Nos. 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

BOB JONES UNIVERSITY,
Petitioner,
—v.—
UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, As *Amicus Curiae*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith, respectfully move this Court for leave to file the accompanying brief *amicus curiae* in support of the position requesting this Court to affirm the decisions below that the Commissioner of Internal Revenue correctly withdrew charitable tax-exempt status from Petitioners.

Consent to file the attached brief has been sought from the parties, but Petitioner Bob Jones University has withheld consent. It is therefore necessary to request permission of this Court under Rule 42.

B'nai B'rith, founded in 1843, is the oldest civil service organization of American Jews. The Anti-Defamation League

was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States.

The Anti-Defamation League is one of the leading organizations in the United States devoted to combating anti-Semitism and to promoting racial and ethnic harmony generally. The organization has filed numerous *amicus* briefs in this and other Courts in the interest of securing the human rights of all Americans. The Anti-Defamation League is national in scope. It brings to the issues raised in this case the perspective of a national organization dedicated both to the eradication of racial discrimination and the fostering of religious freedom.

The Anti-Defamation League seeks to submit the accompanying brief because it believes this case presents to the Court a serious challenge to the authority of the United States Government to refuse to assist educational organizations that concededly practice racial discrimination.

Respectfully submitted,

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Congress substantially retained the original taxing provisions on which these regulations have rested.

"Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received Congressional approval and have the effect of law." *Id.* at 83 (footnote omitted).*

2. Congress has ratified the Commissioner's Ruling in this case

In this case, Congress has plainly ratified the Commissioner's construction of section 501(c)(3). Indeed, the evidence of ratification is more compelling than in any of the cited cases.

In 1976, some six years after the Commissioner's Ruling, Congress added what is now section 501(i) to the Code, denying tax-exempt status to social clubs which discriminated on the basis of race, color or religion. In doing so, Congress left untouched—and thus ratified—the construction of section 501(c)(3) contained in the Commissioner's Ruling. Moreover, in footnote 5 to both the House and Senate Reports accompanying the bill proposing section 501(i), the anti-discrimination principle announced first in *Green v. Connally, supra,* and later codified by the Commissioner, was cited as a reason for enactment of the new section:

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* Also applying the ratification doctrine are *Fribourg Nav. Co. v. Commissioner,* 383 U.S. 272, 283 (1966) (rejecting ad hoc position of Commissioner in light of longstanding regulations concerning depreciation); *Cammarano v. United States,* 358 U.S. 498, 510-11 (1959) (upholding regulations concerning the deductibility of lobbying expenses); *United States v. Leslie Salt Co.,* 350 U.S. 383, 396-97 (1956) (ad hoc position of Treasury Department concerning documentary stamp taxes for corporate notes cannot stand in light of prior longstanding and consistent regulations); *Corn Products Co. v. Commissioner,* 350 U.S. 46, 53 (1955) (upholding regulations concerning the tax treatment of commodities futures transactions).

> "Also, the Supreme Court has affirmed (*Coit v. Green*, 404 U.S. 997 (1971)) a decision (*Green v. Connally*, 330 F. Supp. 1150 (D.C., D.C. 1971)) 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))." 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).

Congress continued to adhere to the same view—that racial discrimination was inconsistent with tax exemption—when it amended section 501(i) in 1980 to exclude from coverage certain religiously-affiliated fraternal societies and alumni clubs. The Senate Report, accompanying the version of the amendment which was ultimately enacted, made clear that the principle underlying both *Green* and the Commissioner's Ruling would be preserved, even where religion was involved:

> "Such clubs will continue to be eligible for exemption provided the religious limitation on membership is designed in good faith, to further the teachings or principles of that religion, and not for the purpose of excluding individuals of a particular race or color. The provision is intended to benefit Catholic Alumni Clubs, but it is not intended to authorize discrimination on the basis of race under the guise of religious affiliation." S. Rep. No. 96-1033, 96th Cong., 2d Sess., at 10 (1980).

Further evidence of ratification is to be found in Congressional pronouncements in 1979, during the debate on two Treasury bill amendments, incorporated in the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74 §§ 103, 615, 93 Stat. 559, 562, 576-77 (1979). These amendments denied to the Treasury Department the funds to enforce certain guidelines intended to identify racially discriminatory schools more effectively. The first of these amendments, introduced by Congressman Ashbrook (the

"Ashbrook amendment"), denied the IRS any funds to formulate or carry out any guidelines promulgated on or after August 22, 1978 which would jeopardize any private school's tax-exempt status. The second, offered by Congressman Dornan (the "Dornan amendment"), withheld funds for enforcement of two specific regulations proposed by the IRS in August 1978 and February 1979.*

Far from indicating Congress' disapproval of the Commissioner's Ruling, as some of the briefs in this case contend, these amendments provide additional evidence of Congress' ratification of the IRS' denial of tax-exempt status to racially discriminatory institutions.** While the sponsors of these amendments took exception to the newly proposed IRS procedures, they made quite clear that they intended to leave untouched existing IRS regulations—including the Commissioner's Ruling involved in this case. Representative Ashbrook stated:

> "The thing to reemphasize is that my amendment would not in any way interrupt [the IRS'] continued case-by-case

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* The new guidelines proposed in August 1978 provided that any school formed or substantially expanded at the time of local public school desegregation and having a minority enrollment of less than one fifth of the percentage of the community's minority school-age population would be presumed discriminatory. The IRS would characterize these schools as "reviewable" and would require the schools to rebut a prima facie case of intentional discrimination. In February 1979, in response to strong public reaction, the Commissioner released a set of revised guidelines which contained less rigid criteria than those initially proposed. *See generally* Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools,* 93 Harv. L. Rev. 378, 382-83 (1979).

** The fact that the Dornan and Ashbrook amendments limited the IRS' authority after 1978 does not dilute their significance as ratifications of the Commissioner's Ruling. In *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), this Court held that Congress had ratified the fairness doctrine by citing an amendment to section 315 of the Communications Act which *excepted* certain broadcasts from the statute's equal time provisions. 395 U.S. at 380.

> process which they were using up until August 22 and from which point they are going to change.
>
> . . .
>
> "As I pointed out, under their current regulation 7450 [sic], they can review schools. They can bring schools in effect before the mast, even though they have given them prior tax exempt status. I am not trying to take that away." 125 Cong. Rec. H5882 (daily ed. July 13, 1979).

Representative Dornan made the same point.

> "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." *Id.* at H5982 (daily ed. July 16, 1979).

Other supporters of the amendments confirmed that the IRS had the authority to promulgate the anti-discrimination procedures in effect prior to 1978. *See, e.g., id.* at S11851 (daily ed. Sept. 5, 1979) ("[T]he IRS will still be able to continue denying schools their tax-exempt status on a case-by-case method which is the proper denial approach.") (Sen. McClure); *id.* at H5885 (daily ed. July 13, 1979) ("At the present time, IRS has more than adequate authority to strip away the tax-exempt status of private schools that practice racial discrimination and I know this authority has been used effectively in a number of cases. The intelligent and sensible thing to do would be to leave it at that.") (Rep. Dickinson); *id.* at H5982 (daily ed. July 16, 1979) ("Many question whether IRS has the need or authority to establish and enforce such new and extensive rules. No one is saying that we should allow tax breaks for segregated schools, but IRS already has significant authority to act, and indeed, has done so in the past, where evidence of discrimination exists.") (Rep. Miller).*

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* Still other proponents stated that they opposed only the 1978 regulations—not the IRS' general authority to deny tax benefits to

Several years later, during the debate on the Treasury, Postal Service and General Government Appropriations Bill of 1982, the sponsors of the amendments once again acknowledged the validity of IRS Regulations that were in effect prior to 1978 and stressed that those regulations would not be affected by the proposed appropriations legislation. Once again, Representative Ashbrook stated:

> "IRS should be able to proceed on the basis of the regulations they had in existence. If they know of discrimination, they can litigate, they can withdraw the tax exempt status, anything that they could do prior to August 22, 1978, the time when they endeavored to implement these Draconian regulations, could be implemented by IRS. In no way am I trying to impinge on IRS' ability to withdraw the tax exempt status of any school which might violate the law." 127 Cong. Rec. H5395-96 (daily ed. July 30, 1981).

Representative Lott of Mississippi confirmed that the IRS had the authority to enforce its pre-1978 regulations:

> "The validity [of *Green v. Connally*] is in no way challenged by this amendment. The IRS remains free to deny exemptions to any school proven guilty of discrimination . . .
>
> "If this amendment passes, the IRS will still be free to investigate charges of racial discrimination. It will be free to deny exemptions to any institution proven guilty of racial discrimination through fair hearings. In short, it will be free to enforce the regulations and court orders in effect in 1978." *Id.* at H5397-98 (daily ed. July 30, 1981).

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racially discriminatory private schools. *See, e.g., id.* at S11853 (daily ed. Sept. 5, 1979) (Sen. Laxalt); *id.* at H5881 (daily ed. July 13, 1979) (Rep. Campbell); *id.* at H5883 (daily ed. July 13, 1979) (Rep. Sensenbrenner); *id.* at H5884 (daily ed. July 13, 1979) (Rep. Hammerschmidt).

Finally, if further evidence of ratification is needed, it can be found in the failure of Congress to pass any one of the many bills proposed since 1970 which sought to modify the principle that a racially discriminatory school is not eligible for tax exemption under 501(c)(3) or for deductible charitable contributions under section 170.* *See Red Lion Broadcasting Co., supra,* 395 U.S. at 381 & n.11.

POINT II

THE COMMISSIONER'S WITHDRAWAL OF TAX EXEMPTIONS FROM BOB JONES AND GOLDSBORO CHRISTIAN DOES NOT VIOLATE THE SCHOOLS' RELIGIOUS FREEDOM

Relying on findings of trial courts that their racially discriminatory practices are the product of genuine religious beliefs, petitioners contend that the federal government must continue to confer tax-exempt status to them or run afoul of the religion clauses of the First Amendment. The argument is specious. The protection afforded by the Constitution to the practice of all religions does not require the government to support activities which the Constitution, the Congress and the courts have found to be repugnant to our society.

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* H.R. 68, 92d Cong., 1st Sess. (January 22, 1971); H.R. 2352, 92d Cong., 1st Sess. (January 25, 1971); H.R. 5350, 92d Cong., 1st Sess. (March 2, 1971); H.R. 1394, 93d Cong., 1st Sess. (January 6, 1973); S.103, 96th Cong., 1st Sess. (January 15, 1979); H.R. 1002, 96th Cong., 1st Sess. (January 19, 1979); H.R. 1905, 96th Cong., 1st Sess. (February 8, 1979); S.449, 96th Cong., 1st Sess. (February 22, 1979); S.995, 96th Cong., 1st Sess. (April 9, 1979); H.R. 332, 97th Cong., 1st Sess. (January 9, 1981); H.R. 95, 97th Cong., 1st Sess. (January 5, 1981); H.R. 802, 97th Cong., 1st Sess. (January 9, 1981); H.R. 5186, 97th Cong., 1st Sess. (December 11, 1981).

A. The withdrawal of tax benefits does not abridge the free exercise of religion

The free exercise clause of the First Amendment prohibits the government from imposing unreasonable burdens on the practice of religion. But the freedom to practice one's religion is not unlimited. "[T]he [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). Limitations on religious exercise may be justified by a compelling secular interest, provided that no less restrictive means of achieving that interest is available. *See Thomas v. Review Board*, 450 U.S. 707, 718 (1981).

As is discussed elsewhere in this brief (*see* pp. 7-9, *supra*), the governmental interest in eradicating racial discrimination is among the most compelling in our society today. It is far more significant than those which this Court has cited in the past in upholding restrictions on the practice of religious beliefs. *See, e.g., Braunfeld v. Brown*, 366 U.S. 599 (1961) (the interest in a uniform day of rest is sufficient grounds for denying an Orthodox Jewish merchant an exemption from Pennsylvania's Sunday closing law); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (the public interest in the health and well-being of minors justifies an outright ban on the public sale of religious periodicals by minor members of the Jehovah's Witnesses); *Reynolds v. United States*, 98 U.S. 145 (1878) (interest in maintaining public morality justifies restricting Mormons from following their religiously-based practice of polygamy). *Cf. Cleveland v. United States*, 329 U.S. 14 (1946) (upholding Mann Act conviction of Mormon fundamentalist who crossed state lines with his wives); *Davies v. Beason*, 133 U.S. 333 (1890) (upholding Idaho statute prohibiting Mormon polygamists from voting).

Moreover, while denial of tax-exempt status may pose hardships to Bob Jones and Goldsboro Christian, it does not

directly prohibit the actual practices of religious beliefs, as would a statute banning polygamy. Petitioners remain free to teach their doctrines about the separation of the races. Their members individually may still conduct their private affairs in a manner consistent with the teachings of their religion. Indeed, terminating the grant of tax benefits to petitioners is the least restrictive way in which the government could end its involvement with practices that it could not constitutionally engage in itself. *See, e.g., Norwood v. Harrison*, 413 U.S. 455 (1973).

B. The withdrawal of tax benefits does not constitute the establishment of religion

Petitioners also contend that the Commissioner's Ruling effectively establishes those religions that do not practice racial discrimination and will require the government to scrutinize, and thus be impermissibly entangled with, the operations of religious institutions. Governmental actions, however, do not violate the Establishment Clause if they have a secular purpose, if their principal or primary effect neither advances nor inhibits religion and if they do not foster an *excessive* entanglement with religion. *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). These criteria have been satisfied in this case.

First, the Commissioner's Ruling clearly reflects a secular legislative purpose. Sections 501(c)(3) and 170 are intended to benefit institutions which promote the public good. *See, supra,* pp. 5-7. More specifically, the Commissioner's Ruling also promotes a secular purpose—to deny government support, in the form of significant tax benefits, to racially discriminatory organizations. *See Gillette v. United States*, 401 U.S. 437 (1971) (Congressional decision to exempt from draft registration only those conscientious objectors who object to all wars is supported by a secular purpose).

Second, the application of the Commissioner's Ruling neither advances nor inhibits religion. The Ruling has, at most,

the incidental effect of favoring those churches that do not practice racial discrimination, which is hardly sufficient to raise issues of constitutional dimensions. Many laws and regulations have *some* incidental effect on religious practices, but they cannot for that reason alone be said to violate the Establishment Clause. *See e.g., Reynolds v. United States, supra* (prohibition of polygamy does not establish monogamous religions); *Prince v. Massachusetts, supra* (prohibition of the sale of religious materials by minors does not establish religions which do not encourage this practice). As the Court of Appeals held below, the Establishment Clause "does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied." 639 F.2d at 154. *See Gillette v. United States, supra,* 401 U.S. at 454-58.

Finally, the Commissioner's Ruling does not require an excessive entanglement with religious organizations. The IRS is obliged to determine simply whether petitioners maintain racially discriminatory policies, a determination that can be made by examining admissions policies, a relatively objective criterion. *See* Rev. Proc. 75-50, 1975-2 C.B. 587. The IRS need not evaluate a school's curriculum or the qualifications of its teachers. *See Tilton v. Richardson,* 403 U.S. 672, 678 (1971) (occasional on-site inspection of activities conducted in sectarian school buildings constituted only a "minimal contact"). And it need not determine whether the discrimination it finds is the product of a sincerely held religious belief. Indeed, the adoption of a rule exempting only those schools whose discriminatory practices are based on such religious beliefs would result in a far more excessive, and probably unconstitutional entanglement in the affairs of those schools. *See NLRB v. tholic Bishop of Chicago*, 440 U.S. 490, 499 (1979) (NLRB efforts to distinguish "completely religious" schools from those that are merely "religiously associated" raise serious entanglement problems).

Conclusion

Racial discrimination in education violates one of the most important policies of this nation. The determination of the Commissioner of Internal Revenue—that private schools practicing racial discrimination, and thus seeking to elude the *Brown* decision, are not entitled to tax exemption—was well within his discretion. That such practices may be the product of religious beliefs is not dispositive, for petitioners' right to act upon those beliefs must give way to the government's compelling need to enforce fundamental national policy.

Accordingly, *amicus* urges that the judgments of the Court of Appeals in these cases be affirmed.

Respectfully submitted,

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BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICUS CURIAE*

Amicus respectfully submits that the judgments of the United States Court of Appeals for the Fourth Circuit in the above-captioned cases should be affirmed.

Interest of the *Amicus Curiae*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League ("ADL") was organized in 1913 as a section of the B'nai B'rith to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States.

Among its other activities directed to these ends, the ADL has filed briefs *amicus curiae* opposing practices and policies which impair the integrity and self-respect of individuals of all races. Briefs have been filed in such cases as *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954); *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Runyon v. McCrary*, 427 U.S. 160 (1976).

The ADL also supports the right of all groups to practice their religion free from unjustified governmental interference. The ADL has filed briefs in *Sherbert v. Verner*, 374 U.S. 398 (1963), and other cases before this Court in support of these vital First Amendment rights.

In the cases now before it, the Court is asked to decide whether the Commissioner of Internal Revenue properly exercised his discretion in withdrawing tax exempt status from two religious schools that concededly practice racial discrimination. As an organization committed to the right of all citizens to enjoy civil rights under law, the ADL believes that racial discrimination may be not tolerated, even under the mantle of religious freedom. In curtailing governmental assistance to these discriminatory schools, the Commissioner has exercised an appropriate discretion and has fulfilled a clear Congressional mandate.

The ADL respectfully submits that the Commissioner's actions in this case should be upheld.

Questions Presented

1. Did the Commissioner of Internal Revenue properly exercise his discretion in withdrawing charitable status under the Internal Revenue Code of 1954 (the "Code") to two concededly racially discriminatory schools, where the Congress which adopted the relevant statutes intended to grant favorable tax treatment only to institutions that serve the public interest and where subsequent sessions of Congress have ratified the Commissioner's actions?

2. Does the decision of the government not to support religious educational organizations practicing racial discrimination (a) constitute an impermissible interference with their rights to exercise freely their religious beliefs, and (b) constitute an impermissible establishment of religions that do not practice such discrimination?

Summary of Argument

I. Congress did not intend to grant favorable tax treatment under sections 501(c)(3) and 170 of the Code to each and every organization that fancies itself to be "charitable," "educational" or "religious." To the contrary, only organizations that serve the public interest were the intended beneficiaries of tax-exempt status. In withdrawing the tax exemptions of the two petitioners, Bob Jones University ("Bob Jones") and Goldsboro Christian Schools, Inc., ("Goldsboro Christian"), the Commissioner properly followed Congress' mandate; the public interest in eradicating racial discrimination—articulated by Congress and this Court—is fundamental and compelling, and is ill-served by extending benefits to racially discriminatory schools. Moreover, since the Commissioner announced that tax exemptions would not be available to institutions practicing racial discrimination, Congress has ratified his position, on several occasions, and in the plainest of terms.

II. The Commissioner's withdrawal of tax benefits was neither an infringement of religious freedom nor the establish-

ment of religion. Whatever impact the withdrawal may have on Bob Jones and Goldsboro Christian is more than amply justified by the governmental interest in eradicating racial discrimination. Moreover, the Commissioner's ruling is facially neutral, secular in its principal purpose and effect, and does not excessively entangle the government with religion.

ARGUMENT

POINT I

THE COMMISSIONER ACTED WITHIN HIS STATUTORY AUTHORITY IN WITHDRAWING TAX-EXEMPT STATUS FROM BOB JONES AND GOLDSBORO CHRISTIAN

In 1970, the Commissioner of Internal Revenue (the "Commissioner") promulgated a revenue ruling barring tax exemption under section 501(c)(3) of the Internal Revenue Code (the "Code") or deductibility under section 170(c) of the Code of all sums received by and given to organizations practicing racial segregation. 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 (the "Ruling" or the "Commissioner's Ruling"). As the Commissioner himself has noted, the Ruling was necessary to stem the growth of "newly formed private schools [which] were absorbing white students from school districts integrated under court order . . . ." *Statement by Randolph W. Thrower Before the Ways and Means Committee on the Tax Exempt Status of Racially Discriminatory Private Schools* ("Thrower Statement"), 35 Tax Lawyer 701, 702 (1982).

The Commissioner's Ruling has accomplished its objective and is continuing to do so. As Commissioner Thrower observed, the Ruling "was expected in short order to remove the 'No Admittance' signs hung on the doors of many private secondary schools that barred entrance to certain students solely because of their race. This was accomplished almost overnight." *Thrower Statement, supra,* 35 Tax Lawyer at 708.

As will be demonstrated below, the Commissioner properly exercised his discretion in denying tax-exempt status to institutions plainly violating the fundamental national policy against racial discrimination. Moreover, actions of Congress since the time of the Commissioner's Ruling have effectively ratified his construction of the law.

A. The Commissioner has broad discretion in administering and enforcing the Code

Like all executive agencies, the Internal Revenue Service (the "IRS") has broad discretion in interpreting and implementing the laws of Congress. Judicial review of executive rule-making is traditionally deferential, *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920), particularly where IRS rules are being reviewed. Treasury regulations are generally "sustained unless unreasonable and plainly inconsistent with the revenue statutes." *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).

This doctrine applies, as well, to less formal revenue rulings and procedures, such as the Commissioner's Ruling in this case. *See, e.g., United States v. Correll*, 389 U.S. 299 (1967) (upholding "rulings" of the Commissioner concerning deductibility of expenses for meals of travelling salesmen). Deference is appropriate because "Congress has delegated to the Secretary of the Treasury, not to [the courts], the task of administering the tax laws of the Nation." *Commissioner v. Portland Cement Co. of Utah*, 450 U.S. 156, 169 (1981) (citations omitted).

B. Congress intended to limit tax-exempt status to those institutions that serve the public interest

The statutes which the Commissioner was charged with enforcing provided him with sufficient latitude to exercise his administrative discretion to deny tax exempt status to racially discriminatory educational institutions. Congress intended that tax-exempt status be accorded only to those organizations that serve the public interest; it did not intend that every organiza-

tion which fashions itself as "educational" or "religious" be entitled to tax exemptions. Were it otherwise, organizations such as "Fagin's School for pickpockets," *Green v. Connally*, 330 F. Supp. 1150, 1160 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971), or a school for training terrorists would be deemed "educational" and thereby be eligible for tax-exempt status.

This intent is demonstrated by the legislative history of the statutes which were ultimately codified as sections 501(c)(3) and 170. The Revenue Act of 1909 contained exemptions similar to those now found in section 501(c)(3). During the deliberations relating to this Act, a sponsor of the legislation explained the manner in which the exemptions from corporate taxation were intended to operate. As he stated, these exemptions were intended only for those institutions which were "devoted exclusively to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse." 44 Cong. Rec. 4150 (July 6, 1909).

Similarly, in 1917, when Congress added to the Code a 15% charitable contributions provision, Senator Hollis, the sponsor of the provision, identified the purpose of such legislation expressly in terms of the public interest:

> "For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 percent, it is all devoted to that purpose." 55 Cong. Rec. 6728 (Sept. 7, 1917).

To like effect was the House Report accompanying the Revenue Act of 1938, which eliminated tax-exempt status for foreign organizations:

> "The exemption from taxation of money or property devoted to charitable 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." H.R. Rep. No. 1860, 75th Cong., 3rd Sess. (1938).

Thus, by the time the specific legislation which now comprises sections 501(c)(3) and 170 was codified in the present Internal Revenue Code, the principle that tax exemptions were intended to promote the public good had been firmly entrenched. While the precise contours of the "public interest" were not delineated, the exemptions were not—and could not be—limitless.

This Court, also, has applied a public interest limitation in considering issues arising under the Code. For example, this Court has held that tax benefits may not be extended where they would frustrate "sharply defined" national or state policies proscribing particular types of conduct. *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30, 33-34 (1958). In *Tank Truck*, the Commissioner rejected taxpayer's characterizations of fines incurred for the violation of state regulatory laws as "ordinary and necessary" business expenses. This Court affirmed, on the theory that allowing the deductibility of such fines and penalties would frustrate the state's regulatory scheme in a "severe and direct fashion by reducing the 'sting' of the penalty prescribed by the state legislature." *Id.* at 35-36. *Accord, Hoover Motor Express Co. v. United States*, 356 U.S. 38 (1958).

C. The Commissioner's Ruling was clearly consistent with the public-interest standard intended by Congress

However difficult this public-interest standard may be to apply in other cases, there is no question that the Commissioner correctly applied the norms of public policy in this case. The Constitutional and Congressional commitment to the eradication of racial discrimination is fundamental and compelling.

For over one hundred years, the federal government has condemned racial discrimination. The national commitment to

racial equality, voiced in the Thirteenth, Fourteenth, and Fifteenth Amendments, has been affirmed repeatedly by this Court during the past thirty years. Since *Brown v. Board of Education,* 347 U.S. 483 (1954), this Court has consistently and vigorously advanced the goals of eliminating racial discrimination in public education and of fostering equal educational opportunities for children of all races. It was to prevent evasion of this mandate that the Commissioner promulgated the Ruling involved in this case. *See supra* p. 4.

Brown's impact has been wide-ranging, barring both state and federal officials from maintaining racially segregated school systems. *Bolling v. Sharpe,* 347 U.S. 497 (1954). Efforts to provide tuition, textbooks and other forms of financial assistance to racially segregated private schools have been firmly rejected. *E.g., Norwood v. Harrison,* 413 U.S. 455 (1973); *Poindexter v. Louisiana Fin. Assistance Comm'n,* 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam,* 389 U.S. 571 (1968); *Lee v. Macon County Bd. of Educ.,* 267 F. Supp. 458, 475-78 (M.D. Ala.), *aff'd per curiam sub nom. Wallace v. United States,* 389 U.S. 215 (1967). Public officials have been ordered to take affirmative steps to remedy the harmful effects of segregation in education. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971); *Keyes v. School District No. 1,* 413 U.S. 189 (1973). Even purely private conduct—the denial of admission to private schools on racial grounds—has been held to violate the Congressional policy in 42 U.S.C. § 1981, which forbids discrimination in the making of contracts. *Runyon v. McCrary,* 427 U.S. 160 (1976).*

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* In *Runyon v. McCrary,* this Court expressly left open the question whether § 1981 is violated by private school discrimination which is religiously, rather than racially, motivated. 427 U.S. at 167 & n.6. The lower federal courts have, by and large, avoided the issue by finding that the discriminatory practices involved were not the product of sincerely held religious beliefs. *See Fiedler v. Marumsco Christian School,* 631 F.2d 1144 (4th Cir. 1980); *Brown v. Dade Christian Schools, Inc.,* 556 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978). A compelling argument can be made that § 1981 prohibits such discrimination, whatever the motive, thus flatly forbidding the prac-

There is no doubt that both petitioners here engage in racial discrimination. Goldsboro Christian refuses to admit black students under any circumstances. Since 1975, Bob Jones University has admitted blacks but has subjected its students to racially-based rules prohibiting interracial dating and marriage. As the court below correctly held, this type of discrimination on the basis of racial affiliation or companionship is as invidious as less subtle varieties. *See Tillman v. Wheaton Haven Recreational Assoc.,* 410 U.S. 431 (1973); *Loving v. Virginia,* 388 U.S. 1 (1967); *McLaughlin v. Florida,* 379 U.S. 184 (1964).

The Commissioner's Ruling and its application to the petitioners in this case were consistent with the Congressional intent to grant tax-exempt status only to benefit institutions which promote the public good, and to further well-settled national policy forbidding racial discrimination and the Constitutional prohibitions against segregation in public schools. His actions were reasonable and should be upheld as a proper exercise of discretion.

D. The Congress has repeatedly ratified the Commissioner's Ruling

This Court has often upheld an administrative ruling based on actions of Congress which, although less than a formal enactment of the administrative interpretation, have been found to constitute a "ratification." In this case, if the Commissioner is found to have exceeded his authority by promulgating his Ruling in 1970, that Ruling is nonetheless valid because it has been effectively ratified by Congress since that time.

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tices engaged in by Bob Jones and Goldsboro Christian. Nevertheless, the question need not be reached in this case, since the denial of tax exemption—as opposed to an outright ban on the challenged practices—does not require a finding that the schools' practices are, as a matter of law, unlawful. Moreover, the denial of tax exemption, as shown in Point II of this brief, does not violate the religion clauses of the First Amendment. (*See* pp. 17-20, *infra*).

1. The ratification doctrine

Where Congress has amended or re-enacted a statute, without altering a known administrative construction of that statute, it may be fairly said to have ratified the agency's construction. In *United States v. Rutherford,* 442 U.S. 544 (1979), for example, this Court rejected a challenge to the Food and Drug Administration's ("FDA") restrictions on the dissemination to cancer victims of the drug Laetrile. The FDA had construed the Food, Drug, and Cosmetic Act so as to cover drugs used by the terminally ill. In upholding that construction, this Court held:

> "[T]he construction of a statute by those charged with its administration is entitled to substantial deference . . . . *Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives."* 442 U.S. at 553-554 (emphasis added).

Because the FDA's construction had been "fully brought to the attention of the public and the Congress" and because "the latter has not sought to alter that interpretation although it has amended the statute in other respects," the Court held that "presumably the legislative intent has been correctly discerned." *Id.* at 554 n.10.

Similarly, in *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367 (1969), the Federal Communications Commission's "fairness doctrine" was upheld on the basis of the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." 395 U.S. at 381. The Court noted, further, that Congress had "ratified" the Commission's rule with "positive legislation" embodying the concepts underlying the fairness doctrine, *id.* at 381-82, although the "fairness doctrine" itself had never been enacted into law. Further evidence of ratification was found in Con-

gress' failure to pass bills which would have modified the rule. *Id.* at 381 & n.11.

More recently, this Court applied the ratification doctrine in finding an implied private right of action under the Commodity Exchange Act ("CEA"). *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 50 U.S.L.W. 4457 (May 4, 1982). The Court noted that prior to 1974, when Congress amended the CEA in other respects, the federal courts had routinely recognized an implied private right of action under the Act. Because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change," this Court concluded that an implied right of action had been intended. 50 U.S.L.W. at 4465 n.66.

The ratification doctrine has also been applied by this Court in tax cases. For example, in *Lykes v. United States,* 343 U.S. 118 (1952), the Court held that under section 23(a)(2) of the Internal Revenue Code, a taxpayer could not deduct from his gross income the attorneys' fees paid to contest the amount of his federal gift tax. In so holding, the Court noted that 1946 Treasury Regulations had construed section 23(a)(2) to preclude such a deduction and that, since the publication of those regulations, "Congress has made many amendments to the Internal Revenue Code without revising this administrative interpretation of section 23(a)(2)." 343 U.S. at 126-27.

Similarly, in *Helvering v. Winmill,* 305 U.S. 79 (1938), this Court held that a taxpayer could not under section 23(a) deduct from his gross income brokerage commissions paid in purchasing securities. The Court relied, in part, upon Treasury Regulations promulgated under the 1916 income tax law—regulations whose interpretation "reappeared . . . under succeeding tax statutes." 305 U.S. at 82. The Court then applied the ratification doctrine:

> "In the period since 1916 statutes have from time to time altered allowable deductions, but it is significant that