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

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF INDEPENDENT SECTOR IN SUPPORT OF AFFIRMANCE

Of Counsel:
ADAM YARMOLINSKY
1828 L Street, N.W.
Washington, D.C. 20036
(202) 223-8100

August 25, 1982

* Counsel of Record

JOHN H. PICKERING *
WILLIAM T. LAKE
DUANE D. MORSE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Independent Sector

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION OF INDEPENDENT SECTOR FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rules 36 and 42 of the Rules of the Court, Independent Sector respectfully requests leave to file the attached brief *amicus curiae.*

Independent Sector, a coalition of over 400 national voluntary organizations, corporations, and foundations, seeks leave to address the merits of this controversy because it is vitally concerned about the potential im-

pact of the Court's decision on tax-exempt organizations generally.* Several *amici* have invited the Court to affirm the decisions below on the ground that the government may not constitutionally grant preferred tax treatment to organizations that discriminate on the basis of race. Respondent's argument that the statute does not authorize the Internal Revenue Service to deny exempt status to such organizations increases the danger that the Court may base its decision on constitutional grounds. Independent Sector is concerned that a constitutionally based affirmance could have unintended adverse consequences for exempt organizations that differentiate on bases other than race.

The attached brief is submitted in the interest of avoiding such unintended consequences. It presents statutory arguments for affirmance that have been ignored in most of the briefs already on file, and it discusses some of the reasons why a nonconstitutional holding in these cases is desirable. Furthermore, in recognition of the possibility that the Court may find it necessary to decide these cases on constitutional grounds, the brief outlines a principled basis for approaching the constitutional issue and for circumscribing a constitutional holding so as to avoid producing adverse consequences for charitable organizations generally. In this regard, Independent Sector's views present a new perspective on these cases, and we believe they may assist the Court in reaching a just result.

Because Independent Sector wishes to present views supporting affirmance of the lower court's decisions, the closing date for filing this motion and the attached brief ordinarily would have been March 3, 1982, the date respondent's brief was due. As the Court is aware, however, respondent's brief repudiated its earlier position and argued that the decisions below should be reversed.

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* A fuller description of Independent Sector and its interest in these cases is set forth at pages 1-3 of the attached brief.

In light of respondent's changed position, on April 19, 1982 the Court appointed William T. Coleman, Jr., Esq. *amicus curiae* to advocate the validity of the lower court's decisions in these cases. Mr. Coleman's brief is due August 25, 1982. Since Independent Sector wishes to present views in support of the position Mr. Coleman represents, and since none of the parties would be prejudiced so long as those views are presented at or before the time his brief is filed, Independent Sector respectfully requests the Court to treat this motion and the attached brief as timely filed for purposes of Rule 36.

Counsel for Independent Sector contacted the parties to this case and requested their consent to the filing of the attached brief. Counsel for petitioner Bob Jones University declined to provide such consent; counsel for petitioner Goldsboro Christian Schools stated that he is concerned that the filing may be untimely, but otherwise would be willing to consent. The written consent of the Acting Solicitor General is attached.

Accordingly, Independent Sector respectfully requests the Court to grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

JOHN H. PICKERING *
WILLIAM T. LAKE
DUANE D. MORSE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Independent Sector

August 25, 1982

* Counsel of Record

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BRIEF AMICUS CURIAE OF INDEPENDENT SECTOR IN SUPPORT OF AFFIRMANCE

INTEREST OF AMICUS CURIAE

Independent Sector ("IS") is a coalition of over 400 national voluntary organizations, corporations, and foundations created in 1980 to preserve and enhance the national tradition of giving, volunteering, and not-for-profit

initiative.[1] Its major objectives are to improve the public's understanding of America's nongovernmental, or independent, sector of organizations created to serve community purposes; to promote communications within that sector in order to identify shared problems and opportunities; to perform research designed to improve knowledge about the independent sector; to encourage effective management of nonprofit organizations; and to facilitate relations between the independent sector and national, state, and local governments.

IS and most of its members are nonprofit charitable organizations. Their revenues are tax-exempt under 26 U.S.C. § 501(c)(3) (1976), and contributions to them are tax-deductible under 26 U.S.C. §§ 170(a) and (c) (1976).

Because of their interest in private philanthropy and charitable organizations, IS and its members are vitally concerned with the outcome of this litigation. They believe that the Internal Revenue Service (the "IRS" or the "Service") and the lower court ruled correctly that the practice of racial discrimination disqualifies a nonprofit organization from Section 501(c)(3) status, and they urge this Court to affirm that ruling. At the same time, IS has an interest in this Court's basing its affirmance on a construction of the statute rather than on the proposition, urged by several *amici*, that tax-exempt status is equivalent for constitutional purposes to governmental support.

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[1] IS is the successor of the Coalition of National Voluntary Organizations and the National Council on Philanthropy, which merged effective January 1, 1980 to create IS. A copy of IS' membership list is appended to this brief.

IS acts in this matter through its Board of Directors. IS' 400 members are listed in the Appendix for identification purposes only. This listing does not imply that each of the member organizations has taken a position on this brief.

A holding equating exempt status with federal financial assistance for constitutional purposes would imperil the very independence of the independent sector. If this Court should blur the distinction between private charitable activity and governmental action, the result could be to discourage independent public service by inviting attempts to subject exempt organizations and their donors to federal and state regulation. As Judge Friendly has observed, "If the federal courts take over the supervision of philanthropy, there will ultimately be no philanthropy to supervise." [2] This brief is submitted in the interest of avoiding that result.

SUMMARY OF ARGUMENT

Section 501(c)(3) of the Internal Revenue Code, together with its companion provision, Section 170(c), grant preferred tax treatment to nonprofit organizations whose activities benefit the public and to those who contribute to such organizations. Those sections were not designed, nor should they be interpreted, to encourage private activity that violates the clearly defined public policy against racial discrimination.

That exempt organizations must benefit the public is evident not only from the language of the statutory provisions but also from their legislative history. Congress has emphasized repeatedly that tax exemptions are justified by the public benefit that exempt organizations confer, and the courts have relied on that rationale in interpreting the exemption sections. Petitioners' argument that religious or educational organizations are entitled to exempt status regardless of how abhorrent their activities may be to public policy stands congressional intent on its head.

Congress and the courts have made clear that the practice of racial discrimination negates any public benefit

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[2] *Jackson v. Statler Foundation*, 496 F.2d 623, 640 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (Friendly, J., dissenting from denial of rehearing *en banc*).

a nonprofit organization might otherwise confer. This Court has emphasized repeatedly that racial discrimination, particularly in an educational setting, is contrary to basic constitutional principles. Congress has ratified and extended that view by enacting federal statutes designed to eradicate racial discrimination. And the law of charitable trusts recognizes that racial discrimination so affects an otherwise "charitable" activity that it no longer can be considered to serve the public interest.

Even if there were no clear indication of congressional intent to limit exempt status to organizations that confer a public benefit, this Court should not ascribe to Congress an intent to provide preferred tax treatment to organizations that discriminate on the basis of race. This Court's prior decisions establish that the tax laws should not be construed in a way that would frustrate sharply defined public policy.

Furthermore, Congress, quick to modify IRS actions of which it disapproves, has implicitly ratified the denial of tax-exempt status to organizations practicing racial discrimination. In the twelve years since the original IRS ruling involved here, Congress frequently has had the opportunity to enact new legislation in this area but has refused to alter the IRS practice. Instead, it has sent clear signals that denial of tax-exempt status to racially discriminatory organizations is fully consistent with the intent behind Section 501(c)(3).

The evidence compels a conclusion that the IRS position is consistent with the language and intent of Section 501(c)(3). That conclusion makes it unnecessary to decide whether granting tax exemptions to schools that discriminate on the basis of race would violate the Fifth Amendment. The principle of avoiding unnecessary constitutional adjudication should be applied here because a holding that equated tax exemptions to government financial aid for constitutional purposes could disrupt what is today a clear delineation between public and private activities conducted for the public good. This Court can and

should avoid such disruption by deciding this case on statutory grounds.

If this Court nevertheless finds it necessary to reach the constitutional issue in order to affirm, its holding should be carefully limited to avoid adverse effects on charitable organizations and their patrons. First, the Court should explicitly avoid suggesting that impermissible governmental action necessarily would be found where a tax-exempt organization makes distinctions on some basis other than race. Second, it would be undesirable for this Court to create any basis for an implication that exempt organizations are de facto arms of the government, or that they are subject to the same constitutional and legal constraints that apply to the government. Careful limitation of any constitutional ruling is critical to preserving the tradition of vigorous private philanthropic activity in this country.

ARGUMENT

I. The IRS Properly Interpreted Sections 501(c)(3) and 170(c) As Denying Exempt Status to Organizations That Discriminate on the Basis of Race.

The central issue in this case is whether preferred tax treatment should be extended to religious or educational organizations that discriminate on the basis of race. Both the statutory framework and the legislative history show that tax exemptions are designed to encourage private nonprofit activities beneficial to the public. Congress has made clear that an organization is not entitled to preferred tax treatment simply because it confers some public benefit, if its activities violate fundamental public policy. Constitutional commands, judicial decisions, and congressional enactments establish that the practice of racial discrimination is so fundamentally at odds with public policy that it negates, for this purpose, any public benefit an organization might otherwise provide. Petitioners, who admittedly engage in racial dis-

crimination, do not satisfy the public-benefit test, and the IRS properly denied them exempt status. Congress has been aware of this ruling by the Service and has indicated its approval of it.

A. *Congress intended to deny preferred tax treatment to organizations whose activities violate a fundamental public policy such as the policy against racial discrimination.*

The underlying purpose behind Sections 501(c)(3) and 170(c) is the promotion of private, nonprofit activities that benefit the public.[3] This purpose is evident not only from the kinds of organizations listed in Section 501(c)(3)—those "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . or for the prevention of cruelty to children or animals"—but also from the fact that "Section 170 of the Code, the companion provision to 501(c)(3), places the separately enumerated purposes in that section under the broad heading of 'charitable' and permits deduction of contributions made to organizations serving those purposes. 26 U.S.C. § 170(c)(2)(B)." [4]

Congress' intent to exempt only organizations whose activities benefit the public also is manifest in the legislative history and has been recognized by this Court. As the Senate sponsor of the predecessor of the current exemption provision explained, the exemption was designed to relieve from tax those institutions "devoted exclusively

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[3] This is not to say that an exempt organization must be in strict harmony with prevailing public views about what is advantageous to society, but only that the activities of the organization should not be contrary to a fundamental public policy such as the policy against racial discrimination.

[4] *United States v. Bob Jones University*, 639 F.2d 147, 151, n.6 (4th Cir. 1981). *See also* 26 U.S.C. § 642(c) (1976) ("Deduction for amounts paid or permanently set aside for a charitable purpose").

to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse." [5] This Court noted that purpose in its first decision interpreting the exemption provision: "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain." [6] And the House Committee Report that accompanied the immediate statutory predecessor of Section 501(c)(3) confirmed that the primary rationale for the exemption is public benefit:

> "The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare." [7]

Petitioners and the United States make much of the fact that Section 501(c)(3) lists qualifying charitable activities in the disjunctive. They contend that a nonprofit organization that qualifies as "educational" or "religious" is automatically entitled to an exemption

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[5] 44 Cong. Rec. 4150 (1909) (remarks of Senator Bacon). The notion of exempting charitable organizations from taxation has its roots in the English Statute of Charitable Uses, enacted in 1601. A leading history of the subject states that "[p]ublic benefit was the key to the statute . . . ." G. Jones, *History of the Law of Charity 1532-1827*, at 27 (1969).

[6] *Trinidad v. Sagrada Orden*, 263 U.S. 578, 581 (1924). *See also McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972) (three-judge court) ("The rationale for allowing the deduction of charitable contributions has historically been that by doing so, the Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government.").

[7] H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938).

even if some of its activities violate public policy.[8] But that argument proves too much. As the late Judge Leventhal observed, it would lead to the conclusion that Fagin's school for pickpockets was entitled to a tax exemption.[9] Similarly exempt would be institutions established to train terrorists, religious groups devoted to practicing human sacrifice, or scientific groups committed to the development and distribution of illegal drugs. Such activities plainly fail to meet Congress' central "public benefit" criterion.

Congress never intended to grant preferred tax treatment to organizations whose activities violate fundamental public policy, even if they also happen to be engaged in one of the charitable pursuits listed in Section 501(c)(3). Rather, it intended to exempt organizations that confer a public benefit without flouting public policy. Unless petitioners can meet the public-benefit requirement, the fact that they are educational or religious is insufficient. This conclusion and its underlying principles are fully explicated in *Green v. Connally*, *supra*, and need no elaboration in this brief.

B. *Petitioners' racially discriminatory policies negate, for purposes of these tax provisions, any public benefit their religious or educational activities might otherwise provide.*

Once it is recognized that a nonprofit religious or educational organization is disqualified from preferred tax status if its activities violate an established, fundamental public policy, petitioners' statutory argument collapses. Few public policies are as firmly established, or have such explicit constitutional foundations, as that against

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[8] Brief for Petitioner Bob Jones University 12-13; Brief for Petitioner Goldsboro Christian Schools 15-17; Brief for the United States 13-18.

[9] *See Green v. Connally*, 330 F. Supp. 1150, 1160 (D.D.C.), *aff'd per curiam sub nom. Coit v. Green*, 404 U.S. 997 (1971).

racial discrimination. Whatever room there may be in the exemption sections for organizations that engage in other types of questionable conduct, there is none for organizations that discriminate on the basis of race. Decisions of this Court and of the lower courts over the past 30 years establish conclusively that the practice of racial discrimination in any form is so intolerable that it negates, for these purposes, any public benefit the organization might otherwise confer.

Race or color is the only classification expressly forbidden by the Constitution.[10] This Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), relied on that prohibition in giving full force to the nation's public policy against racial discrimination in education. Since that decision, there has been no retreat from the principle that racial discrimination in education is repugnant to the constitutional values to which the nation is committed. Rather, Congress has extended that principle by providing in Title VI of the Civil Rights Act of 1964 that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[11] And this Court has made clear that, under 42 U.S.C. § 1981 (1976), even a private, commercially operated, nonsectarian school may not deny admission on the basis of race. *Runyon v. McCrary*, 427 U.S. 160 (1976).

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[10] Amendment XV provides, in pertinent part, that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The other Civil War Amendments, XIII and XIV, are rooted in the same attitude of repugnance toward racism. No other classification has an equivalent status under the Constitution.

[11] Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (1964), codified at 42 U.S.C. § 2000d (1976).

The strength of this policy against racial discrimination was underscored in *Norwood v. Harrison*, 413 U.S. 455 (1973), in which this Court struck down on constitutional grounds a state program for lending textbooks to private schools, including schools practicing racial discrimination. While recognizing that private schools fulfill an "important educational function," the Court went on to state that, where "the legitimate educational function cannot be isolated from discriminatory practices . . . [the] discriminatory treatment exerts a pervasive influence on the entire educational process." *Id.* at 469. Thus, the Court concluded that a state could not provide any "tangible financial aid" to such schools.

The rule that racial discrimination is irreconcilable with public benefit also has been recognized by this and other courts in the area of charitable trust law. Thus, provisions that restrict the beneficiaries of a charitable trust to persons of a given race routinely have been held to be unenforceable.[12] In order to give effect to such trusts, courts have applied the *cy pres* doctrine to remove racial restrictions.[13] And in cases where removing racial restrictions would have contravened the settlor's intent, the courts have held the entire trust void.[14]

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[12] *See, e.g., Evans v. Newton*, 382 U.S. 296 (1966); *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957); *Pennsylvania v. Brown*, 373 F.2d 771 (3d Cir. 1967), *Sweet Briar Institute v. Button*, 280 F. Supp. 312 (W.D. Va. 1967) (three-judge court); *Coffee v. Wm. Marsh Rice Univ.*, 408 S.W.2d 269 (Tex. Civ. App. 1966). *See also Green v. Connally, supra*, 330 F. Supp. at 1160 ("The cases indicate a trend that racially discriminatory institutions may not validly be established or maintained even under the common law pertaining to educational charities.").

[13] *See, e.g., Lockwood v. Killian*, 172 Conn. 496, 375 A.2d 998 (1977); *Trammell v. Elliott*, 230 Ga. 841, 199 S.E.2d 194 (1973). *See also* Bogert & Bogert, *The Law of Trusts and Trustees* § 378 (Rev. 2d ed. 1977).

[14] *See, e.g., Evans v. Abney*, 224 Ga. 826, 165 S.E.2d 160 (1968), *aff'd*, 396 U.S. 435 (1970); *LaFond v. City of Detroit*, 357 Mich. 362, 98 N.W.2d 530 (1959).

It is also established in charitable trust law that if no method can be found for separating the charitable from the noncharitable aspects of a trust, the entire trust is void.[15] Similarly, because petitioners' racially discriminatory practices exert a pervasive influence on their religious and educational functions, *Norwood v. Harrison*, *supra*, 413 U.S. at 469, those ordinarily beneficial functions are tainted and their exemption claims must be denied.[16]

In short, the decisions of this Court and of the lower courts make clear that organizations that discriminate on the basis of race are not deemed to confer a public benefit. This being so, the fact that they are "educational" or "religious" organizations is insufficient. Whatever else they may be, petitioners are not the kind of nonprofit organizations whose activities Congress intended to encourage by providing preferred tax treatment.

C. *Even if congressional intent were less clear, this Court should not ascribe to Congress the intent to grant tax-exempt status to organizations whose activities violate public policy.*

This Court has held that the Internal Revenue Code should not be construed in a way that would frustrate public policy. In *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958), this Court held that fines paid for violations of state highway weight limits were not deductible under section 162 as "ordinary and necessary" business expenses. It declared that "[a] finding of 'necessity' cannot be made . . . if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced

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[15] Bogert & Bogert, *supra* note 13, § 372.

[16] *See generally Green v. Connally*, *supra* note 9; *Simon, The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 Tax L. Rev. 477, 496, 500 (1981).

by some governmental declaration thereof." [17] While the statute on its face contained no such exception, the Court refused to "presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State." [18]

The principle that the Code should not be construed to frustrate public policy is directly applicable to this case.[19] Congress created preferred tax status as a means of encouraging nonprofit activity that benefits the public. Since racial discrimination in education is so plainly contrary to the public interest, "The Code must be construed and applied in consonance with the Federal public policy

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[17] *Id.* at 33-34.

[18] *Id.* at 35. *See also Textile Mills Securities Corp. v. Commissioner*, 314 U.S. 326, 339 (1941) (corporate lobbying expenses held not deductible as ordinary and necessary business expenses on public policy grounds).

[19] The United States argues that the public policy doctrine has been limited by *Commissioner v. Tellier*, 383 U.S. 687 (1966) and by subsequent legislative action. Brief for the United States 25-26. However, the Court's concern in *Tellier* was that the public policy doctrine should not be applied to deny a deduction for legal expenses incurred in defending against criminal charges, since to deny the deduction would be to penalize the exercise of the constitutional right to counsel. 383 U.S. at 694. That consideration is not applicable to the case at bar. Furthermore, while Congress amended the statute to limit the relevance of public policy considerations under section 162, *see* Tax Reform Act of 1969, Pub. L. No. 91-172, § 902, 83 Stat. 487, 710 (1969), the doctrine has continued to be applied under other sections of the Code. *See, e.g, Holt v. Commissioner*, 69 T.C. 75 (1977), *aff'd*, 611 F.2d 1160 (5th Cir. 1980) (personal loss deduction denied for marijuana seized and forfeited); *Raymond Mazzei*, 61 T.C. 497 (1974) (personal deduction denied for theft loss incurred during involvement in illegal counterfeiting scheme). Moreover, as the court of appeals pointed out in its opinion below, since "section 501(c)(3) is rooted in public policy considerations", the public policy doctrine ought to have a broader scope with respect to it than it has under section 162, which merely defines taxable income. 639 F.2d at 152.

against support for racial segregation of schools, public or private." [20]

Where, as here, granting tax-exempt status would encourage private conduct that violates the fundamental public policy against racial discrimination, this Court should not construe the statute to permit the exemption in the absence of clear evidence that Congress intended that result. As we have shown, the legislative history not only contains no hint of congressional intent to confer preferred tax status on racially discriminatory organizations but indicates strongly that Congress intended the opposite result. Accordingly, the Service's position should prevail.[21]

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[20] *Green v. Connally, supra*, 330 F. Supp. at 1163. As the court observed in its seminal opinion in that case, the concepts of what constitutes a public benefit and what violates public policy receive their content from present legal and moral standards, rather than from those in existence when the initial exemption provision was enacted. "Calculations of community benefit are often difficult, and as time passes, conceptions of worthy purposes may change." *Id.* at 1158.

This principle has long been recognized in the charitable trust area. As Bogert has said:

> "The courts should be left free to apply the standards of the time. What is charitable in one generation may be noncharitable in a later age, and vice versa." *Bogert & Bogert, supra* note 13, § 369.

This is not the only area in which the Service's interpretation of § 501(c)(3) has changed as society's attitudes have evolved. For example, in 1975 the IRS ruled that public-interest litigation constitutes a charitable activity within the meaning of the statute. Rev. Proc. 75-13, 1975-1 C.B. 662; *see* Rev. Proc. 71-39, 1971-2 C.B. 575. Yet clearly the Congress that enacted the initial exemption provisions did not envision such organizations as being exempt. Simon, *supra* note 16, 36 Tax L. Rev. at 490.

[21] It is no answer for petitioners to assert that "if the IRS is permitted to deny tax-exempt status to an organization on the ground that it has not complied with federal public policy, the ultimate result would be that the specific criteria for determining an organization's tax-exempt status under Section 501(c)(3) would

D. *Congress has ratified the Service's denial of exempt status to organizations that discriminate on the basis of race.*

The Service's position that the practice of racial discrimination disqualifies a nonprofit organization from Section 501(c)(3) tax-exempt status dates from 1970.[22] It was adopted in response to the issuance of a preliminary injunction in *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), prohibiting the IRS from according tax-exempt status to racially discriminatory private schools in Mississippi. That injunction was later made permanent in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), and affirmed by this Court in *Coit v. Green*, 404 U.S. 997 (1971) (*per curiam*). Since 1970, Congress has been fully aware of the Service's position, has repeatedly considered its propriety, and has refused to alter it.

One month after the IRS announced its position with respect to racially discriminatory schools, Commissioner Thrower testified before the Senate Select Committee on Equal Educational Opportunity in order to explain the Service's policy. Senator Mondale, the Chairman of the Committee, urged the Service to take vigorous action to enforce its new policy, and the Commissioner agreed to do so.[23]

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change every time the IRS determines that there has been a change in federal public policy." Brief for Petitioner Goldsboro Christian Schools 31. We have here no subtly perceived, ephemeral shift in public policy, but a well-established policy that has its roots in the Constitution, has been enunciated in numerous decisions by this Court, and has been further underscored by various congressional enactments.

[22] *See* Internal Revenue Service News Release, July 10, 1970, 7 Stand. Fed. Tax Rep. (CCH) ¶ 6790 (1970) (codified in Rev. Proc. 71-447, 1971-2 C.B. 230). *See also* Rev. Proc. 75-50, 1975-2 C.B. 587.

[23] *See Hearings Before the Select Senate Committee on Equal Educational Opportunity*, 91st Cong., 2d Sess., Part 3D—Desegregation Under Law, at 1992-2028 (1970).

In 1976, Congress codified the principle that racial discrimination is inconsistent with tax-exempt status by adding the provision now contained in 26 U.S.C. § 501(i) (Supp. II 1978), which denies preferred tax treatment to private social clubs that discriminate on the basis of race.[24] This provision was a direct response to the ruling by the three-judge district court in *McGlotten v. Connally*, 338 F. Supp. 448, 457-59, 462 (D.D.C. 1972), that recognition of racially segregated social clubs as tax-exempt entities under § 501(c)(7) did not violate the Code, the Constitution, or Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976). In reporting the measure, both the Senate and House Committee Reports cited the three-judge district court's holding in *Green v. Connally*, *supra*, that "discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2))."[25] It was of course unnecessary for Congress to legislate with respect to discriminatory schools, because the IRS position stemming from *Green* already denied them tax-exempt status.

The 1976 legislation demonstrates not only Congress' commitment to the principle of nondiscrimination, but also its willingness to overturn judicial decisions with which it disagrees. Correspondingly, Congress' citation of *Green*, coupled with its willingness to let that decision stand, must be taken as ratification of the ruling that racial discrimination disqualifies an educational organization under Section 501(c)(3).

Further evidence of Congress' awareness and approval of the policy against granting tax-exempt status to schools that discriminate on the basis of race is provided

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[24] Act of October 20, 1976, Pub. L. No. 94-568, § 2(a), 90 Stat. 2697.

[25] S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7-8 & n.5 (1976); H.R. Rep. No. 94-1353, 94th Cong., 2d Sess. 8 & n.5 (1976).

by the legislative history of the Ashbrook and Dornan Amendments. In 1978, the IRS proposed a new set of *procedures* that would have required private schools seeking Section 501(c)(3) exemptions to provide evidence that they did not discriminate on the basis of race. Congress responded by stipulating in the Ashbrook and Dornan Amendments to the Treasury Department appropriations bill in 1980 [26] that none of the appropriated funds could be used to carry out the proposed IRS procedures, or "to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 *unless in effect prior to August 22, 1978.*" (Emphasis added.)

Statements by sponsors of the amendments make clear that Congress' action was prompted by objections to the proposed procedures and that Congress did not intend to alter or limit the underlying policy against tax-exempt status for schools that discriminate on the basis of race. For example, Representative Dornan said:

> "Let me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50. My amendment will protect thousands of innocent schools that would suffer if IRS adopts the proposed revised revenue procedure." [27]

Similarly, Senator Helms, who introduced the Ashbrook Amendment in the Senate, declared that under it:

> "IRS would still be able to enforce all regulations which were in effect as of August 22 of last year."

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[26] Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, §§ 103 (Ashbrook Amendment), 615 (Dornan Amendment), 93 Stat. 559, 562, 577 (1979).

[27] 125 Cong. Rec. H5982 (daily ed. July 16, 1979).

"The existing law provides substantial procedures for the IRS to deny the tax-exempt status of schools which discriminate."

"In fact, IRS has denied the tax-exempt status of over 100 schools which it, or a court, has found to be discriminatory. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of IRS to act against offending schools on a case-by-case basis." [28]

Finally, since the Service announced its policy on July 10, 1970, numerous bills have been introduced in Congress designed to modify the policy that a racially discriminatory private school is not "charitable" within the meaning of Section 501(c)(3) and not eligible for deductible contributions under Section 170.[29] None of them has been enacted. As this Court declared in comparable circumstances in *Runyon v. McCrary*, *supra*, "There could hardly be a clearer indication of congressional agreement with the view [of the Service] . . . ." [30]

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[28] 125 Cong. Rec. S11979-S11980 (daily ed. Sept. 6, 1979).

[29] *See* H.R. 68, 92d Cong., 1st Sess. (1971); H.R. 2352, 92d Cong., 1st Sess. (1971); H.R. 5350, 92d Cong., 1st Sess. (1971); H.R. 1394, 93d Cong., 1st Sess. (1973); S. 103, 96th Cong., 1st Sess. (1979); H.R. 1002, 96th Cong., 1st Sess. (1979); H.R. 1905, 96th Cong., 1st Sess. (1979); S. 449, 96th Cong., 1st Sess. (1979); S. 995, 96th Cong., 1st Sess. (1979); H.R. 332, 97th Cong., 1st Sess. (1981); H.R. 95, 97th Cong., 1st Sess. (1981); H.R. 802, 97th Cong., 1st Sess. (1981); H.R. 5186, 97th Cong., 1st Sess. (1981).

[30] 427 U.S. at 174-75, *citing Flood v. Kuhn*, 407 U.S. 258, 269-285 (1972); *Joint Industries Board v. United States*, 391 U.S. 224, 228-29 (1968). In *Runyon*, the Court addressed the question whether 42 U.S.C. § 1981 (1976) reaches private acts of racial discrimination. In holding that it does, the Court noted that Congress had "specifically considered and rejected an amendment" that would have overturned the Court's interpretation of that statute (in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)) as granting a right of action to the victim of discrimination. *Runyon v. McCrary*, *supra*, 427 U.S. at 173-74.

In sum, Congress has long been aware of the Service's policy of denying tax-exempt status to schools that discriminate on the basis of race, has repeatedly rejected legislative efforts to alter or limit the substance of that policy, and has ratified the policy by extending it to discriminatory private social clubs. As the Court has stated, "[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation . . . , then presumably the legislative intent has been correctly discerned." [31] Under these circumstances, there can be no question but that the Service acted properly in refusing to accord petitioners preferred tax treatment.

II. This Court Need Not and Should Not Decide Whether Granting Preferred Tax Treatment to Nonprofit Organizations That Discriminate on the Basis of Race Would Violate the Constitution.

Several *amici* urge this Court to affirm the lower court's decisions on the ground that granting tax-exempt status to racially discriminatory private schools would violate the Fifth Amendment. In essence, they argue that a tax exemption confers a benefit on such organizations that is equivalent for constitutional purposes to direct governmental support. Pointing out that *Norwood v. Harrison, supra*, held that the government may not provide tangible financial aid to schools that discriminate on the basis of race, *amici* urge the Court to hold here that tax exemptions are likewise constitutionally objectionable.[32]

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[31] *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979), *quoting Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940). *See also Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978); *Helvering v. Winmill*, 305 U.S. 79, 83 (1938).

[32] *See* Brief for the Lawyers Committee for Civil Rights Under Law 5-18; Brief for the American Civil Liberties Union and the American Jewish Committee 17-32; Brief of North Carolina Association of Black Lawyers 5-7.

This Court should decline the invitation of *amici* to decide this case on constitutional grounds. Quite apart from the fact that the constitutional equivalence of tax exemptions and direct financial support is questionable,[33] a holding that preferred tax treatment is legally equivalent to federal funding would raise a great variety of troublesome questions. For example, if tax-deductible contributions were treated as government funds, taxpayers making those contributions could be subject to some or all of the constraints the Constitution places on the government. It is not idle hyperbole to suggest that private philanthropy would be gravely impaired if individuals who make charitable contributions—large and small—were regarded as dispensers of government funds. Could individual parishoners, for example, make gifts to religious organizations without effecting the prohibited establishment of religion, or contributors to women's colleges do so without violating federal law? [34]

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[33] There are substantial legal and practical differences between tax exemptions and direct financial subsidies. "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to [exempt organizations] but simply abstains from demanding that [those organizations] support the state." *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970). While an organization's tax-exempt status undoubtedly aids its fundraising efforts, its funds come from the private sector and their amount is determined by individual contributors rather than by the Government. Furthermore, a respectable body of opinion holds that tax exemptions such as the charitable exemption granted by § 501(c)(3) are primarily an income-defining device designed to implement "the congressional intent to tax only net income." *Tank Truck Rentals, Inc. v. Commissioner, supra*, 356 U.S. at 35. *See, e.g.*, Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285, 1288-89 (1969). Thus, it is by no means clear that tax exemptions and direct subsidies are analogous for constitutional or any other purposes.

[34] *See* Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (codified at 20 U.S.C. § 1681 (1976)): "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be

And what about the exempt organizations themselves? Would they become subject to the myriad regulations and legal obligations that accompany federal funding? If so, retirement homes operated by particular religious charities might be forced to admit persons of any creed;[35] private schools or organizations for girls or boys might have to become coeducational;[36] senior citizens groups might be forbidden to discriminate on the basis of age;[37] community centers designed to serve particular ethnic groups might have to open their doors to all comers;[38] and any exempt organization might be required to modify its physical facilities to provide access to the handicapped.[39] Resolving these and similar questions that might be raised by an overbroad holding in this case could occupy exempt organizations, their benefactors, the courts, and Congress for years to come.

The Court can and should avoid such a possibility by deciding this case on statutory grounds. As we have shown, the IRS properly interpreted the statute in denying tax exemptions to racially discriminatory schools. The further question whether Congress constitutionally could make such schools exempt need not and should not be reached. This Court should not " 'anticipate a ques-

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subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ."

[35] *Cf.* U.S. Const. amend. I.

[36] *See* 20 U.S.C. § 1681(a) (1976) (prohibits sex discrimination in federally funded educational programs).

[37] *See* 42 U.S.C. § 6102 (1976) (prohibits age discrimination in federally assisted programs).

[38] *See* 42 U.S.C. § 2000d (1976) (prohibits discrimination on the basis of national origin in federally funded programs).

[39] *See* 42 U.S.C. § 4151 (1976) (requires federally financed buildings to be accessible to the handicapped).

tion of constitutional law in advance of the necessity of deciding it'." [40]

III. If This Court Finds it Necessary to Rule That Granting Petitioners Tax-Exempt Status Would Violate the Constitution, It Should Make Clear That Its Holding Applies Only to Organizations That Discriminate on the Basis of Race.

If this Court should nevertheless find it necessary to resolve the constitutional issue in order to affirm, we believe it should circumscribe its holding carefully so as to minimize any adverse effect on charitable organizations and their donors. Specifically, if it rules that granting tax-exempt status to petitioners would constitute impermissible governmental action, it should avoid any suggestion either (1) that impermissible governmental action necessarily would be found where an exempt organization makes distinctions on some basis other than race, or (2) that exempt organizations are de facto arms of the government. Those questions should be reserved explicitly for future cases.

The constitutional significance of granting tax exemptions to racially discriminatory organizations depends on the extent to which exemptions encourage discrimination. That question would not be resolved by a finding that tax exemptions confer a benefit on the exempt organization. Clearly they do, for they reduce the organization's expenses and assist its fundraising efforts. But not every form of governmental assistance to even racially discriminatory organizations is unconstitutional.[41] This

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[40] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). *See also, e.g., Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) (the Court should not pass on constitutional questions unless their decision is unavoidable).

[41] *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) ("The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State.").

being so, the relevant question is whether granting tax benefits to petitioners would involve the government unconstitutionally in private discrimination. That question is essentially a state-action question.

State-action analysis has been applied in two different types of situations. In the more common situation, in which private conduct is challenged, the courts have asked whether there is sufficient governmental involvement so that the private conduct may fairly be treated as that of the government itself—in other words, whether the challenged private conduct is really discriminatory *governmental* action.[42] In the less common situation, in which the challenged conduct is that of the government itself, governmental action clearly is present and the relevant question has been whether that action sufficiently promotes private discrimination that it may fairly be treated as discriminatory.[43] The state action question here is of the second type: Governmental action, in the form of preferred tax treatment, clearly would be present if petitioners were exempt. The constitutional question the Court is being asked to decide is whether that governmental action would sufficiently promote petitioners' discriminatory policies that the grant of preferred tax treatment itself could fairly be treated as unconstitutional discrimination.[44]

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[42] *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Moose Lodge No. 107 v. Irvis, supra*, 407 U.S. at 176; *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

[43] *See Norwood v. Harrison, supra; Reitman v. Mulkey*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

[44] *Cf. Norwood v. Harrison, supra*, 413 U.S. at 466 (a state may not grant tangible financial aid if doing so would tend significantly to "facilitate, reinforce, and support private discrimination"); *Reitman v. Mulkey, supra*, 387 U.S. at 381 (state constitutional provision forbidding the state to limit private housing discrimination held invalid on the ground it would "significantly encourage and involve the State in private discriminations"); *Jackson v. Statler Foundation, supra*, 496 F.2d at 637 (Friendly, J., dissenting from denial of rehearing *en banc*) ("the only question [is] whether

The national commitment to racial equality may inform, but it does not conclusively answer, the constitutional question whether preferred tax treatment amounts to unconstitutional governmental action. Preferred tax treatment is, at most, an extremely limited form of governmental involvement in private conduct. By contrast to the kinds of tangible aid to discriminatory organizations that the Court has struck down in prior cases,[45] "[a]n exemption or other tax benefit, available to a wide range of institutions, has always been regarded as the least possible form of government support, except for the police and fire protection provided all citizens." [46] This Court's decision in *Walz v. Tax Commission*, *supra*, makes clear that, for First Amendment purposes at least, tax-exempt status is not constitutionally significant.[47] While a different result might well obtain where an exempt organization discriminates on the basis of race,[48] the governmental action question is not without some difficulty.

The point we wish to emphasize, however, is not whether the constitutional issue is difficult or easy. The

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[governmental] action sufficiently promote[s] private racial discrimination to render the decisions impermissible for a government officer").

[45] *See, e.g., Norwood v. Harrison*, *supra* (textbook lending program); *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974) (exclusive use of municipal recreation facilities); *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd mem.*, 389 U.S. 571 (1968) (tuition grant program).

[46] *Jackson v. Statler Foundation*, *supra*, 496 F.2d at 638 (Friendly, J., dissenting from denial of rehearing *en banc*).

[47] 397 U.S. at 675.

[48] *Cf. Norwood v. Harrison*, *supra*, 413 U.S. at 470 ("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.").

important point is the limited significance that any resolution of that constitutional issue should have for future cases. Specifically, we submit that a holding that Congress could not constitutionally grant petitioners preferred tax treatment because of petitioners' racially discriminatory practices should not be viewed as undercutting the exempt status of organizations that draw distinctions on bases other than race or as making such organizations themselves or their contributors arms of the government that are subject to the constitutional restraints that bind the government.

In the first place, the objectionable private conduct in this case is racial discrimination. The government clearly does not have the freedom to assist organizations that discriminate on the basis of race that it may have to assist organizations that differentiate on other grounds. Racial equality occupies a special place in our constitutional jurisprudence, and the courts routinely have taken account of that fact by applying a less onerous state-action test in cases involving racial discrimination than in cases involving other constitutional claims.[49] While this Court has not expressly enunicated a two-tier state action

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[49] *Spark v. Catholic University of America*, 510 F.2d 1277, 1281-83 (D.C. Cir. 1975) (*per curiam*); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 879 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); *Greenya v. George Washington University*, 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975); *Adams v. First National Bank*, 492 F.2d 324, 333 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); *Jackson v. Statler Foundation*, *supra*, 496 F.2d at 629; *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1142 (2d Cir. 1973); *Lefcourt v. Legal Aid Society*, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *Wagner v. Sheltz*, 471 F. Supp. 903 (D. Conn. 1979); *Sament v. Hahnemann Medical College and Hospital of Philadelphia*, 413 F. Supp. 434 (E.D. Pa. 1976), *aff'd*, 547 F.2d 1164 (3d Cir. 1977); *Pitts v. Dept. of Revenue*, 333 F. Supp. 662, 668 (E.D. Wis. 1971) (three-judge court).

test,[50] its decisions reflect a special solicitude for constitutional claims based on racial discrimination.[51] Given the special status of racial discrimination in state-action analysis, a holding that the government could not lawfully grant preferred tax status to organizations that discriminate on the basis of race should not control the question whether tax exemptions are constitutionally significant for other purposes. That question should be expressly reserved for future decision.

Furthermore, a holding that the government cannot constitutionally grant tax exemptions to organizations that discriminate on the basis of race need not mean that exempt organizations themselves are subject to the same constitutional and legal constraints as the government. Such a holding—that the government would act unconstitutionally if it granted the exemption—does not resolve the wholly separate question whether exempt organizations themselves are engaged in governmental action. Moreover, to treat exempt organizations as the

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[50] *See Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at 373-74 (Marshall, J., dissenting).

[51] *Compare Gilmore v. City of Montgomery, supra* (city may not permit exclusive access to municipal recreation facilities by segregated private schools); *Norwood v. Harrison, supra* (textbook lending program held unconstitutional when it benefited racially discriminatory private schools); *Burton v. Wilmington Parking Authority, supra* (racially discriminatory policies of private restaurant operated on municipal premises held unconstitutional); *Shelley v. Kraemer, supra* (state court enforcement of private racially restrictive covenants held unconstitutional), *with Everson v. Board of Education,* 330 U.S. 1 (1947) (state reimbursement of cost of transporting students to private parochial schools upheld); *Board of Education v. Allen,* 392 U.S. 236 (1968) (state program of lending textbooks to parochial school students upheld); *Jackson v. Metropolitan Edison Co., supra* (attempt to impose due process obligations on utility based on state regulation of the utility rejected); *Flagg Bros. v. Brooks,* 436 U.S. 149 (1978) (due process claim based on state UCC provision authorizing sale of goods by secured creditor rejected).

government itself would threaten "traditional values of decentralization, self-reliance, private endeavor, and personal association." [52] As Judge Friendly has pointed out,

> "A holding that an otherwise private institution has become an arm of the state is much broader and can have far more serious consequences than a determination that the state has impermissibly fostered private discrimination. The foundation might be exposed to damage claims for prior discriminatory conduct and could be required by a court to make decisions not only as to the disposition of its charitable donations but in the selection of its employees in accordance with the restrictions properly imposed on governmental agencies. Indeed, it might not be able to escape the mark of government action even by disclaiming future tax benefits; the courts might hold that years of tax benefits had rendered the foundation's status as an agent of the state irrevocable . . . ." [53]

In light of these dangers, courts have been less willing to find a constitutional violation in suits seeking to enjoin private activity than in suits directed at governmental encouragement of that activity.[54] One court has noted this distinction explicitly:

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[52] *Cornelius v. Benevolent Protective Order of Elks,* 382 F. Supp. 1182, 1190 n.8 (D. Conn. 1974) (three-judge court) (complaint dismissed as moot because of intervening change in defendants' racially discriminatory membership policies). *See Wahba v. New York University,* 492 F.2d 96, 102 (2d Cir.) *cert. denied,* 419 U.S. 874 (1974) (recognizing the "value of preserving a private sector free from the constitutional requirements applicable to government institutions"). IS is devoted to fostering this healthy pluralism.

[53] *Jackson v. Statler Foundation, supra,* 496 F.2d at 637 (Friendly, J., dissenting from denial of rehearing *en banc*).

[54] *Compare Falkenstein v. Department of Revenue,* 350 F. Supp. 887 (D. Ore. 1972) (three-judge court), *appeal dismissed for want of jurisdiction,* 409 U.S. 1099 (1973) (state tax exemptions for racially exclusive fraternal organizations enjoined); *McGlotten v. Connally,* 338 F. Supp. 448 (D.D.C. 1972) (three-judge court) (fed-

> "[A claim] that some form of state assistance has led to significant state involvement in and 'encouragement' of the private discrimination . . . may well succeed upon a showing of less state involvement than would be required to constitute the state-assisted entity as an agent of the state and hence itself directly subject to Fourteenth Amendment limitations." [55]

Thus, if granting tax exemptions to racially discriminatory organizations amounts to impermissible governmental encouragement of private discrimination, as may be the case, an entity's exempt status need not require it to be treated as an agent of the government. This Court should point out that limitation if it reaches the state-action question.

In sum, if this Court finds it necessary to decide the constitutionality of tax exemptions for schools that discriminate on the basis of race, it should tread carefully. A broad holding that tax exemptions are governmental action for constitutional purposes could leave exempt organizations vulnerable to legal challenges on a variety of theories having nothing to do with racial discrimination. That result would be contrary to the public interest in

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eral tax exemptions for racially exclusive fraternal organizations held unconstitutional); *Pitts v. Dept. of Revenue*, *supra*, 333 F. Supp. at 666 (state tax exemptions for racially discriminatory organizations enjoined), *with New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975) (sex discrimination by exempt organizations held not state action); *Junior Chamber of Commerce v. United States Jaycees*, 495 F.2d 883 (10th Cir.), *cert. denied*, 419 U.S. 1026 (1974) (same); *Stearns v. Veterans of Foreign Wars*, 394 F. Supp. 138 (D.D.C. 1975) (three-judge court), *cert. denied*, 429 U.S. 822 (1976) (sex discrimination by congressionally chartered organization held not state action).

[55] *Cornelius v. Benevolent Protective Order of Elks*, *supra*, 382 F. Supp. at 1189. *See* Brown, *State Action Analysis of Tax Expenditures*, 11 Harv. C.R.-C.L. L. Rev. 97, 119 (1976); Comment, *The Tax-Exempt Status of Sectarian Educational Institutions that Discriminate on the Basis of Race*, 65 Iowa L. Rev. 258, 266 (1979).

encouraging philanthropic activity, and the Court should seek to avoid it by circumscribing any governmental-action holding narrowly and restricting it to discrimination on the basis of race.

CONCLUSION

For these reasons, Independent Sector respectfully requests the Court to affirm the decisions below.

Respectfully submitted,

JOHN H. PICKERING *
WILLIAM T. LAKE
DUANE D. MORSE
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Independent Sector

Of Counsel:
ADAM YARMOLINSKY
1828 L Street, N.W.
Washington, D.C. 20036
(202) 223-8100

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* Counsel of Record

APPENDIX

APPENDIX

INDEPENDENT SECTOR VOTING MEMBERS
(as of August 16, 1982)

Aetna Life and Casualty Company
African Wildlife Leadership Foundation, Inc.
Agudath Israel of America
Aid Association for Lutherans
Alcoa Foundation
Alliance to Save Energy
American Arts Alliance
American Assembly
American Association for the Advancement of Science
American Association for Higher Education
American Association of Fund-Raising Counsel, Inc.
American Association of Homes for the Aging
American Association of Museums
American Association of University Women
American Cancer Society
American Citizens Concerned for Life
American Council for the Arts
American Council of Voluntary Agencies for Foreign Service
American Diabetes Association
American Enterprise Institute for Public Policy Research
American Express Foundation
American Farmland Trust
American Heart Association
American Hospital Association
American Kidney Fund
American Lung Association
American Protestant Hospital Association
American Red Cross
American Social Health Association
American Standard Foundation
American Symphony Orchestra League
American Telephone and Telegraph

American Theatre Association
Appalachian Mountain Club
Armco Foundation
Arrow, Inc.
Aspira of America, Inc.
Association for International Practical Training
Association for Volunteer Administration
Association of Art Museum Directors
Association of Black Foundation Executives, Inc.
Association of College, University and
Community Arts Administrators, Inc.
Association of Governing Boards of
Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Junior Leagues, Inc.
Association of Science Technology Centers
Association of Voluntary Action Scholars
Association of Volunteer Bureaus
Atlantic Richfield Foundation
Avon Products, Inc.

Mary Reynolds Babcock Foundation
BankAmerica Foundation
Bankers Trust Company
Bethlehem Steel Corporation
Blue Cross & Blue Shield Associations
Borden Foundation
Bread for the World Educational Fund, Inc.
Bristol-Myers Company
Brookings Institution
Business and Professional Women's Foundation
Business Committee for the Arts, Inc.

California Community Foundation
Call for Action, Inc.
Camp Fire, Inc.
Carnegie Corporation of New York
Carter Hawley Hale Stores, Inc.

Catalyst
Caterpillar Foundation
CBS Inc.
Center for Citizenship Education
Center for Corporate Public Involvement
Center for Responsive Governance
Champion International
Chase Manhattan Bank, N.A.
Chemical Bank
Chevron U.S.A., Inc.
Children's Aid International
Citibank, N.A.
Citizen's Scholarship Foundation of America, Inc.
Cleveland Foundation
Close Up Foundation
Coca-Cola Company
CODEL, Inc.
College Board
Colt Industries Inc.
Columbus Foundation
Committee for Corporate Support of
Private Universities, Inc.
Committee to Combat Huntington's Disease, Inc.
Commonwealth Fund
Connecticut General Insurance Corporation
Conoco, Inc.
Conservation Foundation
Consolidated Natural Gas Company
Consortium for International Citizen Exchange
Continental Bank Foundation
Continental Group Foundation, Inc.
Corning Glass Works Foundation
Council for the Advancement and Support of Education
Council for the Advancement of Small Colleges
Council for American Private Education
Council for Financial Aid to Education
Council of Better Business Bureau/Philanthropic
Advisory Service Division

Council of Engineering and Scientific Society Executives
Council of Jewish Federations
Council on Foundations
CPC International, Inc.
Crown Zellerbach Foundation
Crum and Forster Foundation
Cummins Engine Company, Inc.
Charles A. Dana Foundation, Inc.

Dart & Kraft Inc.
Dayton Hudson Corporation
Deere and Company
Geraldine R. Dodge Foundation
Gaylord Donnelley Foundation
Dresser Industries, Inc.
Drown Foundation
Duke Endowment
E.I. duPont de Nemours and Company
Durfee Foundation
Dyson Foundation

Eastman Kodak Company
Eaton Corporation
Educational Testing Service
Energy Conservation Coalition
Environmental Law Institute
Epilepsy Foundation of America
Equitable Life Assurance Society of the United States
Esmark, Inc. Foundation
Evangelical Council for Financial Accountability
Exxon Corporation

Family Service Association of America
Fireman's Fund Insurance Company Foundation
Fluor Corporation
Ford Foundation
Ford Motor Company Fund
Foremost-McKesson Foundation, Inc.

Foundation Center
Foundation for Children with Learning Disabilities
Foundation for Teaching Economics
Fresh Air Fund

Gannett Foundation
General Conference of Seventh-day Adventists
General Electric Company
General Mills Foundation
General Motors Foundation
Girl Scouts of the U.S.A.
Girls Clubs of America, Inc.
Morris Goldseker Foundation of Maryland, Inc.
Goodwill Industries of America
Grace Foundation, Inc.
William T. Grant Foundation
Grotto Foundation
Gulf Oil Corporation
Gulf & Western Foundation
George Gund Foundation

Miriam and Peter Haas Fund
Walter and Elise Haas Fund
Hallmark Cards, Inc.
Hawaiian Foundation
Edward W. Hazen Foundation
H.J. Heinz Company Foundation
Heublein Foundation, Inc.
William and Flora Hewlett Foundation
Hewlett-Packard Company Foundation
Hoffman-LaRoche Foundation
Hogg Foundation for Mental Health
Hospital Research and Educational Trust
Hunt Foundation

IBM Corporation
Independent College Funds of America, Inc.
Independent Research Libraries Association
Inland Steel-Ryerson Foundation, Inc.

Institute for Journalism Education
International Service Agencies
International Telephone and Telegraph
International Women's Health Coalition
Interracial Council for Business Opportunity

James Irvine Foundation
Irving Trust Company
Ittleson Foundation
Jerome Foundation
JWB
Robert Wood Johnson Foundation
Johnson & Johnson
Joint Action in Community Service
Joint Center for Political Studies
Jostens Foundation, Inc.
Joyce Foundation

Henry J. Kaiser Family Foundation
W.K. Kellogg Foundation
Charles F. Kettering Foundation
Esther A. and Joseph Klingenstein Fund, Inc.
Samuel H. Kress Foundation
Albert Kunstadter Family Foundation

LEAD Program in Business, Inc.
League of Women Voters Education Fund
Leukemia Society of America, Inc.
Levi Strauss Foundation
Lilly Endowment, Inc.
Henry Luce Foundation
Lutheran Council in the U.S.A.
Lutheran Resources Commission—Washington
Lyndhurst Foundation

J. Roderick MacArthur Foundation
John D. and Catherine T. MacArthur Foundation
March of Dimes Birth Defects Foundation
John and Mary R. Markle Foundation

May Department Stores Company
Louis B. Mayer Foundation
Robert R. McCormick Charitable Trust
McDonald's Corporation
McGraw-Hill Foundation
Merek Company Foundation
Joyce Mertz-Gilmore Foundation
Metropolitan Life Foundation
Mexican-American Legal Defense and Education Fund
Eugene and Agnes E. Meyer Foundation
John Milton Society for the Blind
Minneapolis Foundation
Mobil Oil Corporation
Monsanto Company
Charles Stewart Mott Foundation
Stewart R. Mott Charitable Trust
Mutual Benefit Life

National Alliance for the Mentally Ill
National Alliance for Optional Parenthood
National Alliance of Business
National American Indian Court Judges Association
National Amyotrophic Lateral Sclerosis Foundation, Inc.
National Assembly of Community Arts Agencies
National Assembly of National Voluntary Health and Social Welfare Organizations, Inc.
National Assembly of State Arts Agencies
National Association for Bilingual Education
National Association for Hospital Development
National Association of Independent Colleges and Universities
National Association of Schools of Art
National Association of Schools of Music
National Association of Social Workers
National Audubon Society
National Black Media Coalition
National Black Programming Consortium, Inc.
National Board of Young Men's Christian Associations

National Board of the Young Women's Christian Association of the U.S.A.
National Catholic Development Conference, Inc.
National Center for a Barrier Free Environment
National Coalition of Hispanic Mental Health and Human Services Organizations (COSSMHC)
National Committee for Citizens in Education
National Committee for the Prevention of Child Abuse
National Concilio of America
National Conference of Catholic Charities
National Congress of American Indians
National Corporate Fund for Dance
National Council Boy Scouts of America
National Council for Children and Television
National Council of La Raza
National Council of the Churches of Christ in the U.S.A.
National Council of Women of the United States, Inc.
National Council on Alcoholism
National Easter Seal Society, Inc.
National Executive Service Corps
National Federation of State Humanities Councils
National Fund for Medical Education
National Future Farmers of America, Inc.
National Health Council, Inc.
National Hispanic Scholarship Fund
National Hospice Organization
National Image, Inc.
National Information Bureau, Inc.
National Legal Aid and Defender Association
National Medical Fellowships, Inc.
National Mental Health Association
National Park Foundation
National Parks and Conservation Association
National Puerto Rican Coalition
National Puerto Rican Forum, Inc.
National Retired Teachers Association—American Association of Retired Persons (NRTA-AARP)
National School Volunteer Program, Inc.

National Society for Autistic Children
National Society of Fund Raising Executives
National Society to Prevent Blindness
National Tribal Chairmen's Association
National Trust for Historic Preservation
National Urban Coalition
National Urban Fellows, Inc.
National Urban League, Inc.
National Wildlife Federation
National Youth Work Alliance, Inc.
Native American Rights Fund
Natomas Company
Nature Conservancy
Neighborhood Coalition
New England Mutual Life Insurance Company
New World Foundation
New York Community Trust
New York Life Foundation
New York Times Company Foundation, Inc.
NL Industries Foundation, Inc.
Nordson Foundation
Northwest Area Foundation

Olin Corporation
Opera America
Ophthalmic Research Foundation
Oxfam America, Inc.
Owens-Illinois, Inc.

Parents Anonymous
Parents Without Partners
Partners for Livable Places
J.C. Penney Company, Inc.
Pepsico Foundation, Inc.
Permanent Charities Committee of the
Entertainment Industries
Permanent Charity Fund of Boston
Pfizer Foundation, Inc.

Philip Morris, Inc.
Phillips Petroleum Company
Piton Foundation
Planned Parenthood Federation of America, Inc.
Polaroid Foundation, Inc.
Population Crisis Committee/Draper Fund
Population Resource Center
Premier Industrial Foundation
Private Agencies in International Development
Proctor and Gamble Fund
Project Orbis, Inc.
Prudential Foundation
Puerto Rican Legal Defense & Education Fund, Inc.

RCA Corporation
Reader's Digest Association, Inc.
Reading is Fundamental, Inc.
Reinberger Foundation
Republic Steel Corporation
Charles H. Revson Foundation
R.J. Reynolds Industries, Inc.
Rockefeller Brothers Fund
Rockefeller Family Fund
Rockefeller Foundation
Rockwell International Corporation Trust
Rosenberg Foundation

Samuel Rubin Foundation
Safeco Insurance Companies
Russell Sage Foundation
Saint Paul Foundation
Salvation Army
San Francisco Foundation
Save the Children
Schering-Plough Corporation
Dr. Scholl Foundation
Shell Companies Foundation, Inc.
Sherwin-Williams Company

Lois and Samuel Silberman Fund
Alfred P. Sloan Foundation
Spencer Foundation
Spring Hill Center
Standard Oil Company (Ohio)
W. Clement and Jessie V. Stone Foundation
Student Conservation Association, Inc.
Sun Company, Inc.
Support Center
Syntex (U.S.A.), Inc.

Taconic Foundation, Inc.
Tandy Corporation
Teachers Insurance and Annuity Association of America College Retirement Equities Fund (TIAA-CREF)
Telecommunications Cooperative Network
Texaco, Inc.
Textron, Inc.
3M Company
Time Inc.
Times Mirror Foundation
Tosco Corporation
Transamerica Corporation
Travelers Insurance Companies
Trebor Foundation
Trilateral Commission
Trout Unlimited
Trust for Public Land
TRW, Inc.

Union Carbide Corporation
Union of Independent Colleges of Art
Union Pacific Foundation
United Jewish Appeal
United Negro College Fund
United Parcel Service of America, Inc.
United States Catholic Conference

United States Olympic Committee
United States Steel Foundation, Inc.
United Way of America
Urban Institute
Urban Investment and Development Company

van Ameringen Foundation
VOLUNTEER: The National Center for Citizen Involvement
Volunteers of America

Izaak Walton League of America
Eloise and Richard Webber Foundation
Weingart Foundation
Westinghouse Electric Corporation
Weyerhaeuser Foundation
Women and Foundations/Corporate Philanthropy
Women in Community Service, Inc.
Women's Action Alliance, Inc.
World Crafts Council
World Neighbors

Xerox Corporation