Nos. 81-1 and 81-31

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 UNITED CHURCH OF CHRIST AS AMICI CURIAE ON QUESTIONS OF MOOTNESS AND STANDING

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GOLDSBORO CHRISTIAN SCHOOLS, INC., Petitioner,	)	No. 81-1
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	
BOB JONES UNIVERSITY Petitioner,	)	No. 81-3
v.	)	
UNITED STATES OF AMERICA Respondent.	)	

MOTION OF AGENCIES OF THE UNITED CHURCH OF CHRIST FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON QUESTIONS OF MOOTNESS AND STANDING

Avery D. Post, President; Board for Homeland Ministries; Commission for Racial Justice; Office for Church in Society; and Office of Communication of the United Church of Christ ("UCC") hereby request leave of the

Court to file the brief amicus curiae submitted herewith on questions of mootness which have arisen in these proceedings and on the standing of the petitioners to present issues under the Free Exercise Clause of the Constitution of the United States. Consent has been granted by petitioner Bob Jones University and by the United States, as evidenced by the attached letters. Consent has been withheld by Goldsboro Christian Schools, Inc.

UCC has approximately 1,750,000 members organized in 6,462 churches in every state of the United States except Alaska. Under UCC's constitution each church is independent in its own right. The amici are the President and national instrumentalities of UCC recognized or established by the General Synod, which is the chief delegate body of the denomination.

UCC has deep roots in the events which gave rise to the Free Exercise Clause and to the abolition of slavery. The Pilgrims

who fled religious persecution in Europe and landed at Plymouth Rock were forebears of the Congregational Christian Churches which joined in forming UCC. For a time the Congregational Church was an established church in the Connecticut colony. UCC participated in the abolition movement, and following the Civil War, UCC founded colleges open to Black students in each of the states of the Confederacy.

UCC did not submit an amicus brief on the merits in this case because it expected that its views would be adequately represented by the Solicitor General. In the light of the new situation resulting from the filing by the United States of its memorandum of January 8, 1982, UCC respectfully requests leave to file the amicus brief submitted herewith. To the best of our knowledge, no

amicus has yet presented the arguments included in this brief.

Respectfully submitted,

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INTEREST OF AMICI

The interest of the amici is described in the motion for leave to file which is respectfully incorporated herein by reference.

QUESTIONS PRESENTED

This brief will be limited to two questions:

1. Are these cases moot?

2. Have the petitioners established free exercise claims of sufficient quality to merit consideration in these cases?

UCC agrees with the analysis of the three judge court in Green v. Connally, 330 F. Supp 1150, aff'd sub nom, Coit v. Green, 404 U.S. 997 (1971). UCC adopts and joins in the arguments on that issue contained in the amicus briefs submitted by the N.A.A.C.P. Legal Defense and Education Fund and by the American Civil Liberties Union and the American Jewish Committee.

STATEMENT OF THE CASE

(a) On the question of mootness:

On October 13, 1981, this Court granted writs of certiorari in the above cases. The grant had been supported by the Government which stated:

> "Although there is no conflict of appellate decision and we believe that the decisions of the court of appeals are correct, we do not oppose the petitions in these cases. The Internal Revenue Service is currently meeting substantial resistance from church-related and religious schools to enforcement of its position that such institutions are not entitled to tax-exempt status under Section 501(c)(3) if they engage in racially discriminatory practices. This resistance is premised on the argument raised by petitioners in these cases that the Service's revocation or denial of tax-exempt status violates the First Amendment rights of such institutions. For example, in Green v. Regan, No. 1355-69 (D.D.C.), the Service is under an injunctive order to investigate certain private schools in

Mississippi to determine whether they are entitled to tax exemption. There are 29 church-operated schools which have been identified as potentially subject to the court's order, and 12 of those schools have invoked the First Amendment as a bar to compliance with the Service's request for the information necessary to complete its investigation. Pursuant to the government's motion in Green, the court has suspended its injunctive order as it relates to the church schools pending resolution of the First Amendment claims.

"Because of the sensitivity of claims that the Internal Revenue Service's administration of the tax laws violates the First Amendment right of schools to the free exercise of religion, and because of the strong conviction with which such claims are often asserted and adhered to, the Service has been impeded in its efforts to achieve even-handed enforcement in this area against religious institutions. Reliance on the authority of its published rulings or even on the decisions below of a single court of appeals has been inadequate to avoid unseemly confrontations with religious claims in the Service's investigations.

* * *

> "Since there is no likelihood of a ruling by another court of appeals in the near future on these First Amendment questions of substantial public importance to both the Service and the institutions involved, we believe that a definitive decision by this Court will dispel the uncertainty surrounding the propriety of the Service's ruling position and foster greater compliance on the part of the affected institutions."

On January 8, 1982, the Government filed a memorandum with the Court stating that the Treasury Department had taken steps to grant both petitioners tax-exempt status and refund the taxes in dispute and further, that the Department "has commenced the processes necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax-exempt status under the Code." Accordingly, the Government asked that the judgments of the Court of Appeals be vacated as moot.

On January 18, 1982, the President announced that he would seek legislation denying tax-exempt status to private schools that practice

racial discrimination. The Treasury Department announced that it would not grant exemptions to such schools (except to the petitioners in these cases) pending Congressional action.[1/]

At the opening of hearings before the Senate Finance Committee on February 1, 1982, documents were produced showing a sharp division of opinion within the Executive Department on the January 8 policy. Among those expressing concern were Roscoe L. Egger, Jr., head of the Internal Revenue Service; Lawrence G. Wallace, the Deputy Solicitor General in charge of these cases; John F. Murray, of the Justice Department's Tax Division; Theodore Olson, Head of the Department's Office of Legal Counsel, and Peter G. Wallison, General Counsel of the Treasury Department. On February 2, more than 200 lawyers and others in the Justice Department's Civil Rights Division made

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1/ Supplemental Memorandum for the United States at 10a-11a.

public a letter dated January 26th expressing "serious concern" about the change in policy.[2/] On February 3, 1982, Howard H. Baker, Jr., the Senate Majority Leader, said that he had advised the White House of his view that legislation was unnecessary and that a joint resolution approving the questioned Revenue Rulings would be sufficient. He said that there were "preliminary indications the White House would accept such a joint resolution." House Speaker Thomas P. O'Neill, Jr. was quoted as saying that neither a resolution nor legislation was needed and that neither would be enacted.[3/]

Meanwhile, the plaintiffs in Green applied to the District Court for an order expanding its injunction from Mississippi to the entire United States. District Judge George L. Hart, Jr. denied the application but stated that Treasury officials would be held in contempt if the injunction were not

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2/ New York Times, February 3, 1982, p. A-1.

3/ New York Times, February 4, 1982, p. A-1.

obeyed in the State of Mississippi. The Treasury assured the Court that it would comply with the injunction. An appeal from Judge Hart's order is pending in the District of Columbia Circuit.

(b) On the standing of petitioners:

Bob Jones University has about 5,700 students and offers 50 different academic degrees (JA 63). It is not affiliated with any church, nor does it claim to subscribe to the religious views of any church. Its religious views are the views of its founder Bob Jones and his son and grandson (JA 61-62). Noting that the University could not be described as church-related, the District Court concluded that it must be treated as a church (A 44-45). However, a church is usually a group of persons who hold common religious views and practice those views together. The University's students are members of many different Christian faiths, even including UCC (JA 23-29). Many

of the faiths emphatically disagree with Dr. Jones' scriptural interpretations and with his ideas on racial segregation and miscegenation.[4/] Teachers at the University are expected to be born-again Christians, but that is, of course, no indication that they believe in racial separation (JA 34-35). The University makes no effort to determine the attitudes, religious or otherwise, of applicants for admission in respect to interracial dating and marriage (JA 33-34, 90-91). Nothing in the record tells us the religious views of parents in respect of these matters. Students are not required to engage in any baptism, confirmation or other ceremony of affiliation with the University. The only oath taken by students relates to multiple admission applications (JA 137-8). Students promise to obey University rules and are put on notice that they will be expelled

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4/ Some have stated so in amicus briefs filed in these cases. See, e.g., the brief of the American Baptist Churches in the U.S.A. joined by the United Presbyterian Church in the U.S.A.

if they date or marry outside of their own race or encourage others to do so or if they are members of a group which advocates interracial marriage (JA 197, 277).

The Internal Revenue Service rulings under attack do not compel Bob Jones or any person connected with the University to engage in interracial dating or marriage in violation of his religious views. At most, they pressure the University to allow its students to speak, date and marry in accordance with their individual convictions.[5/]

The facts in Goldsboro are similar to those in Jones. The School has about 750 students (JA 6). Attendance at the School meets the requirements of the State's school attendance laws and it is subject to State regulation of curriculum, faculty and physical facilities (JA 6-7). Although the

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5/ The Executive Committee of the University considered a policy of requiring parental consent for interracial dating and marriage but it was decided that the students were beyond the age of parental control (JA 253). The University did not consider adopting a racially neutral policy such as prohibiting undergraduate marriages generally.

is affiliated with the Second Baptist Church of Goldsboro (JA 3), it is a separate non-profit corporation (JA 5). Its opposition to the mixing of the races is stated to be based on its own religious beliefs rather than on the beliefs of the Second Baptist Church (JA 5-6, 42-45). Teachers are required to take an oath of belief in one God and Jesus Christ and in the inspiration of the Old and New Testaments. (JA 8). So far as the record discloses, they are not required to believe in racial separation. Students and parents are not required to subscribe to any creed. They can come with "any religion under the sun as long as they cooperate" (JA 86). The School's articles of incorporation outline its religious beliefs but contain no reference to racial separation. (JA 6).

The School's principal stated that it believes that the peoples of the world are divided into three main races descended from

the sons of Noah, i.e., Hamites (Orientals, Egyptians, Indians, Negroes), Semites (Hebrews) and Japethites (Caucasians, Germans, Scandinavians, Greeks, Romans, Russians), and that "[God] has commanded that . . . they shall not mix culturally or biologically." (JA 40-41). Notwithstanding this commandment, however, the School has enrolled students who are products of prohibited biological mixtures, i.e., the children of a Japethite parent and a Hamitic or Semitic parent (JA 45). At least four children with one Japanese and one Japethite parent have been accepted. (JA 92). The School has also accepted at least one full-blooded Hamite-an American Indian. (JA 85). The principal of the School testified that he would be willing to accept a limited number of Chinese or Egyptian students (JA 83, Cf. JA 92). He would not, however, accept a Negro because "you have a racial problem in the country and because of the problem in this area" (JA 82).

"Q. Is there anybody, other than a Negro that you would have problems in accepting -- any racial grouping?

A. We don't have problems accepting -- accepting a Negro, except for the climate in the country today. It's not a matter of discrimination.

Q. And the Bible teaches you that when this climate exists in the country, you should not accept Negroes in school, or any racial grouping where this climate exists?

A. Where a climate exists whereby you have a certain race clamoring for certain things within the school's curriculum. Certain -- making certain demands of society, every aspect of society, then I think you are on very thin grounds when you, particularly in a southern region where you open your doors to them in a Christian school situation.

Q. Okay, now, to get back to my question there, but if you just accepted one into the school, one person would not cause a problem?

A. I think it would personally.

Q. Just a single person?

A. Yes, sir."

A founder of the School explained that it was willing to forego its views on separation of the races in order to admit minorities who could not receive a Christian education otherwise, but it was unwilling to accept a Black student "because of the positions taken by groups in this country such as the NAACP, CORE [and] the Federal Government . . ." (JA 90-91). He went on to explain that Blacks were excluded because of the size of the Black population and its militancy (JA 92-93).

Thus there is no showing that any teacher, student or parent connected with Goldsboro is put under pressure by the IRS rulings to act against his or her religious convictions. The school corporation may suffer financially by denial of tax-exempt status. Its officers may thereby be pressed to announce a policy of nondiscrimination with which they sincerely disagree. But such a policy would not require them as indivi-

duals to mix with Hamites or Semites to any significant extent. Moreover the basis of their disapproval is a mixture of secular and scriptural concerns. Segregated schools have a long secular tradition in the United States. They have been defended on educational and social as well as religious grounds. The testimony of the two school principals shows that secular considerations -- i.e., fear of disruption of school discipline by militant blacks -- are dominant in their minds. Scriptural restraints are regarded as something they can and do disregard when the secular consequences are acceptable.

SUMMARY OF ARGUMENT

1. The mere discontinuance of allegedly unlawful action does not moot a case unless it is clear that recurrence of the action is unlikely. This is particularly true where the challenged action is deeply rooted and long standing, and when the

discontinuance occurs after the Court has taken jurisdiction. The Government's about face has not laid to rest the issues in these cases. Although the Government has assured the Court that the Treasury Department will take steps to rescind the rulings under attack, the Treasury has announced that it will not do so immediately and it may never do so. The legality of its proposed actions has been challenged and they cannot in any event be made applicable in the State of Mississippi without further judicial action.

Regardless of Congress action, this Court will ultimately be required to resolve the constitutional issues in these cases. If constitutional interpretation does not resolve issues as to presently accrued taxes, the questions of statutory interpretation will also require resolution. Clearly a prompt decision would promote judicial, legislative and administrative economy. The sharp adversity necessary to a case or controversy

under Article III is clearly present. The exhaustive legal analysis in prior decisions and in the briefs of the parties and amici leaves no doubt that the cases are ripe for adjudication.

2. Bob Jones University has no standing under the Free Exercise Clause since the challenged Revenue Rulings do not exert pressure on any person connected with the University to act against his or her personal religious convictions. At most, the rulings would impel the University to permit its students to speak and act in accordance with their individual religious views. Such an influence would promote religious freedom rather than the reverse.

The Goldsboro School's separationist views are not shown to be the views, religious or otherwise, of its faculty, students and parents nor even the views of the Second Baptist Church which assisted in founding it. The views of the School's officers are a mixture of secular and scriptural ideas, but

the former are dominant. They do not give rise to Free Exercise claims. In any event, these qualified and attenuated religious interests are clearly outweighed by the compelling public interest in the quality of public school education.

These cases would be different if they concerned churches, religious orders or religious seminaries and public policies less urgent than eliminating "the badges of slavery."[6/] A "high and impregnable wall"[7/] must always be maintained between church and state, but it is evident that if the wall is placed too close to the state's vital interests and too far from central religious concerns, it will be repeatedly breached. The exemptions sought by petitioners invite abuse and therefore compel governmental intrusion into matters of

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

7/ See Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 18 (1947).

conscience. The analysis of the Circuit would make such matters irrelevant and avoid government entanglement in matters of religion.

ARGUMENT

POINT I

THE PROMISED DISCONTINUANCE OF THE GOVERNMENT'S ALLEGEDLY ILLEGAL ACTIONS DOES NOT MOOT THESE CASES IN VIEW OF THE LIKELIHOOD THAT THE ACTIONS INVOLVED WILL RECUR.

"[M]ere voluntary cessation of allegedl illegal conduct does not moot a case." U. S. v. Concentrated Phosphate Export Assn, 393 U.S. 199, 203 (1968), U. S. v. W. T. Grant Co., 345 U.S. 629 (1953).

The rule is particularly applicable to the voluntary abandonment of a practice "where the practice is deeply rooted and long standing" (Gray v. Sanders, 372 U.S. 368, 376 (1963)) and is all the more true when the cessation occurs after the court has taken jurisdiction. Bus Employees v. Missouri, 374 U.S. 74 (1963); cf. Super Tire Engineering Co. v. Mc Corkle, 416 U.S. 115, 129 (1974) (Stewart, J., dissenting). Indeed that was

the holding when the IRS policies here at issue were adopted. Green v. Connally, supra, 330 F. Supp at 1170.

In Church of Scientology of Hawaii v. U. S., 485 F.2d 313 (9th Cir. 1973), the IRS attempted to moot a claim of exemption under section 501(e)(3) of the Internal Revenue Code by tendering a refund of the taxes in dispute. The Court held that the taxpayer was entitled to obtain a judicial determination because the Service might deny exemption in future years.

While the refunds, if actually granted, may satisfy petitioners, there is no present and enforceable assurance to petitioners that the refunds will be forthcoming. Mootness, from the perspective of the petitions (See Network Project v. Corporation for Public Broadcasting, 561 F.2d 963, 968-9 (D.C. Cir. 1977), cert. denied, 434 U.S. 1068 (1978)), is absent. In any event, the announced desires of the original litigants to a controversy are not controlling on a

mootness issue. Brown v. Liberty Loan Corp. of Duval, 539 F.2d 1355 (5th Cir. 1976), cert. denied, 430 U.S. 949 (1977).

Whatever the present articulations of the parties, the continuance of the exemptions is clearly precarious. See U. S. v. W. T. Grant Co., supra at 632. The President has declared that petitioners should not be tax-exempt. A declaratory judgment was granted in Green v. Connally, supra, and affirmed by this Court, holding that a 501(c)(3) exemption is not available to schools like petitioners'. That judgment is still in effect. While the IRS may at some future date disregard that judgment, the administrative actions necessary to effect a change in policy have not yet been taken and apparently will not be taken while the subject is under Congressional consideration. At present, this Court has only "statements" by various officers of the Government underpinning its claim of mootness. Such statements, by themselves, do little more than

explain why the Government failed to brief its record position and certainly do not moot that position. See United States v. Concentrated Phosphate Export Ass'n, supra. Further, there is substantial disagreement in the Department of Justice regarding the legality of the Government's proposed actions, and legal proceedings have been instituted to enjoin them. Clearly, there cannot indefinitely be one law for petitioners and another for other schools. Nor can there be one law for Mississippi and another for the rest of the United States. See International Business Machines Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965).

The Congress may, of course, take action to restore order to the situation, but the Congress itself seems stalemated by the uncertainty as to the present state of the law. Moreover, the constitutional issues raised by both sides will have to be resolved, whatever action the Congress might ultimately take.

Admittedly, this Court lacks authority under Article III to issue advisory opinions even when, as here, the public interest cries out for restoration of order. But the Court has before it in these cases well developed factual records, briefs prepared by eminent attorneys well-versed in the legal issues under review, and several exhaustive opinions by the lower courts. There is no doubt that petitioners will argue vigorously if these cases are not found to be moot. If the Government does not wish to defend the decisions below, the Court can allow argument by amici whose commitment is not in question.[8/] A true controversy is not mooted because one side gives up. Rubbermaid Inc. v. Federal Trade Commission, 575 F.2d 1169 (6th Cir. 1978).

8/ The Lawyers Committee for the Defense of Civil Rights under Law has furnished counsel to the Green plaintiffs since its inception.

POINT II

THE REVENUE RULINGS IN QUESTION DO NOT INHIBIT ANY PERSON ASSOCIATED WITH PETITIONERS FROM FOLLOWING RELIGIOUS CONVICTION. ACCORDINGLY PETITIONERS HAVE NO CLAIMS UNDER THE FREE EXERCISE CLAUSE.

Petitioners rely heavily on two decisions of this Court, Sherbert v. Verner, 374 U.S. 403 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972). In both cases natural persons were penalized for acting in accordance with their religious convictions. Mrs. Sherbert was a Sabbatarian who was denied unemployment insurance benefits because she refused to work on Saturday. The petitioners in Yoder were Amish parents who were fined for schooling their children on farms in accordance with a long religious tradition. Justice Douglas dissented in Yoder insofar as the decision applied to parents whose children had not testified to their personal beliefs. Id. at 243-46. The Court noted that it was the parents who were to be penalized, and there was no claim that

the children had contrary views. Id. at 230-234. Justices Brennan, Stewart and White emphasized this point in concurring opinions.

The teaching of Yoder is that the religious freedom of parents and students is protected by the Free Exercise Clause. Yoder does not involve the alleged right of school authorities to impose their own "idiosyncratic views" (Id. at 239) on students of different beliefs. Pierce v. Society of Sisters, 268 U.S. 510 (1925) held that parents had the constitutional right to enroll their children in private schools of their own selection, subject, of course, to the state's power to require, inter alia, studies "essential to good citizenship" and "that nothing be taught which is manifestly inimical to the public welfare".10/ Id. at 534. Nothing in

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10/ We note in passing that racial separation is not "good citizenship" and is "manifestly inimical to the public welfare." Brown v. Board of Education, 347 U.S. 483 (1954).

Pierce suggested that the school had more than an economic interest in seeing that its patrons were not subject to unlawful interference. Id. at 536.[11/] A school restricted to students holding common religious beliefs might have standing to assert Free Exercise claims on their behalf. But neither petitioner claims that its students share its religious views. No case of which we are aware suggests that any person except a parent has a right under the Free Exercise Clause to regulate the religious practices of others. Nor that a corporation can have religious liberties apart from those of its members.

In McGowan v. State of Maryland, 366 U.S. 420 (1961), this Court held that seven department store employees could not

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11/ In Runyon v. McCrary, 427 U.S. 160 at 175, fn.13 (1976), the Court said, "It is clear that the schools have standing to assert those arguments on behalf of their patrons," citing Pierce (emphasis added).

challenge a Sunday closing law since they alleged no infringement of their own religious freedoms. Cf. Braunfeld v. Broun, 366 U.S. 599 (1961). In Welsh v. U. S., 398 U.S. 333 (1970) the Court noted the "intensely personal" nature of religious belief and in Thomas v. Review Board of Indiana, 450 U.S. 909 (1981) the Court noted that intrafaith differences are not uncommon and it is the convictions of the particular adherant which give rise to Free Exercise claims. The seminal "Virginia Bill for Religious Liberty"[12/] stated:

> "That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . ." (Emphasis added)

12/ The historic setting and importance of the Virginia Statute of Religious Freedom is discussed in Everson v. Board of Education, 330 U.S. 1 at 11-13 (1947). See also Jones v. Opelika, 316 U.S. 103, on rehearing, 319 U.S. 103, 894, fn. 5 (Reed, J., dissenting) (1943)..

And this Court's discussion of both the Free Exercise and Establishment Clauses has usually been couched in terms of individual freedoms.[13/]

Sustaining Free Exercise claims in Jones would protect its officers' contract right to enforce their religious views against students who may not agree. But as the Court stated in Norwood v. Harrison, 413 U.S. 435, 470 (1973) and repeated in Runyon v. McCrary, 427 U.S. 160, 176 (1976): "while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections'". Assuming arguendo that Goldsboro stands higher than Jones because its religious principles prohibit mere association, these principles are so readily yielded by its officers when there are no secular concerns that they lack

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13/ See e.g. Everson, 330 U.S. at 15-16.

the "quality" to outweigh compelling state interests, Cf. Wisconsin v. Yoder, supra at 215.

Granting tax exemption to schools like Bob Jones University and the Goldsboro Christian School while denying it to other private schools with similar policies would raise serious Establishment issues. In Walz v. Tax Commission, 397 U.S. 664 (1970), the Court sustained real property tax exemptions for churches but noted that New York

> ". . . 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. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." Id. at 672-73.

"White flight" from the unitary school system is not a minor or isolated phenomenon.

A policy which granted tax exemptions to segregated schools sponsored by fundamentalist religious sects but not to segregated schools sponsored by others would certainly promote such sects. Moreover it would to some degree promote the principles of racial separation espoused by such groups.

Commenting on Walz, this Court said that "'neutrality in matters of religion is not inconsistent with 'benevolence' by way of exemption from onerous duties...so long as an exemption is tailored broadly enough that it reflects valid secular purposes." Gillette v. United States, 401 U.S. 437, 454 (1971). But what is sought here is an exemption narrowly confined to religiously motivated racists or, consistent with Welsh, supra, intensely dedicated racists. Mr. Justice Frankfurter, who was one of this Court's most consistent and reasoned advocates of judicial restraint, said this:

> "The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 653 (1943).

UCC unalterably favors a "high and impregnable wall" between church and state, but such a wall can survive only so long as each respects the interests of the other. The public interest in equal educational opportunity for all children is so compelling and the policies of Brown and Runyan are so necessary to that goal as to fall clearly under the authority of the state. Recognizing free exercise claims in these circumstances would invite exaggerated and even fraudulent claims by other schools seeking exemption and would inevitably bring searching inquiry and government entanglement in matters of conscience and belief. Brown v. Dade Christian Schools, Inc., supra, 556 F.2d

at 323. Cf. N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 502-3 (1979). This will not serve the interests of any church.

CONCLUSION

The Court should retain jurisdiction of these cases and should dismiss petitioners constitutional claims for lack of standing. The decisions below should be affirmed.

Respectfully submitted,

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