob Jones University's tax-exempt status is not conditioned upon any violation of the only religious duty it asserts -- namely, to eschew interracial marriage and dating relationships; Bob Jones does not assert any religious duty to shun racially integrated schools. Likewise, Goldsboro's tax-exempt status is not conditioned on abandonment of

the practice dictated by the religious belief which it asserts -- namely, complete separation of the races; even apart from the I.R.S. rule, the realities of twentieth-century American life and our national commitment to integration make it impossible for Goldsboro's students or their parents to realize wholesale separation from individuals of other races.

Far from violating the Establishment Clause, as petitioners contend, the uniform application of the I.R.S. rule to all racially discriminatory schools -- including sectarian schools whose discrimination is based on religious beliefs -- is the only policy consistent with the Establishment Clause. No Establish-

ment Clause problems arise merely because a government rule -- which, like the instant one, is neutral on its face and adopted for legitimate secular purposes -- coincides with the tenets of some religions but not others. The I.R.S. rule does not entail any excessively entangling governmental inquiries into sectarian schools' policies. On the contrary, such inquiries would be required by an exception for schools such as petitioners; such exception would force the government to ascertain the sincerity of the asserted religious beliefs and the tightness of the fit between such beliefs and the racially discriminatory policies allegedly compelled thereby. Furthermore, a

special exception for religiously-based discrimination would amount to special government financial assistance to religious institutions, a classic violation of the Establishment Clause.

Finally, because the Equal Protection guarantee permits even less government aid to any racially discriminatory school than the Establishment Clause permits to sectarian schools, and because excepting sectarian schools from the general denial of tax benefits to racially discriminatory schools would constitute impermissible aid for Establishment Clause purposes, a fortiori, such an exception would constitute impermissible aid for Equal Protection purposes.

ARGUMENT

I. THERE IS A COMPELLING, CONSTITUTIONALLY MANDATED NATIONAL INTEREST IN ELIMINATING ALL GOVERNMENT SUPPORT FOR RACE DISCRIMINATION IN ALL SCHOOLS.

Because "education is perhaps the most important function of state and local governments," and because the segregation of school children "may affect their hearts and minds in a way unlikely ever to be undone,"* any government support of race discrimination in the schools is diametrically opposed to "the compelling governmental interest in moving nearer [the] noble goal" of fulfilling "[t]he constitutional imperative to

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* Brown v. Board of Education, 347 U.S. 483, 493-94 (1954).

eliminate the badges of slavery...."* As this Court enjoined in Cooper v. Aaron, 358 U.S. 1, 19 (1958):

> "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Fourteenth Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the [Fifth Amendment's] concept of due process of law. Bolling v. Sharpe, 347 U.S. 497."

The Court more recently reaffirmed this fundamental principle in Norwood v. Harrison, 413 U.S. 455

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* Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 324 (5th Cir. 1977) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978).

(1973), which repeatedly stressed that the government may not give a racially discriminatory school any "tangible" aid, id. at 458, 464, 466:

> "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."
>
> Id. at 497.*

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* Accord, Adickes v. S.H. Kress & Co., 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring in part and dissenting in part):

> "Something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination.

(Footnote continued)

The elimination of government support for race discrimination in all schools, public and private, promotes the compelling national policy of eradicating race discrimination throughout our society in two specific ways. First, it discourages race discrimination in the private sector. Numerous judicial decisions

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(Footnote continued)

> Accordingly ... this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken .... These decisions represent vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination." [Citations omitted].

and legislative enactments manifest the growing national commitment to ending private race discrimination, a commitment which is especially strong in the sphere of education. For example, in Runyon v. McCrary, 427 U.S. 160 (1976), this Court held that § 1 of the 1866 Civil Rights Act, 42 U.S.C. § 1981, prohibits private, commercially operated, nonsectarian schools from denying admission on the basis of race.

Eliminating government support for race discrimination in education will also foster the all-important but elusive goal of achieving a racially integrated public school system by reducing the well-documented "white flight" phenomenon

-- i.e., the massive withdrawal of white children from the public schools and the concomitant establishment of segregated private schools in the wake of desegregation efforts. See, e.g., Norwood, supra, 413 U.S. at 457 (between 1964 and 1970, the number of private non-Catholic schools in Mississippi had increased from 17, with a total enrollment of 2,362, to 155, with a virtually all-white enrollment of approximately 42,000). The United States Commission on Civil Rights estimates that, as of 1979, 3,500 private schools had been created or substantially expanded concurrently

with public school desegregation.* "White flight" seriously hinders the integration of public school systems both by creating mostly- or all-black public schools, and by undermining financial support for public schools. Note, 1977 Duke L.J. 1219, 1252-53 & nn. 131-32 (1977); see Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833, 856-57 (E.D. La. 1967), aff'd, 389 U.S. 571 (1968):

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* See Proposed IRS Revenue Procedure Affecting Tax Exemption of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 479 (1979) (Statement of E. Richard Larson, on behalf of the American Civil Liberties Union).

"Unless this system [of private segregated schools] is destroyed, it will shatter to bits the public school system of Louisiana and kill the hope that now exists for equal educational opportunities for all our citizens, white and black."

II. THE GRANT OF TAX-EXEMPT STATUS CONSTITUTES CONSTITUTIONALLY PROHIBITED GOVERNMENT AID TO RACIALLY DISCRIMINATORY SCHOOLS.

The grant of tax-exempt status to racially discriminatory schools is constitutionally prohibited because it constitutes "tangible" government support for private racial discrimination. Norwood v. Harrison, supra, 413 U.S. at 458, 464, 466, 467.*

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* The degree of government support necessary for a conclusion that the Constitution prohibits such support

(Footnote continued)

In light of the compelling national policy and constitutional dictate to eliminate all government support for racially discriminatory schools, courts have appropriately been particularly ready to find that

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(Footnote continued)

is lower than the degree of government support necessary for a conclusion that the Constitution prohibits the underlying private discrimination. Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1189 (D. Conn. 1974). Nevertheless, courts have indicated that the grant of tax-exempt status may constitute such significant government support for private racial discrimination that even the private discrimination itself is thereby rendered impermissible. See, e.g., Jackson v. Statler Foundation, 496 F.2d 623, 628-30 (2d Cir. 1973), cert. denied, 420 U.S. 927 (1975); Falkenstein v. Dep't of Revenue, 350 F. Supp. 887, 888-89 (D. Or. 1972), appeal dismissed, 409 U.S. 1099 (1973).

any form or degree of government support to such schools -- including specifically the grant of tax-exempt status -- is impermissible. For example, in Pitts v. Department of Revenue, 333 F. Supp. 662, 668 (E.D. Wis. 1971), which held a state to be constitutionally barred from granting tax-exempt status to racially discriminatory educational and religious organizations, the court stressed:

> "[W]hatever its nature in other contexts, a tax exemption constitutes affirmative, significant state action in an equal protection context where racial discrimination fostered by the State is claimed."

Other federal courts have also "struck down tax exemptions for

institutions practicing the crudest form of racial discrimination -- the exclusion of blacks from attendance in schools or membership in clubs of a public nature." Jackson v. Statler Foundation, supra, 496 F.2d 623, 637 (2d Cir. 1973) (Friendly, J., dissenting from denial of reconsideration en banc), cert. denied, 420 U.S. 927 (1975) (emphasis supplied). See, e.g., Falkenstein v. Department of Revenue, 350 F. Supp. 887, 889 (D. Or. 1972), appeal dismissed, 409 U.S. 1099 (1973); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); cf. Green v. Connally, 330 F. Supp. 1150, 1169, 1171 (D.D.C. 1971), aff'd per curiam sub nom. Coit v. Green, 404

U.S. 997 (1971) (dicta).*

This Court has specifically held that a degree of government support which may be permissible in the context of other constitutional guarantees -- including, for example, the right to be protected from any governmental establishment of religion -- is impermissible in the context of

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* Compare Marker v. Shultz, 485 F.2d 1003, 1006-07 (D.C. Cir. 1973) (rejecting claim that grant of tax-exempt status to labor unions constitutes impermissible government support for union activities, and distinguishing Green and McGlotten, supra, because they involved "constitutional rights rooted in the Civil War and the Amendments passed in the wake of the Civil War, which operate to eradicate any government involvement whatever, however 'minimal and remote,' that might in any way foster racial discrimination in the schools.")

the constitutional guarantee of equal protection of the laws, at least when race discrimination is involved.*

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* See Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1135-36 (C.D. Cal. 1976), vacated on other grounds, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824, (1980):

> "A growing number of circuits openly express the view that the degree of involvement required for a showing of significant state involvement is less when racial discrimination is involved." [Citations omitted].

Thus, the Writers Guild opinion aptly dispels a shibboleth raised by petitioners when they argue that the denial of tax-exempt status to racially discriminatory private schools would require the denial of tax-exempt status to all other private organizations with practices contrary to public policy.

> "In short, it is one thing for a state to offer support to institutions which prac-

(Footnote continued)

In Norwood v. Harrison, supra, 413 U.S. at 470, the Court stated:

> "However narrow may be the channel of permissible state aid to sectarian schools... [the Establishment Clause] permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices...."

Accordingly, in Norwood the Court held that a state program of loaning

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(Footnote continued)

> tice racial discrimination or sex discrimination and quite another for the state to offer aid to hospitals which happen to have decided not to perform abortions, to schools whose disciplinary procedures would not meet constitutional requirements if practiced by government institutions, or to other institutions whose personnel procedures do not measure up to those required of government." 423 F. Supp at 1136.

school books to children in public and private (including sectarian) schools violated the Equal Protection Clause insofar as books were loaned to children attending racially discriminatory private schools, although the Court had previously upheld a virtually identical state program as against an Establishment Clause challenge in Board of Education v. Allen, 392 U.S. 236 (1968).

For this reason, the Court's holding that churches may be granted tax-exempt status consistent with the Establishment Clause, in Walz v. Tax Commission, 397 U.S. 664 (1970), is wholly inapposite to the separate question -- to be determined according to far stricter standards --

whether such tax-exempt status may be granted to racially discriminatory schools consistent with the Equal Protection Clause. A tax exemption which may survive the standard of "benevolent neutrality" applicable to government action for Establishment Clause purposes* may well be struck down under the standard of strict neutrality imposed upon government conduct for equal protection purposes.**

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* See Walz, supra, 397 U.S. at 669: "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

** See, e.g., Reitman v. Mulkey, 387 U.S. 369, 375-76 (1967).

The grant of tax-exempt status to racially discriminatory schools constitutes "tangible" -- and hence unconstitutional -- government support for two major reasons: first, because it is economically equivalent to a direct government subsidy; and second, because it confers an imprimatur of government approval.

This Court has recognized that "in practical terms" there is "little difference" between a state's giving to parents of private school students, on the one hand, a tax deduction for tuition and, on the other hand, a direct tuition grant:

> "The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools.

> The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sums he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that '[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education.'" Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 790-91 (1973).*

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* Similarly, the various separate opinions filed in Walz, supra, achieved unanimity on the point that the grant of tax-exempt status constitutes an economic benefit provided by the government: 397 U.S. at 674 (majority); at 690, n.9 (Brennan, J., concurring); at 699 (Harlan, J., concurring) (exemptions are "economically indistinguishable' from direct subsidies); at 701, 709 (Douglas, J., dissenting).

Because Nyquist struck down tax benefits to sectarian schools under the Establishment Clause, and because Norwood held that the Establishment Clause permits more government aid to private sectarian schools than the Equal Protection Clause permits to private racially discriminatory schools (413 U.S. at 470), it follows, a fortiori, that this Court must strike down any tax benefits to racially discriminatory private schools. E.g., Griffin v. County School Board, 377 U.S. 218, 233 (1964) (enjoining state program

providing tax credits to racially discriminatory private schools was "appropriate and necessary"). In Norwood, upholding the contention that government aid to racially discriminatory private schools "in any form is in derogation of the State's obligation not to support discrimination in education," this Court pointed out that it "has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools," and cited Green v. Connally, supra -- which barred the grant of tax-exempt status to racially discriminatory

schools -- in the corresponding footnote. 413 U.S. at 463 & n.6.*

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* In Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), appeals dismissed sub nom. Cannon v. Green, 398 U.S. 956 (1970) & Coit v.Green, 400 U.S. 986 (1971) (granting preliminary injunction to plaintiffs in the class action which ultimately led to the Green v. Connally decision), the court observed that the "significance of tax deductions as supportive of the pertinent activity [racially discriminatory private schools] can hardly be gainsaid, and may, indeed, be the subject of judicial notice," and recited detailed evidence specifically demonstrating that the schools' financial viability depends on the tax benefits. 309 F. Supp. at 1134-36. See generally Surrey, Tax Incentives as a Device for Implementing Government Policy; A Comparison with Direct Government Expenditures, 83 Harv. L. Rev. 705, 706-11 & nn. 1-2 (1970).

Even apart from its economic significance, the grant of tax-exempt status to racially discriminatory schools constitutes constitutionally barred tangible government support because tax exemptions "allow such organizations to represent themselves as having the imprimatur of the Government." McGlotten v. Connally, supra, 338 F. Supp. at 457. As the McGlotten opinion explained:

> "A contribution, even for an approved purpose, is deductible only if made to an organization of the type specified in [Internal Revenue Code] § 170 and which has obtained a ruling or letter of determination from the Internal Revenue Service. Thus the government has marked certain organizations as 'Government Approved' with the result that such organizations may solicit funds from the

general public on the basis of that approval." Id. at 456.

Accord, Falkenstein v. Department of Revenue, supra, 350 F. Supp. at 889.*

* The Falkenstein decision also noted another respect in which the grant of tax-exempt status constitutes impermissible tangible government support of racially discriminatory organizations:

> "Unlike the liquor license in Moose Lodge [No. 107 v. Irvis, 407 U.S. 163 (1972)], tax exemptions for fraternal organizations benefit both the State and the organizations. Oregon relieves fraternal organizations from the burden of ... taxes and in return, the public benefits from the charitable and benevolent activities of these organizations. This is the kind of 'symbiotic relationship' that was lacking in Moose Lodge, supra, at 175 ...."

III. THE FIRST AMENDMENT RELIGION CLAUSES DO NOT ENTITLE ANY RACIALLY DISCRIMINATORY SECTARIAN SCHOOLS TO GOVERNMENT SUPPORT THROUGH TAX-EXEMPT STATUS.

A. The Free Exercise Clause Does Not Entitle Petitioners to Government Support for Their Religious Practice of Racially Discriminatory Education.

The withdrawal of government support, through tax benefits, for petitioners' race discrimination does not burden any religious belief or practice. Moreover, even assuming arguendo that this withdrawal did impose some such burden, it would be heavily outweighed, in the balancing analysis applicable to a free exercise claim, by the compelling national interest in eliminating government support for race discrimination

in education. E.g., Gillette v. United States, 401 U.S. 437, 462 (1971) ("The incidental burdens [on religious beliefs] felt by persons in petitioners' position are strictly justified by substantial government interests that relate directly to the very impacts questioned.").

1. The I.R.S. rule does not burden petitioners' religious beliefs or practices.

Consistent with its articulated religious beliefs, petitioner Bob Jones University refuses to admit, and also expels, any person engaging in an interracial marriage or dating relationship, or participating in a group advocating such relationships.

Petitioner Goldsboro Christian Schools, which refuses to admit blacks, claims a religious belief "that separation of the races is scripturally mandated." (Goldsboro's brief at 9)*

In stark contrast with cases where this Court has sustained free exercise claims, these consolidated cases involve neither the outright governmental ban of any religious belief or practice,** nor the require-

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* Because the Goldsboro case was disposed of by summary judgment, the lower courts had to assume the sincerity of the asserted belief. The Fourth Circuit noted, however, that although Goldsboro's asserted belief "would seemingly require the exclusion of all noncaucasians .... [n]evertheless, [Goldsboro] has on occasion accepted noncaucasians ...." (Pet. 7a).

** E.g. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

ment that, in order to receive a government benefit, petitioners abandon any religious belief or practice.* The I.R.S. rule does not directly compel petitioners, under threat of criminal or civil sanctions, to embrace any repugnant religious belief or to abandon any religiously motivated practice. Moreover, in sharp distinction to the statute at issue in Sherbert v. Verner, 374 U.S. 398 (1963), the I.R.S. rule does not indirectly compel any such result by conditioning a government benefit on the abandonment of religious beliefs or practices.

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* E.g. Thomas v. Review Board, 49 U.S.L.W. 4341 (April 6, 1981); Sherbert v. Verner, 374 U.S. 398 (1963).

Petitioners do not jeopardize their tax-exempt status by teaching separation of the races or whatever else they choose; petitioners remain free "to inculcate whatever values and standards they deem desirable." Runyon v. McCrary, 427 U.S. 160, 177 (1976). Bob Jones University's tax-exempt status is not conditioned upon any violation of the only religious duty it asserts -- namely, to eschew interracial marriages and dating relationships; Bob Jones does not assert any religious duty to shun racially integrated schools. See Brown v. Dade Christian Schools, Inc., supra, 556 F.2d at 322 (despite injunction prohibiting the school's racial discrimination,

"Dade Christian students, like everyone else, remain free to marry whom they choose [and] Dade Christian parents remain free to teach their children that interracial marriage violates religious commands"). Similarly, Goldsboro's tax-exempt status is not conditioned on abandonment of the practice dictated by the religious belief which it asserts -- namely, complete separation of the races; even apart from the I.R.S. rule, the realities of twentieth-century American life preclude Goldsboro's constituency from realizing wholesale separation from individuals of other races. In choosing to live in a society which abhors any notion of apartheid, Goldsboro students

and their parents voluntarily accept racial integration in most aspects of their daily lives -- for example, in transportation, restaurants, neighborhoods and housing.*

2. The compelling national interest in eliminating government support for racially discriminatory education would outweigh any resulting burden on petitioners' religious practices

Even assuming arguendo that the I.R.S. rule imposed a burden on petitioners' religiously-dictated

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* See Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941 (D.S.C. 1966), aff'd in part and rev'd on other grounds, 377 F.2d 433 (4th Cir. 1967), aff'd and modified on other grounds, 390 U.S. 400 (1968) (religious belief in separation of races does not justify white restaurant owner's refusal to serve black patrons).

racially discriminatory practices, petitioners would still have no viable free exercise claim, because "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." Thomas v. Review Board, 49 U.S.L.W. 4341, 4344 (April 6, 1981).

Applying this balancing analysis, the Court has upheld government rules imposing far greater burdens on religious liberty, even where the countervailing government interests were not nearly so compelling as those advanced here -- the constitutional mandate against government support of race discrimination in education and the national commitment

to eradicate race discrimination from our society. E.g., Prince v. Massachusetts, 321 U.S. 158 (1944) (government interest in protecting welfare of minors held sufficiently compelling to justify criminal statute prohibiting minors from fulfilling religious duty to distribute religious literature). Accord, Cleveland v. United States, 329 U.S. 14 (1946); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1898). In each of the foregoing cases this Court upheld not merely minor burdens on, but outright government bans of, religiously dictated conduct which "posed a substantial threat to public

safety, peace or order." Sherbert v. Verner, supra, 374 U.S. at 403.

A fortiori, the I.R.S. rule which contains no such ban must be upheld since the conduct at which it is aimed -- government support of racially discriminatory schools -- poses uniquely substantial threats to our social fabric. The compelling national interest in eliminating such government support, discussed above has expressly been held to override free exercise claims. As Judge Goldberg pointed out in Brown v. Dade Christian Schools, Inc., supra, none of the government interests which this Court has previously held sufficient to overcome free exercise claims -- in stark contrast to the interest here --

has risen to constitutional stature. Referring to the national interest in eliminating race discrimination in education, he concluded in words even more strongly applicable here (with regard to eliminating government support of such discrimination):

> "A more compelling governmental interest has perhaps never been enlisted in opposition to a free exercise claim." 556 F.2d at 323.*

The challenged I.R.S. rule constitutes the only possible means --

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* Accord, Railway Mail Ass'n v. Corsi, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring); Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1152 n.10 (4th Cir. 1980); Green v. Connally, supra, 330 F. Supp. at 1163, 1167; Newman v. Piggie Park Enterprises, Inc., supra, 256 F. Supp. at 945.

and hence the least restrictive means -- for eliminating the government support of tax benefits, for racially discriminatory schools.* The purported "less restrictive alternative" Goldsboro proposes -- a series of § 1981 actions (Goldsboro's brief at 42-43) -- ironically would impose far greater burdens upon free exercise than does the challenged rule, since the possible relief could

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* It should also be stressed that the challenged I.R.S. rule makes a reasonable and appropriate accommodation of free exercise rights, consistent with the "least restrictive means" test, by providing that a school which "selects students on the basis of membership in a religious denomination or unit thereof will not be deemed to have a discriminatory policy if membership in the denomination or unit is open to all on a racially nondiscriminatory basis." Rev. Proc. 75-50, § 3.03.

include injunctions totally proscribing private schools' religiously motivated discriminatory practices.

B. The Denial of Government Support, Through Tax Benefits, for All Racially Discriminatory Schools is Completely Consistent with the Establishment Clause.

Here, as in Gillette v. United States, 401 U.S. 437, 450 (1971), "[t]he critical weakness of petitioners' establishment claim arises from the fact that [the challenged rule], on its face, simply does not discriminate on the basis of religious affiliation or religious belief ...." Thus, petitioners here, as in Gillette, are forced to argue instead that the rule constitutes a

"de facto discrimination among religions," or what the Court has termed a "religious gerrymander." 401 U.S. at 452. Specifically, petitioners claim that the I.R.S. rule operates as an impermissible de facto discrimination in favor of schools whose religious tenets do not require racially discriminatory education. However, the Court should reject this argument for the same reason it rejected the parallel argument in Gillette: that the rule according conscientious objector status only to those whose religious beliefs condemned all wars constituted an impermissible de facto discrimination against those whose religious beliefs condemned only unjust wars. Here,

as there, "a neutral, secular justification for the lines ... drawn" defeats the Establishment Clause claim. 401 U.S. at 460.* Indeed, as discussed above, the secular objective here is not merely "entirely appropriate for governmental action,"** but moreover, is constitutionally required.

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* Accord, Committee for Public Education & Religious Liberty v. Nyquist, supra, 413 U.S. at 771 ("It is well established ... that not every law that confers [a] benefit upon religious institutions is, for that reason alone, constitutionally invalid"); McGowan v. Maryland, 366 U.S. 420, 442, (1961) ("The Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.").

** Tilton v. Richardson, 403 U.S. 672, 679 (1971).

In addition to reflecting a secular legislative purpose, the challenged rule also satisfies the two other tests which this Court has prescribed for avoiding Establishment Clause violations: its primary effect is not to advance or inhibit religion, and its administration does not foster excessive government entanglement with religion. Tilton v. Richardson, 403 U.S. 672, 677 (1971).

As fully discussed in the preceding section of this brief, far from having a "primary effect" of advancing or inhibiting religion, the challenged I.R.S. rule has no significant impact whatsoever on religious beliefs or practices. Its primary

effect, consistent with its purpose, is to withdraw government support, in the form of tax benefits, from all racially discriminatory schools. In striking contrast, cases failing the "primary effect" test (as well as other tests under the Establishment Clause) characteristically involve the grant of government support to religious institutions. For example, in Nyquist, supra, the Court held that a law providing government financial assistance -- including tax benefits -- to sectarian schools "has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian ... schools." 413 U.S. at 774.

Far from leading to excessive governmental entanglement with religion, uniform application of the I.R.S. rule to all racially discriminatory schools -- including those whose discrimination is based on sincere religious beliefs -- is the best means for avoiding such entanglement.* The only governmental involvement with religious schools resulting from the I.R.S. rule is that the government must ascertain whether or not such schools maintain racially

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* It must be stressed that only excessive entanglement is prohibited, as some entanglement is inevitable. Zorach v. Clauson, 343 U.S. 306, 312 (1952). Accord, Walz v. Tax Comm'n, supra, 397 U.S. at 674 (the grant or the withdrawal of tax-exempt status both entail some government involvement with religion).

discriminatory policies. This factual determination entails only a minimal degree of entanglement, and is indistinguishable in nature from routine governmental determinations as to whether sectarian schools comply with various state-prescribed minimum requirements, such as the nature of the school's curriculum, the qualifications of its teachers, and the progress of its students. But cf. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979) (potential excessive entanglement problems arise where NLRB would have to "go beyond resolving factual issues.").

The I.R.S. determination whether any private school is in compliance with its racially non-dis-

criminatory criteria would require only occasional and minimal contacts -- which this Court has held not to constitute excessive entanglement -- as opposed to intrusive daily surveillance -- which this Court has held does constitute excessive entanglement. Compare Tilton v. Richardson, 403 U.S. 672, 678 (1971) (permitting as a "minimal contact" occasional on-site government inspection of activities conducted in government-financed sectarian school buildings) with Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (striking down because of potentially excessive entanglement a government program which would have required continuous monitoring of classroom activities in sectarian schools).

IV. IT WOULD BE UNCONSTITUTIONAL TO EXCEPT SECTARIAN SCHOOLS FROM THE CONSTITUTIONALLY MANDATED GENERAL POLICY OF DENYING TAX-EXEMPT STATUS TO RACIALLY DISCRIMINATORY SCHOOLS.

A. Such an Exception Would Violate the First Amendment's Establishment Clause.

Far from being required by the Establishment Clause -- as petitioners contend -- any religiously-based exception to the constitutionally mandated general policy of denying tax-exempt status to all racially discriminatory schools would clearly violate that very clause for two reasons: first, it would constitute government financial support of religion; and second, it would entail excessive government entanglement with religion.

To deny tax-exempt status to all racially discriminatory schools except those whose discrimination is based on sincere religious beliefs would constitute impermissible governmental "financial support" of religion, one of the "three main evils against which the Establishment Clause was intended to afford protection . . . ." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). In sustaining a state's grant of real property tax exemptions to religious organizations in Walz v. Tax Commission, supra, this Court stressed that the state. . .

> ". . . has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class

> of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups." 397 U.S. at 672-73.

In contrast, the Court has held that special tax benefits accruing only to religious institutions do violate the Establishment Clause. E.g., Committee for Public Education & Religious Liberty v. Nyquist, supra, 413 U.S. at 791-93.

To grant tax-exempt status to racially discriminatory religious schools, but not to any other racially discriminatory schools, would constitute a special tax benefit to religion of the type which Nyquist condemned under the Establishment Clause. This Court has expressly recognized "the

danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause ...." Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972).*

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* In Wisconsin v. Yoder this Court did permit a religiously-based exception to a generally enforced rule because of the unusually great threat to free exercise which would have resulted had that rule been extended to the religious group in question. But see Thomas v. Review Board, supra, 49 U.S.L.W. at 4346 (Rehnquist, J., dissenting) (exception to general rule denying state unemployment benefits to individuals who voluntarily quit their jobs, for those who so quit for religious reasons, would grant financial benefits for sole purpose of accommodating religious beliefs and thus violate Establishment Clause as interpreted in Nyquist).

Here, in contrast with Yoder and Thomas, the general rule at issue does not significantly threaten free exercise, and it promotes a

(Footnote continued)

To grant tax-exempt status only to those racially discriminatory schools whose discrimination stemmed from sincere religious beliefs would also violate the Establishment Clause by "foster[ing] an excessive government entanglement with religion." Lemon v. Kurtzman, supra, 403 U.S. at 613. The Court specifically recognized this type of impermissible entanglement in Braunfeld v. Brown, 366 U.S. 599 (1961), as a basis for rejecting the argument that the state should be compelled to make an excep-

(Footnote continued)

> more compelling government interest. Therefore, a religiously-based exception to such rule would have no independent justification, but would serve only to aid the religions in question, in clear contravention of the Establishment Clause.

tion to the challenged Sunday closing law for all sincere Sabbatarians:

> "[T]here could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a state might believe would itself run afoul of the spirit of constitutionally protected religious guarantees." 366 U.S. at 608-09.

The excessive entanglement which would result from permitting religiously-based exceptions to general governmental rules has been judicially invoked specifically to reject petitioners' claim: that

private schools whose racial discrimination has a religious foundation should be exempted from a rule generally applicable to racially discriminatory private schools. In his special concurrence in Brown v. Dade Christian Schools, Inc., supra, Judge Goldberg accepted the school's contention that its racially discriminatory policy was based on sincere religious belief, but nonetheless concluded that the First Amendment did not afford a defense to a § 1981 action seeking to enjoin the discrimination. His decision was grounded, in large part, on the entanglement problems which would have resulted from a contrary holding such as the one petitioners seek here:

"[W]hen recognizing the [free exercise] claim will predictably give rise to further claims, many of which will undoubtedly be fraudulent or exaggerated ... the court must either recognize many such claims ... or draw fine and searching distinctions among various free exercise claimants. The latter course would raise serious constitutional questions .... [R]ecognizing some claims while rejecting others unavoidably forces courts to pick and choose among religions and to draw subtle distinctions on the basis of criteria with which no governmental unit should ever become entangled."* 556 F.2d at 323.

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* There is a solid factual foundation for Judge Goldberg's concern that if an exception to the general rule denying tax-exempt status to racially discriminatory schools were permitted for religiously-motivated discrimination, many schools would seek to invoke this exception. Even before this Court's decision in Runyon v.

(Footnote continued)

B. Such an Exception Would Violate the Fifth Amendment's Equal Protection Guarantee.

As discussed above, in Nyquist (413 U.S. at 792-94) this Court held that special tax benefits granted to sectarian schools violate

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(Footnote continued)

McCrary, supra (prohibiting race discrimination by private nonsectarian schools but not reaching issue of permissibility of race discrimination by sectarian schools), many private segregated schools were church-affiliated academies. Note, 82 Yale L. J. 1436, 1447 & n. 68 (1973). There is evidence that in the wake of Runyon, additional private schools may seek religious affiliation in an attempt to shield their racially discriminatory policies. See, e.g., Note, 48 U. Colo. L. Rev. 419, 421 (1977) (all-white segregationist group donated its schools to Baptist church one month after Runyon).

the Establishment Clause, and in Norwood (413 U.S. at 461-64), this Court held that the equal protection guarantee permits even less government aid to any racially discriminatory schools than the Establishment Clause permits to sectarian schools. Therefore, because excepting sectarian schools from the general denial of tax benefits to racially discriminatory schools would constitute impermissible aid for Establishment Clause purposes -- for the reasons set forth in the preceding section of this brief -- a fortiori, such an exception would constitute impermissible aid for equal protection purposes.

CONCLUSION

For the foregoing reasons the decisions below should be affirmed.

Respectfully submitted,

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