Nos. 81-1 and 81-3

# In the Supreme Court of the United States

OCTOBER TERM, 1982.

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**

IN SUPPORT OF AFFIRMANCE

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AS AMICUS CURIAE

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Pursuant to S. Ct. R. 36.3, consent to filing of the *amicus* brief having been orally refused by counsel for one of the petitioners, the National Association of Independent Schools ("NAIS") hereby moves for leave to file the attached brief *amicus curiae*. The *amicus*, NAIS, is an association of "independent schools" constituting over 900 private elementary and secondary schools that are almost entirely independent of church or public control or support; in several of the schools, a majority of the student enrollment are minority students. Consequently, NAIS has a strong stake in the policy considerations to be applied in the decision of these two cases. The brief attached is submitted for the purpose of presenting to the Court the policies and experience of NAIS and its members in administering non-discriminatory private schools as an aid to the statutory and constitutional issues of interpretation involved in this case. The position presented therein is in support of the position that will be urged by William T. Coleman, Jr., Esq., invited by this Court to participate as *amicus curiae*, whose brief is due August 25, 1982.

Accordingly, *amicus* NAIS respectfully moves that leave be granted to file the attached brief.

Respectfully submitted,

NATIONAL ASSOCIATION OF
INDEPENDENT SCHOOLS

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## BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AS AMICUS CURIAE

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### Interest of Amicus

The National Association of Independent Schools ("NAIS") is a nationwide association of nearly 900 private elementary and secondary schools that are almost entirely independent of church or public control or support; these schools enroll about

1% of the roughly 46 million elementary and secondary school students in the country; all private schools enroll about 10%. NAIS member schools range in size from 27 students to 3,600 students; in several schools, a majority of the student enrollment are minority students, including one all-black boarding school. NAIS and its members consequently have comprehensive knowledge of and experience with enrollment of minority students, including blacks. As stated in the accompanying motion, NAIS believes that presentation of its experience can assist the Court in its determination of the issues involved.

## Summary

NAIS, an association of nearly 900 independent private elementary and secondary schools, has long supported, as a matter of good educational policy, the constitutional prohibition against racial discrimination in educational institutions. The public policy to that effect should be uniformly applied to all schools, secular or religious, public or private. In providing income tax exemptions and charitable contribution deductions for nonprofit schools, the Congress, it would appear, intended that vital principles of public policy, such as the bar to racial discrimination, be infused into the privileges afforded under the tax laws to charitable organizations and the administrative obligations of the Internal Revenue Service under those laws.

## Argument

I. Determination of Tax-Exempt Status under Section 501(c)(3) of the Internal Revenue Code Incorporates the Common Law Concept of "Charitable" Organizations Benefitting Society as a Whole.

The legislative history of section 501(c)(3) of the Internal Revenue Code ("Code") is being amply elucidated by the brief of William T. Coleman, Jr., in this case. That history supports the position of the Internal Revenue Service, as exemplified by

Treas. Reg. §1.501(c)(3)-1(d)(2), and of William T. Coleman, Jr., that the common law concept of "charity" requiring benefit to society at large in all instances, was intended to be incorporated in the statute and does indeed infuse its interpretation and administration. See Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 A.B.A.J. 525 (1958); Sacks, *The Role of Philanthropy: An Institutional View*, 46 Va. L. Rev. 516 (1960). To the extent that courts have heretofore alluded to this subject, they have manifested ready agreement with that position. *Helvering* v. *Bliss*, 293 U.S. 144, 147 (1934); *United States* v. *Proprietors of Social Law Library*, 102 F.2d 481, 483 (1st Cir. 1939); *Green* v. *Connally*, 330 F. Supp. 1150, 1156-1164 (D. D.C. 1971), *aff'd per curiam sub nom.*, *Coit* v. *Green*, 404 U.S. 997 (1972).

Furthermore, the concepts of "charity" and "public benefit" incorporate general concepts of policy. It is a fundamental principle that all charitable trusts are subject to the general law requirement that the purpose of the trust may not be illegal or contrary to public policy. *Ould* v. *Washington Hospital for Foundlings*, 95 U.S. 303, 311 (1887); Restatement, Trusts (Second), Section 377, Comment c (1959). It is, therefore, proper for the Internal Revenue Service and this Court to inquire into and apply the appropriate public policy for requisite admission standards to private schools. See Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 Tax. L. Rev. 477 (1981).

## II. Public Policy Manifested by the Constitution Requires that Private Schools Refrain from Discrimination on Racial Grounds.

Amendment Thirteen to the Constitution bars discrimination by states on the basis of race. The Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. §1981, was enacted in furtherance of that amendment. And, in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), this Court held that Section 1981 prohibits private, nonsectarian schools from denying admission to applicants

because they are blacks. Thus, application of this constitutional mandate and congressional policy barring racial discrimination by private schools, could not be clearer, far antedating and justifying the adoption of that same policy for tax purposes by the Internal Revenue Service.

NAIS urges that there is no constitutional bar to application of that policy equally to sectarian schools, but defers to the brief of William T. Coleman, Jr., Esq. for presentation of that point.

## III. NAIS Experience Confirms that the Constitutional Requirement of an Anti-Discrimination Educational Policy is Wholly Consistent with Educational Objectives and Needs.

NAIS has long been committed, by official action, to the principle of non-discrimination in admission of students and employment of teachers and other personnel as a vital educational principle.[1] In 1976, NAIS filed an *amicus curiae* brief with this Court in support of two black families who were charging racial discrimination in the admission of their children by two segregated private schools in Virginia. *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

John C. Esty, Jr., President of NAIS, testified on February 21, 1979, before the Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, in support of the purposes and objectives of a proposed revenue procedure designed to provide administrative tests for implementing Rev. Proc. 72-54, 1972-2 C.B. 834, although several of the particular procedures proposed were found to be unworkable. Mr. Esty continued to assist in the development of feasible and fair guidelines in correspondence with the

[1] For over a decade, an applicant for admission to NAIS must submit a statement "that the school's policies provide for admission of students and employment of personnel without regard to race or color (if not contained in the school catalogue)." NAIS directors reaffirmed these policies in a major statement to members in June 1974.

Commissioner of Internal Revenue, Jerome H. Kurtz. Finally, on February 24, 1982, the Board of Directors of NAIS adopted a resolution approving the legal obligation of the Internal Revenue Service to deny tax exemption to racially discriminatory schools, both religious and secular. This position is founded upon the conviction that racial discrimination is not only socially inadmissible but also educationally deleterious.

NAIS and its members acknowledged their responsibilities to the Internal Revenue Service in conforming to its administrative policy of nondiscrimination announced in 1970[2] and implemented by procedures promulgated in Rev. Proc. 72-54, *supra,* and Rev. Proc. 75-50, 1975-2 C.B. 587. In general, conformance was achieved without undue difficulty. And, when the Internal Revenue Service proposed revised, more stringent procedures,[3] partly in response to existing and threatened litigation, NAIS supported the basic objectives and procedures, but did urge modifications to meet practical difficulties. Its principal objections related to the apparent establishment of inflexible presumptions and numerical standards which failed to afford a school an adequate opportunity to qualify for exemption upon the basis of its own experience and circumstances. NAIS thus does maintain that the procedural implementation of the general concepts exemplified by the opinion in *Green* v. *Connally, supra,* requires especial sensitivity by the Internal Revenue Service. Several of those proposed modifications were subsequently reflected in a revised proposal,[4] and NAIS, through its President, as stated above, testified in general support thereof but suggested further modifications; no revision has yet been adopted, in light of Congressional prohibitions.

[2] I.R.S. News Release, July 10, 1970, 70 P-H ¶55,209; I.R.S. News Release, July 19, 1970, 70 P-H ¶55,230; Rev. Rul. 71-447, 1971-2 C.B. 230. For development of this policy, see Thrower, *Tax-Exempt Status of Private Schools*, 35 Tax Lawyer 701 (1982).

[3] 43 Fed. Reg. 37296 (August 22, 1978).

[4] 44 Fed. Reg. 9451 (February 13, 1979).

NAIS members have vigorously supported for all private schools adherence to the strong public policy of nondiscrimination and realize the need for its proper implementation by the Internal Revenue Service in connection with the tax laws, as well as its application in other areas. NAIS members have not been adversely affected by conformity to reasonable rules of administration, which NAIS believes strengthen the achievement of desirable educational objectives and needs. Such considerations, NAIS urges, should be given substantial weight in deciding the interpretive issues here involved. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

The position of NAIS was well summarized by Mr. Esty's predecessor, Cary Potter, when, at the time of the litigation in *Runyon* v. *McCrary, supra,* he wrote as follows on the presumed right of private schools to discriminate racially:

> "The private school world in general does not support any such right. Private schools do believe that they are fully entitled to determine their own philosophy, to design the curriculum and choose the teaching materials and methods they consider most effective, and to admit students who they believe, and whose parents believe, will benefit from the education offered. But they do not believe that race as a criterion for admission is one that is in accord with the public interest or the public policy.
>
> The position taken by a minority of private schools . . . that there is a right to discriminate on grounds of race, has been a thorn in the side of the private school world as a whole for some time and we are hopeful that the Court will settle the issue for once and for all."

NAIS believes that it is important for it to be stated and repeated publicly that the private school world in general does not support racial discrimination.

## Conclusion

For the reasons stated herein and in the brief of Special Counsel, *amicus* NAIS urges that the decisions below be affirmed.

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