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No. 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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS IN SUPPORT OF RESPONDENT

The North Carolina Association of Black Lawyers moves this Court, pursuant to Rules 36 and 42 of the Rules of the Court, for leave to file the attached brief *amicus curiae.*

Because Movant wishes to present views in support of the position of respondent (as stated in the Court of Appeals for the 4th Circuit and in its brief on the pe-

tition for certiorari to this Court) the appropriate time for making this motion would appear to have been prior to the formal filing of respondent's brief on March 3, 1982. However, in that brief respondent has repudiated its previous position with respect to a basic substantive issue in this case—the appropriate interpretation of Section 501(c)(3) of the Internal Revenue Code with respect to tax exemptions to racially discriminatory educational institutions. This highly unanticipated development does not seem to be envisioned by Rule 36. Arguably a true "respondent's" brief, that is one defending the judgments it won below, has not yet been presented to the Court. In these unique circumstances, movant, North Carolina Association of Black Lawyers, respectfully asks this Court to deem that movant's motion and brief have been presented to the Court within the time intended by Rule 36. Alternatively, the North Carolina Association of Black Lawyers respectfully moves the Court for leave to submit the accompanying brief amicus curiae out of time, in light of the extraordinary circumstances recited herein, and in light of the crucial public interest resulting therefrom. Movant has acted expeditiously after the developments of March 3rd when the respondent's ultimate brief dated "February 1982", was filed and March 4th when its draft brief dated "January 1982" was filed at the direction of the Court. Movant's counsel has become familiar with the record and all documents filed herein up to March 8th. Although deeply concerned with the outcome of these cases (for reasons stated in the accompanying brief at pp. 1-2), movant had until the March developments been content to have its concerns presented (as they had been below, and in the respondents' brief on the petition for certiorari) by the United States, and by certain other amici who had earlier appeared.

Movant was especially concerned by the statement contained in the significant filing of March 8, 1982, by counsel for petitioner, Goldsboro Christian Schools, containing the following statement to a Congressional Committee by

R. T. McNamar, Deputy Secretary of the Treasury: After reciting displeasure with an earlier draft of respondent's brief, Mr. McNamar stated that even a second draft received by him on December 29, 1981 "was still based on the theory that the Service [IRS] could determine that certain Federal public policies could be used as a precondition for obtaining and retaining tax exempt status. Given two tries, there was apparently no legal theory that would permit the Service to deny tax exemptions on the basis of racial discrimination without also giving the authority to deny or revoke exemptions on other grounds." (Petitioner, Goldsboro Christian Schools, Filing of March 8, 1982, p. 4).

Movant is convinced that there is demonstrably such a legal theory, and that it has not been presented to this Court in its full strength by any party or *amici* herein. Without unnecessary duplication of matter already before the Court, movant presents such a theory as decisive in these cases in the accompanying brief *amicus curiae.*

For this reason movant, North Carolina Association of Black Lawyers, respectfully moves this Court pursuant to Rule 36.3 for leave to file the accompanying brief *amicus curiae.*

Movant, North Carolina Association of Black Lawyers, has orally asked the consent to file this brief of counsel for each petitioner, Bob Jones University, and Goldsboro Christian Schools, and they have declined to provide their consent. Movant also orally asked the consent of the Acting Solicitor General, counsel for respondent herein. He likewise declined to provide consent, but stated that he would not oppose this motion.

Respectfully submitted,

JOSEPH A. BRODERICK
Attorney for Movant,
North Carolina Association
of Black Lawyers

March 1982

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INTEREST OF AMICUS CURIAE

Amicus, North Carolina Association of Black Lawyers, is deeply and intimately concerned in the outcome of these cases, particularly *Goldsboro Schools v. United States*, 81-1. Members of the Association include attorneys who practice in Goldsboro and its environs in Eastern North Carolina. While members of the Association have clients and associates who are parents of children in the Goldsboro area, the Association's interest in these cases is deeper and broader than such geographical limits.

The member attorneys of the North Carolina Association of Black Lawyers have been in the forefront of the legal and social struggle of the past three decades for

civil rights in North Carolina, particularly against racial discrimination, using as their main weapon the tools of the law. They had been encouraged by the slow but unmistakable easing of racial tensions in North Carolina, and by what seemed to be the long sought beginnings of an era in which men and women would replace decades of racial bigotry and distrust with mutual respect. The Association and its members over the years have had close association with North Carolina Central University School of Law. In its inception an all-black institution, it has been for years the most integrated professional school in the United States with approximately 60% black and 40% white students working side by side. This institution's interracial collaboration in student body, faculty and alumni, has been a model for all who aspire to a racially healthy and collaborative North Carolina and America.

But in the folds of these two cases are not only the halting of gains, but the threat of a lunge back to the recent past of racial contempt and inhuman indignity. The possibility that the law of the land could once again throw its cloak of "respectability" around racial discrimination is the spectre the Association and its members should like to combat herein, once again using the tools their profession has given them.

As stated above, the principal interest of the North Carolina Association of Black Lawyers is in the *Goldsboro* case. However, no one should misjudge the stunning effect in North Carolina of this Court's approval of a governmental racial tax bounty in the neighboring state to an educational celebrant of undisguised racial disdain. The Association's interest in the *Bob Jones University* case is thus considerable and justified. For here too an approved United States government tax bounty would restore to the cause of racism in our area a most valuable resource one would have thought it had lost—the perception of "respectability" that our society bestows upon "legality."

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus, North Carolina Association of Black Lawyers, urges affirmance of the judgments of the Court of Appeals for the Fourth Circuit in these two cases in which this Court granted certiorari on September 8, 1981, substantially for reasons set forth in the respondent's brief on the petitions for certiorari, and in respondent's draft brief dated "January 1982" which was filed on March 4, 1982 by direction of the Court. However neither of these briefs develops with preciseness and force one of the two keys to an affirmance of the judgments below: the certainty that an interpretation of Section 501(c)(3) of the Internal Revenue Code to allow tax exemptions to racially discriminatory educational institutions would attribute to Congress the enactment of a statutory provision that was beyond its Article I power. The second key to decision herein: whether the Religion Clauses of the 1st Amendment give petitioners special claims to tax exemptions under 501(c)(3) had been adequately dealt with in the briefs of the parties and amici. Respondent in all three of its briefs contends (against petitioners) that if the Court holds that 501(c)(3) bars their tax exemptions, petitioners derive no constitutional comfort from the Free Exercise and Establishment Clauses.

Amicus argues (Point I) that the overt unconstitutionality of a Congressional statute construed to permit tax exemptions to racially discriminatory educational institutions must be in the background of any judicial statutory construction of 501(c)(3). And that such unconstitutionality can be precisely demonstrated by considering the givens of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), *Norwood v. Harrison*, 413 U.S. 455 (1973), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (plurality opinion of Chief Justice Burger).

Amicus, of course, agrees with respondent and various amici that the Religion Clauses offer petitioner no sanctuary, and that the judgments should accordingly be affirmed.

Amicus proposes affirmance of the judgments, after plenary consideration (Point II), and respectfully urges upon the Court the grave consequences if respondent's winding course induces the Court to give less than full judicial consideration to the intimations herein that this Court's decisions forbidding governmental support of racially discriminatory educational institutions are outdated. For this reason in Point II, amicus further suggests alternative steps which the Court might be prepared to take prior to oral argument to assure a full and fair ventilation of the arguments in support of the judgments of the Court of Appeals in these two cases.

North Carolina Association of Black Lawyers suggests the following analysis of the issues raised herein as a predicate for the Points on which the brief focuses:

1. Whether 501(c)(3) authorizes tax benefits to educational institutions that discriminate on the basis of race is, at most, arguable after giving full attention to the legislative history, administrative practice, and congressional legislation subsequent to *Green v. Connolly*, 330 F.Supp. 1150 (D.D.C.), aff'd per curiam, sub nom. *Coit v. Green*, 404 U.S. 997 (1971).

2. In such an arguable posture, the statute (501(c)(3)) must be construed so as to avoid doubts as to its constitutionality. *International Association of Machinists v. Street*, 367 U.S. 740, 749 (1961).

3. 501(c)(3) must therefore be construed not to authorize administrative award of tax exemptions to racially discriminatory educational institutions, because the equal protection component of the fifth amendment due process clause would make unconstitutional a congressional statute construed to authorize tax benefits to educational institutions that concededly discriminate on the basis of race.

4. Assuming (by virtue of propositions 1-3, above) that 501(c)(3) must be construed to prevent award of tax benefits to racially discriminatory educational institutions, the Court would then ad-

dress the only remaining question in this litigation: petitioners' Religion Clauses arguments.

Amicus' Point I below addresses the equal protection analysis referred to in Proposition 3, above, and Point II proposes that the cases proceed to oral argument, with appropriate safeguards.

ARGUMENT

I. IF 501(c)(3) WERE INTERPRETED TO AUTHORIZE TAX EXEMPTIONS TO RACIALLY DISCRIMINATORY EDUCATIONAL INSTITUTIONS, THE STATUTE WOULD VIOLATE THE CONSTITUTION.

Judge Leventhal's opinion in *Green* did not expressly deal with the constitutional issue. Well instructed by this Court, he did not reach constitutional considerations in a case which he concluded could, and therefore should, be decided on statutory grounds. But he left little doubt as to his view of the constitutional implications of a contrary interpretation of 501(c)(3). Should this Court, against *Green*, construe 501(c)(3) as by its terms permitting tax exemptions to racially discriminatory educational institutions it should, in our view, hold the statute unconstitutional as applied to these petitioners.

The deliberate and intentional award of a tax exemption to an avowedly racially discriminatory educational institution would violate the equal protection component of the fifth amendment. Congress' Article I power to tax plus the Necessary and Proper clause is clearly sufficient to justify the grant of tax exemptions of the general character covered by 501(c)(3). But the Necessary and Proper clause, according to the classic interpretation of Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), does not authorize legislation that is against the "letter and spirit" of the Constitution. The government's throwing its weight on the side of racial discrimination is against the "spirit" of a Constitution that, as interpreted consistently since *Brown v. Board of Education*, 347 U.S. 483 (1954), finally ac-

knowledges that it stands against government support of racial discrimination in any form. But even more to the point is that such government conduct is against the "letter" of the fifth amendment of the Constitution in its equal protection components as interpreted by this Court. Authorities from this Court are legion. *Brown v. Board of Education*, 347 U.S. 483 (1954), *Bolling v. Sharpe*, 347 U.S. 497 (1954), *McLaughlin v. Florida*, 379 U.S. 184 (1954), *Loving v. Virginia*, 388 U.S. 1 (1967), *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), *Gilmore v. Montgomery*, 417 U.S. 556 (1974), *Runyon v. McCrary*, 427 U.S. 160 (1976) and, most precisely bearing on the facts herein, *Norwood v. Harrison*, 413 U.S. 455 (1973). This is without mentioning the statutory policy of 28 U.S.C. 1981 and 1982, and the Civil Rights Acts of 1964, 1965 and 1968 as interpreted by this Court. Governmental conduct conferring tax exemptions on racially discriminating educational institutions violates the letter of the Constitution itself. The analysis of Chief Justice Burger in *Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980), with respect to equal protection as a limitation upon Congress' Spending Power, clearly extends to Congress' Article I power to tax. The deliberate, intentional act of the United States Government in knowingly awarding a tax exemption to an admittedly discriminatory educational institution would be, under the cases just cited, a violation of equal protection of the laws, and thus beyond Congress' Article I power. To remind the Court of a remarkably detailed and very pointed predicate for this statement, amicus has attached to this brief as Appendix A crucial excerpts from *Norwood v. Harrison*, 413 U.S. 455 (1973).

On this analysis there is no need to explore the question whether a federal tax exemption is the equivalent of an expenditure of federal funds (and thus in direct violation of Title VI of the Civil Rights Act of 1964). In the two cases before the Court there is no question but that the governmental participation in the racial

discrimination itself is intentional. Petitioners concede, even proclaim, their avowed racial discrimination. The government's award, or restoration, of a tax exemption with this knowledge in hand would be clear, direct and intentional action by the government throwing its weight in favor of racial segregation. And were the government to do so only under the mandate of a court order, *Shelley v. Kraemer*, 334 U.S. 1 (1948), considerations would certainly arise.

It is not the racially discriminatory action of petitioners that would be unconstitutional. They may discriminate all they like, racially and otherwise, free from the restraining hand of the Constitution. But the government, federal or state, may not give its support to racial discrimination. To do so would constitute an Equal Protection violation par excellence. Congress is thus without Article I power to authorize such discrimination, or give support thereto, if the cases cited above are to be left standing.

II. AFTER PLENARY CONSIDERATION, WITH APPROPRIATE ADVERSARINESS SAFEGUARDS, THE COURT SHOULD AFFIRM THE JUDGMENTS BELOW, REAFFIRMING THE FULL VITALITY OF DECISIONS OF THIS COURT WITH RESPECT TO GOVERNMENT SUPPORT OF RACIAL DISCRIMINATION.

A. The Court has jurisdiction to proceed herein, and should do so after insuring adequate adversariness by one of several methods available to the Court.

Although this is apparently the first time in the history of the Court that the government has changed its basic substantive position between the time of granting of certiorari and the briefing of this Court, it is not the only current instance in which this government is declining to defend the constitutionality of Congressional statutes, as written. One example is *Immigration and Naturalization Service v. Chadha*, No. 80-1832, argued this Term and presently *sub judice*. Another instance is

United States v. Brainer, 515 F. Supp. 627 (D.Md. 1981) now on appeal in the Fourth Circuit, after the district judge declared the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.*, unconstitutional and the government declined to defend the statute's constitutionality in the Court of Appeals. These cases are variants of the problem of adequate "adversariness" that must trouble the Court in the *Bob Jones University* and *Goldsboro* cases.

As long as an adequate "controversy" in an Article III sense is present in the case, the Court's concern is (1) that the issues in the cases be framed with the "necessary specificity," and that (2) divergent views on issues that bear on the outcome of the cases be contested with the "necessary adverseness and vigor." *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

Some suggestions have been made by various amici with a view to fulfilling these requirements. Among these are:

1. Appointment of a special amicus or intervenor to defend the judgments of the Court of Appeals in this Court.

This course has been taken on extraordinary occasions in this Court. (See cases cited in Supplemental Brief of NAACP et al.), and cf. *United States v. Lovett*, 328 U.S. 303 (1946). As noted above, this seems to be the course now being taken in the Fourth Circuit in the *Brainer* appeal, with the variation that the appointed amicus defends the constitutionality of the statute, and seeks reversal of the judgment below.

2. Reliance upon present amici to adequately defend the judgments of the Court of Appeals.

This course appears to have been adopted by the district court, and this Court, in *Green v. Connolly*, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam, sub nom. *Coit v. Green*, 404 U.S. 997 (1971). This alternative has been somewhat discredited by Justice Powell's footnote in

Bob Jones University v. Simon, 416 U.S. 725, at 740, n.11 (1974), but Justice Powell's observation might be blunted by granting plenary review herein.

3. Possible consolidation of these cases with an appeal in *Green v. Regan*, No. 1355-69 (D.D.C.).

This alternative has the attraction that counsel for petitioner Bob Jones University is counsel for the intervenors in *Green v. Regan*, and Norman Chachkin, Esq., who has been active as counsel to *amici* in these cases, is counsel for plaintiffs in *Green v. Regan*. However, present jurisdictional considerations and the possibility that such a course would unduly delay decision of these cases might weigh with the Court against this alternative. And cf. *Regan v. Wright*, No. 81-970 (petition for certiorari filed).

Amicus respectfully suggests to the Court that the course followed by the 9th Circuit in *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980) and apparently accepted by this Court (No. 80-1832, *sub judice*), might be worthy of the Court's consideration in the extraordinary present posture of these cases: Inviting the Senate and House of Representatives to intervene, or appear as an amicus, to defend the judgments below and, incidentally defend the constitutionality of 501(c)(3) in light of the issues developed herein in face of respondent United States' abandonment of the 1970-82 IRS position.

B. The Court should decide these cases on the merits after plenary consideration.

Amicus, North Carolina Association of Black Lawyers, respectfully urges the Court to set these cases down for oral argument and decision and opinions. Neither summary affirmance nor dismissal of the writs as improvidently granted would do justice to the interests of the parties, and the broad public that has been under shock as a result of respondent's series of changing postures.

C. The Court should take the occasion of deciding these cases to reassure the nation that the Court's constitutional decisions concerning governmental support of racial discrimination remain vital.

The respondent's position, both in its political stands and in its formally submitted brief of March 3, 1982 has, in effect, challenged the basic constitutional role of this Court. Amicus respectfully asks the Court to take the occasion of these cases to reassure the public and the American judicial system that the constitutional doctrine barring governmental support of racial discrimination remains as firm in this Court as when the unanimous Court decided *Norwood v. Harrison* (see Appendix A of this brief).

Should the Court not be as convinced as *amicus* that *Norwood*, and the other cases cited, dispose of petitioners' statutory construction position (see pp. 6-7, *supra*), amicus respectfully urges the Court to direct parties, and whomever the Court may specially designate to provide adequate adversariness herein, to brief the following question before oral argument:

> "Whether the equal protection clause of the fifth amendment due process clause would render unconstitutional a congressional statute (501(c)(3)) construed to grant tax exemptions to educational institutions that concededly discriminate on the basis of race."

Amicus, North Carolina Association of Black Lawyers, respectfully urges the Court to reaffirm the vitality of *Norwood v. Harrison* (and the other race discrimination cases) either by frankly affirming the judgments below on constitutional grounds, or by identifying the soundness of the IRS' 1970-1982 construction of 501(c)(3) as entailed by inescapable equal protection requirements (putting together *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Norwood v. Harrison*, 413 U.S. 455

(1973)), and cf. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (plurality opinion of Chief Justice Burger).

CONCLUSION

For the foregoing reasons amicus, North Carolina Association of Black Lawyers, respectfully requests that this Court:

1. Appoint an amicus or intervenor to defend the judgments of the Court of Appeals in this Court;

2. Set the two cases down for oral argument by the parties and said amicus or intervenor; and

3. Affirm the judgments of the Court of Appeals.

Respectfully submitted,

JOSEPH A. BRODERICK
Attorney of Record,
North Carolina Association
of Black Lawyers

March 1982

APPENDIX A

THE DECISIVE THRUST OF NORWOOD v. HARRISON, 413 U.S. 455 (1973)

Of all the Supreme Court cases rebutting petitioners' contentions that they have claim to a tax benefit from the federal government while avowedly pursuing racial discrimination the most telling is *Norwood v. Harrison*, 413 U.S. 455 (1973). In *Norwood*, plaintiffs were black parents of four school children in Mississippi who brought a class action to enjoin the state's extension of a textbook lending program to students attending private schools that practiced racial segregation. The District Court had denied plaintiffs relief, but the Supreme Court unanimously reversed in a memorable opinion by Chief Justice Burger that can best speak for itself, as the following excerpts suggest:

1. "This case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race, or religion, or of the authority of a State to allow such schools." (413 U.S. at 457-8)

2. "The narrow issue before us, rather, is a particular form of assistance the State provides to students in private schools in common with all other students by lending textbooks under the State's 33-year-old program for providing free textbooks to all the children of the State." (*Id.* at 458)

3. ". . . a State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally-mandated standards forbidding state-supported discrimination. That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." (*Id.* at 462-3)

4. "This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools. A textbook lending program is not legally distinguishable from the forms of state assistance foreclossed by the prior cases. . . . An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.' *Lee v. Macon County Board of Education*, 267 F.Supp. 458, 475-476 (MD Ala. 1967)." (413 U.S. at 463-5)

5. ". . . the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination." (*Id.* at 466)

6. "The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogther from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal." (*Id.* at 467)

7. ". . . the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of schools which, under the District Court hold-

ing, may discriminate if they so desire. A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially desegregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." (*Id.*)

8. "Under *Brown v. Board of Education*, 347 U.S. 483 (1954), discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted. Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." (*Id.* at 469)

9. ". . . (A)lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." (*Id.* at 470)

10. "However narrow may be the channel of permissible state aid to sectarian schools . . . it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system." (*Id.*)

APPENDIX B

SOME SUGGESTIONS BEARING ON CONTENTIONS OF MR. R. T. McNAMAR AND OTHERS (See Motion for Leave to File Brief *Amicus Curiae*, supra.)

The Court could well temper the result clearly indicated in these cases by straightening some of the curves in notions that have been injected into these proceedings by the government, by petitioners; and and by some others:

1. The notion that while banning tax exemption for race discrimination is good, it is the function of Congress to make the exclusion, and not the IRS.

The 1970-1982 IRS administration of 501(c)(3) was plainly in response to the ruling of the Court in *Green v. Connolly*, 330 F.Supp. 1150 (D.D.C.), aff'd per curiam, sub nom. *Coit v. Green*, 404 U.S. 997 (1971). Far from the IRS usurping Congressional prerogatives, Congress not only made no move to "change" the IRS response to the *Green* order, it would have had no constitutional power to do so. *A fortiori*, neither would the Executive, administering the Congressional statute under Court order.

2. The notion that denial of tax benefits for violation of national policy is a departure from normal tax law.

The denial of tax deductions and benefits to taxpayers who violate "sharply defined national or state policy" has a long and respected history in this Court (*Tank Truck Rentals v. Commissioner*, 356 U.S. 30 (1958), *Hoover Motor Service Co., Inc. v. United States*, 356 U S. 38 (1958), *Cammarano v. United States*, 358 U.S. 498 (1959), *Commissioner v. Heininger*, 320 U.S. 467 (1943); cf. Government's Draft Brief, p. 13c).

Furthermore, the rule of these cases that the disallowance of particular benefits on policy grounds

does not strip the taxpayer of the right to deduction for ordinary business expenses would have direct implications for petitioners, after affirmance of the decisions below. *Commissioner v. Heininger*, 320 U.S. at 473.

3. The notion that affirmance of the judgments herein because petitioners violated the fundamental national policy against racial discrimination would entail that thereafter departure from any specific government policy would be the basis for revocation of a 501(c)(3) exemption. Petitioner (and others) parade a list of horribles. They suggest that sex discrimination by an all-male, or all-female educational institution, or by a religious seminary that ordains all male ministers would, if these cases are affirmed, per se require mandatory revocation or denial of a 501(c)(3) exemption. And it would be similar with age discrimination, or some other form of disapproved conduct.

Obviously, the rule of law that tax deductions may be denied for violations of "sharply defined national . . . policy" would in each instance be subject to judicial scrutiny where claims of violation of the 1st Amendment Expression or Religion Clauses is made. The "significance" of the particular "sharply defined national . . . policy" might or might not be sufficient to withstand the 1st Amendment challenge. But the fundamental national policy against invidious race discrimination clearly is sufficient (for the reasons outlined at pp. 6-7, *supra*). And that is all these cases need decide.