Nos. 81-1 & 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,
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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Motion for Leave to File Brief Amici Curiae, and Brief of Laurence H. Tribe and Bernard Wolfman as Amici Curiae with Respect to Respondent's Motion to Vacate.

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Pursuant to S. Ct. R. 36.3, Laurence H. Tribe and Bernard Wolfman hereby move for leave to file the attached brief *amici*

curiae with respect to respondent's motion of January 8, 1982, to vacate the judgments of the court of appeals in these cases. *

Amici are teachers, scholars, and students of constitutional law and tax law, respectively, and are members of the Bar of this Court. As such, *amici* have an interest, by no means unique but not insubstantial, in the preservation of this Court's special role as arbiter of nationally significant controversies with respect to such issues as those presented by these cases.

Amici appear *pro sese*, and represent no interested organization, group, or party. Inasmuch as the concern that impels the filing of this motion and the preparation of the accompanying brief is the integrity of this Court and of the legal processes at issue in these consolidated cases, *amici* seek to file the accompanying brief as "friends of the Court" in the original sense of that term. Perhaps for this reason, at least some of the observations and suggestions offered in the accompanying brief have appeared in none of the parties' or potential intervenors' submissions in this Court and, as far as *amici* are aware, in none of the public commentary these cases have generated.

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* *Amici* have orally sought consent of the parties for the filing of the accompanying brief. Petitioners Goldsboro Christian Schools and Bob Jones University have declined consent, as has respondent United States, although the latter has informed *amici* that it has no objection to the filing of their brief.

Because respondent's opening brief has yet to be filed and is not yet due, this motion and brief are timely under S. Ct. R. 36.2 insofar as the United States is treated as "the party supported" herein. *Id.* That *amici* oppose the latter's motion to vacate should not prevent such treatment, since the accompanying brief urges that the circuit court's judgments in favor of the United States (as to which the United States has not confessed error) not be set aside, and since treating this submission as one "in support of neither party," *id.*, would require it to have been filed well in advance of the January 8, 1982, motion to which it responds.

Conclusion.

Accordingly, *amici* respectfully move that leave be granted to file the attached brief.

Respectfully submitted,

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February 10, 1982.

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Interest of Amici.

As the accompanying motion explains more fully, *amici* are scholars and teachers of constitutional law and tax law who

appear on their own behalf in order to address matters that bear on the potential abuse of this Court's processes — matters that might not otherwise be brought to the Court's attention.

Summary.

Although the usual predicate for the grant of certiorari in a federal tax case — a conflict between circuits — was and is not present here, the Court granted the writs in these cases after the Government, acquiescing in plenary review, asserted that a "definitive decision by this Court" was needed to "dispel the uncertainty surrounding the propriety of the [Internal Revenue] Service's ruling position and [to] foster greater compliance on the part of the affected institutions." Brief for the United States at 17. The Government supported certiorari so that this Court might affirm "the decisions below [that] correctly held that the Internal Revenue Service acted within its statutory authority in revoking petitioners' tax-exempt status . . . ." *Id.* at 11. The Government's brief states: "[T]here is no conflict of appellate decisions and we believe that the decisions of the court of appeals [in the pending cases] are correct . . . ." *Id.* at 15.

The Court granted certiorari on October 13, 1981. But on January 8, 1982, the Government filed a memorandum "ask[ing] that the judgments of the court of appeals be vacated as moot." The Government did not — and does not — confess or assert error. It did not and does not change its position that the law is reflected correctly in the judgments of the Fourth Circuit.

Amici urge the Court not to vacate the judgments of the court of appeals. If the Court chooses not to have the pending

cases proceed to argument and decision on the merits,[1] it should either dismiss the writs of certiorari as improvidently granted or leave the Fourth Circuit's judgments in place temporarily while referring to that Court, in the first instance, the parties' various allegations with respect to how subsequent developments bear upon the proper disposition of these cases — including the proper disposition of the two inconsistent district court judgments (one holding that Bob Jones University is tax exempt, the other that Goldsboro Christian Schools is taxable) that would be left in place were the Fourth Circuit's judgments simply to be vacated as the Government requested on January 8.

Argument.

I. The Assertion of Mootness.

The Government bases its mootness claim on the Treasury Department's decision "to revoke forthwith the pertinent Revenue Rulings that [it had] relied upon to deny petitioners tax exempt status under the Code." (Footnote omitted.) Accordingly, the Treasury has "initiated the necessary steps" to provide the petitioners tax-exempt status notwithstanding the judgments of the Fourth Circuit that under the law they are taxable. Memorandum of January 8, 1982.

On January 18, 1982, contrary to the underlying basis of this mootness claim, the Treasury Department announced that the Internal Revenue Service would "not . . . act on any

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[1] The Court might, of course, proceed to the merits after granting the January 15, 1982, motion of the NAACP, *et al.*, to intervene as respondents or to participate as *amici curiae*, or after appointing another suitable intervenor or *amicus*, to defend the Fourth Circuit's judgments. *See* p. 7 & n.5 *infra*.

applications for tax exemptions . . . in response to the Internal Revenue Service's policy announced on . . . January 8, 1982, until Congress has acted on . . . proposed legislation [that would retroactively affirm the position of the court below] (*except as required by the memorandum in support of the motion to vacate as filed in the Supreme Court on January 8, 1982*)." Supplemental Memorandum for the United States at 12a (emphasis added). This is to say that, *except as to petitioners*, the existing practice of denying tax exemption to racially discriminatory schools, and tax deduction to their contributors, would remain national policy until Congress chooses to act.

We note two features of this January 18 announcement. *First*, the announcement makes clear that the legal issue of a racially discriminatory school's entitlement to tax exemption under existing law is anything but moot.[2] *Second*, the an-

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[2] In *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 382-83 (1980), all relevant parties agreed that various accident reports obtained by respondents from television manufacturers, including petitioners, should be released. But one set of respondents contended that an extant lower court order would make release of the reports unlawful, whereas another set of respondents contended that the order could have no such effect. *This dispute over the legal effect of the lower court's order*, this Court held in *GTE*, sufficed in itself to create an Article III controversy notwithstanding the shared *desire* of the parties to release the reports in question and their agreement that the reports *ought* to be released. In the instant case, too, despite the fact that the United States and the two petitioner schools agreed as of January 8 that the specific tax benefits the schools sought should be granted, and evidently share a desire to bring about that result, there remains a controversy as to the legal validity and effect of the two district court orders below and of the Fourth Circuit's judgments affirming one of those orders and reversing the other — judgments which petitioners continue to challenge as legally erroneous but as to which the United States has never confessed or asserted error.

Moreover, even if the United States were formally to abandon its Fourth Circuit victories by confessing error as to both, the district court judgment holding that petitioner Goldsboro Christian Schools is not entitled to tax exemption would remain as an apparent obstacle to the Government's proposed action on behalf of that taxpayer. *See* note 3 *infra* (Cont'd. on p. 5.)

nouncement's assertion that "the memorandum in support of the motion to vacate as filed in the Supreme Court on January 8, 1982" "require[s]" the grant of exemption is wholly fallacious. The Government's memorandum is not an order of this Court or any other. If the Treasury chooses to give tax exemption to petitioners while denying it to all other racially discriminatory schools pending congressional action, and does so despite the Fourth Circuit's judgments to the contrary, it does so because it *wishes* to do so for reasons it has never made public.[3] Certainly its memorandum of January 8 does not "*require*" it to do so. The claim of "mootness" — the ground on which the Government asks this Court to vacate the judgments

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Finally, the Government's public statements of January 18, 1982, seem wholly inconsistent with any intention, at least while Congress considers the Administration's proposed legislation, to accord favored tax treatment to schools *similar* to petitioners (or *even to petitioners themselves* apart from the specific years and sums litigated below), or to accord favored tax treatment to *contributors* to any of these schools.

[3] While Internal Revenue Code Section 7122 (a) authorizes the Secretary of the Treasury to "compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense," Section 7122 (b) requires public disclosure of the "opinion of the General Counsel for the Department of the Treasury," including a statement of "his reasons therefor." The only reasons acceptable under current regulations are "[d]oubts as to liability" or "as to collectibility." Treas. Reg. §§ 301.7122-1(a) (1), (2). Indeed, although Section 7122(a) authorizes the Attorney General to "compromise any such case after reference to the Department of Justice for prosecution or defense," the Treasury Department's authority to compromise tax claims *prior* to a reference of such claims to the Justice Department does not extend at all, under current Treasury Department Regulations, to cases where "liability has been established by a valid judgment. . . ." Treas. Reg. § 301.7122-1(a)(1).

The Attorney General's authority to reach a "compromise" under Section 7122(a) most assuredly furnishes no basis for a request that *this Court* use its power to vacate a judgment as a means of facilitating, effectuating, or legitimating whatever benefit the Attorney General has decided to bestow upon a particular taxpayer. *Cf. Rice* v. *Sioux City Cemetery*, *supra*.

below for the evident purpose of making the Treasury's proposed actions favoring only these two schools appear lawful — is accordingly without foundation. Indeed, what the Government would have this Court do ignores Justice Frankfurter's basic admonition that this Court "does [not] sit for the benefit of the particular litigants." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (opinion of the Court granting rehearing, vacating judgment, and dismissing writ of certiorari as improvidently granted where intervening statute deprived Court's initial judgment of general significance).

II. The Proper Remedy for the Change in Litigating Posture.

While the Government's new posture thus does not serve to make these cases moot, it does cast doubt on the adequacy with which the Justice Department would *represent* the constitutional and congressional policies that the judgments below vindicate. That circumstance must not be confused with the absence of an Article III case or controversy. It would be strange indeed to nullify an appellate court's judgments, properly entered after a fully adversary contest, solely to remedy inadequate representation by the current champion of those judgments at the bar of this Court.[4] Such inadequacy suggests

[4] If only the Fourth Circuit's judgments are vacated, two inconsistent district court judgments are left to stand, each with precedential effect in its own sphere. If the Court should go beyond the Government's request and vacate all judgments entered in the pending cases, those of the district courts as well as those of the Fourth Circuit, *cf. United States* v. *Munsingwear*, 340 U.S. 36, 40-41 (1950), that would give no guidance to the respective district courts as to whether they should hold the cases in abeyance pending congressional action, hear argument on the question of mootness, or dismiss both the petitioners' complaints and the Government's counterclaims. *Cf. Slayton* v. *Smith*, 404 U.S. 53, 53-54 (1971) (per curiam); *International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954).

at most a need to permit defense of the judgments below by the proposed (or other) intervenors or by *amici* appointed by this Court for the purpose.[5]

If recent events and the confusion surrounding them should leave the Court reluctant to proceed to judgment on the merits even with the aid of appropriate intervening parties or suitable *amici*, the proper disposition would seem to be a dismissal of the writs of certiorari as improvidently granted,[6] leaving in place the circuit court's final judgments — judgments that might never have been accepted for plenary review here had the Government not acquiesced in this Court's grants of certiorari.[7] Alternatively, the Court might wish to retain these cases on its docket while referring the proceedings to the Fourth Circuit so that the circuit court might, in the first instance, sort out the parties' vacillating positions as to the status of the dispute, make an initial ruling as to the proper disposition of the cases in light of the as yet unexplained largesse apparently contemplated by the Government as to these two taxpayers,[8] and leave to this Court the task of making a final decision in light of the circuit court's ruling.[9]

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[5] *See, e.g., Brown* v. *Hartlage*, No. 80-1285, 50 U.S.L.W. 3300 (U.S. Oct. 19, 1981); *Granville-Smith* v. *Granville-Smith*, 349 U.S. 1, 4 (1955). *Cf. United States* v. *Lovett*, 328 U.S. 303 (1946).

[6] *See, e.g., Burrell* v. *McCray*, 426 U.S. 471 (1976); *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955).

[7] *Cf. Prince Edward School Foundation* v. *United States*, 450 U.S. 944 (1981) (denying certiorari over dissents of Rehnquist, Stewart, and Powell, JJ.).

[8] *See* note 3 *supra*.

[9] *See, e.g., Harris* v. *Ross*, 439 U.S. 1001 (1978) (granting motion for "reference" to district court "to consider settlement"); *Artanyi* v. *Kennedy*, 376 U.S. 936 (1964) (referring to district court to "approve compromise settlement"), *cert. dismissed*, 380 U.S. 938 (1965); *Hubsch* v. *United States*, 338 U.S. 440 (1949) (same), *cert. dismissed*, 340 U.S. 804 (1950).

Conclusion.

For the reasons given, *amici* suggest that the Court either proceed to resolve the merits with the assistance of suitable intervenors or *amici*, dismiss the writs as improvidently granted, or refer the matter to the Fourth Circuit for further proceedings prior to a final resolution of the cases by this Court.

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