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
COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

Brief of the National Association for the Advancement of Colored People, et al., *Amici Curiae* In Support of Petitioners

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INTEREST OF AMICI

The interest of the Amici is more fully set out in their Motion to Intervene as Respondents, Or, In the Alternative, To Participate As Amici Curiae. This Court granted permission to file a brief as amicus curiae on April 19, 1982. The individual Amici, like other members of the Greenville and Goldsboro branches, live directly within the shadow of Petitioners' institutions. They are the targets of Petitioners' exclusionary policies, both because they are black, and (in the case of Bob Jones University) by the mere fact of their membership in the NAACP, an organization supporting the right to racial intermarriage.

SUMMARY OF ARGUMENT

Amici support affirmance of the judgments below. Congress has offered

tax-exempt status under I.R.C. § 501(c)(3) in order to encourage selected categories of organizations that promote the general welfare. Continuing expressions of legislative intent and governing rules of tax law demonstrate the correctness of this Court's prior holding that private schools engaging in deliberate racial discrimination are not exempt under Section 501(c)(3). Furthermore, this interpretation of the statute is compelled by the constitutional ban on significant government aid to private racial discrimination in education.

Petitioners' religious beliefs do not entitle them to more favorable tax treatment than other discriminatory schools receive. Petitioners assert a purported First Amendment right to tax benefits for their practice of racial discrimination in enterprises they have established to offer secular educational

services as an alternative to the more worldly (and integrated) public schools. Their claim is easily outweighed by the government's interests in avoiding the harms their conduct inflicts, and in withholding assistance from private invidious discrimination. Nor do Petitioners' claims justify application of an extraordinary rule of statutory construction to avoid deciding the insubstantial questions they raise.

ARGUMENT

I. BOTH THE INTERNAL REVENUE CODE AND THE CONSTITUTION PROHIBIT TAX-EXEMPT STATUS FOR RACIALLY DISCRIMINATORY SCHOOLS.

A. The Internal Revenue Code Denies Tax-Exempt Status To Racially Discriminatory Private Schools.

Congress has not authorized tax exemptions for "educational" institutions that discriminate on the basis of race. This Court decided that issue in Coit v.

Green,[1] and decided it correctly. This Court should reaffirm that holding in the present case.[2]

1/ 404 U.S. 997 (1971). Subsequently, in a passing remark, this Court questioned the precedential effect of Green, suggesting that no adversarial dispute had persisted, see Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974). Amici agree with the analysis in Wright v. Regan, 656 F.2d 820, 832 & n.29 (D.C. Cir. 1981), that Green is entitled to the same precedential weight this Court normally accords summary affirmances, and that the courts below were bound by this Court's holding, as well as by Judge Leventhal's reasoning. Contrary to the Respondent's suggestion, Brief for the United States at 38 n.35, principles of stare decisis are applicable here. See Tully v. Griffin, Inc., 429 U.S. 68, 74 (1976), particularly on statutory issues, compare Edelman v. Jordan, 415 U.S. 671 (1974); Patsy v. Board of Regents, 102 S.Ct. 2557, 2569 (1982) (White, J., concurring).

2/ Because of Respondent's startling change of position Amici will begin by examining the broad issue decided in Green, whether Section 501(c)(3) of the Internal Revenue Code permits tax exemptions for private schools that deliberately and systematically discriminate against black children in admissions or other activities. Amici will later demonstrate that the assertedly religious basis of Petitioners' invidious policies provides no basis for distinction from the holding in Green.

Petitioners in this case seek refunds of token employment tax payments as a vehicle for obtaining all the benefits of tax-exempt status as religious and educational organizations under I.R.C. § 501(c)(3). The most valuable advantage of exempt status would be the availability to Petitioners' donors of charitable contribution deductions from their own net income.[3/] These deductions have the same economic effect as a matching grant from the Treasury, and are designed to encourage private donations to a select group of organizations favored over other tax-exempt entities. Compare I.R.C. § 170(c) with I.R.C. § 501(c).

Section 501(c)(3) exempts, inter

3/ See e.g., Green v. Kennedy, 309 F.Supp. 1127, 1134-35 (D.D.C. 1970); Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of The House Comm. on Ways and Means, 96th Cong., 1st Sess. 288, 302 (testimony of William Bentley Ball); id. at 400 (testimony of John Esty).

alia, corporations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." As this Court noted long ago, "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." Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578, 581 (1924). In reenacting the exemption Congress has stated the same rationale:

> 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 benefits resulting from the promotion of the general welfare.

H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1939).

No exemption is available for organizations that confer no public benefit.[4/] Therefore, not every activity that is literally "educational" in the dictionary sense of conveying information or providing instruction qualifies as an exempt educational purpose under Section 501(c)(3).[5/]

A fortiori, organizations whose activities include deliberate subversion of the public interest are not eligible for the benefits that Section 501(c)(3)

4/ See, e.g., Randall Foundation v. Riddell, 244 F.2d 803 (9th Cir. 1957); Callaway Family Ass'n v. Commissioner, 71 T.C. 340 (1978) (nonexempt family genealogical study); Rev. Rul. 80-301, 1980-2 C.B. 180 (exempt public genealogical society).

5/ For example, an organization of computer owners that instructs its membership in use of a specific type of computer through seminars, newsletters, and meetings, does not serve a public interest, and is not "educational" within the meaning of the Code. Rev. Rul. 74-116, 1974-1 C.B. 127. See also Rev. Rul. 71-421, 1971-2 C.B. 229 (obedience school for dogs not "educational").

status entails. Otherwise, as the late Judge Leventhal observed, Fagin's school for pickpockets would be an exempt educational endeavor.[6/] The statute cannot bear so absurdly literal a reading as Petitioners and Respondent suggest. First, the expressed congressional intent behind the statutory exemption was to reward organizations for enhancing the general welfare. Congress never intended to subsidize activities inimical to the public interest.[7/] Second, exempt status

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6/ Green v. Connolly, 330 F. Supp. 1150, 1160 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971). Similarly, if every religious organization were eligible for a tax exemption, the Assassins of Alamut and their modern equivalents would be included. These cases do not require the Court to determine the limits on exempt status for corporations organized and operated exclusively for religious purposes, however, since Petitioners are not such corporations. See Part II(A) infra.

7/ This controlling legislative intent has long been expressed by the statement that all 501(c)(3) organizations must

(footnote continued)

is offered only to entities organized and operated exclusively for the enumerated purposes.[8/] Deliberately undermining the public interest is itself a substantial nonexempt purpose precluding eligibility.

This obvious limitation on the grant of exempt status is reinforced by the public policy doctrine which informs interpretation of the Internal Revenue Code generally. This Court has modified even the rules for computing net income

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(footnote continued)

be "charitable" in the broad common law sense. See Bob Jones University v. United States, 639 F.2d 147, 151 (4th Cir. 1980); Rev. Rul. 71-447, 1971-2 C.B. 230. Amici will not attempt yet another review of the legislative history supporting this statement, since other briefs have exhaustively explored the topic.

8/ "[T]he presence of a single [nonexempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes." Better Business Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 279, 283 (1945).

where allowing deductions would "'frustrate sharply defined national or state policies proscribing particular types of conduct . . . evidenced by some governmental declaration,'" Commissioner v. Tellier, 383 U.S. 687, 694 (1966) (emphasis deleted); Cammarano v. United States, 358 U.S. 498 (1959); Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958). Congress adopted and codified this rule for business expense deductions in I.R.C. § 162. The public policy doctrine is particularly applicable where taxpayers claim preferential tax treatment for transactions that the government seeks to discourage.[9/]

9/ See, e.g., Commissioner v. Estate of Donnell, 417 F.2d 106, 112 (5th Cir. 1969) (special privilege deduction under I.R.C. § 263); Mazzei v. Commissioner, 61 T.C. 497 (1974) (theft loss deduction under I.R.C § 165); Rev. Rul. 75-384, 1975-2 C.B. 204 (§ 501(c)(3) exemptions denied to activist organization encouraging violations of law).

Thus, the public policy doctrine also requires denial of tax exempt status under Section 501(c)(3) to organizations deliberately violating sharply defined federal policy, even if they may literally be described as "educational." Congress never intended to authorize tax subsidies to support activities it has vigorously discouraged.10/

Few federal policies are more sharply defined than the condemnation of deliberate racial discrimination in education. This Court has struggled for decades to eradicate state involvement in racial discrimination, and has repeatedly emphasized the pervasive destructive-

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10/ Of course, an organization need not be a criminal enterprise to forfeit its exemption; this Court has applied the public policy doctrine to traffic fines and to perfectly lawful expenditures made non-deductible only by Treasury regulations. Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958); Cammarano v. United States, 358 U.S. 498 (1959).

ness of segregated schooling. Federal law forbids private schools as well to discriminate against black children.[11] The urgency of the federal interest in banning private discrimination in education, for the protection of black children and the establishment of civil equality, is magnified by the role segregation academies have played in circumventing public school desegregation and the complicity of the states in fostering resort to the private schools through programs of financial support that lasted well into the Seventies.[12] There could be

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11/ Runyon v. McCrary, 427 U.S. 160 (1976). This Court reserved the question whether a different interpretation of the 1866 Civil Rights Act was required where religious schools were involved. Id. at 167. That issue is addressed in Part II of this brief.

12/ This Court has been forced to exercise continual vigilance by efforts to perpetuate school segregation in the guise of aid to private schools. See, e.g.,

(footnote continued)

little surprise therefore, when the Internal Revenue Service announced that segregated private schools would lose their federal tax exemptions if their involvement with the state amounted to state action.[13/]

Federal policy prohibits tax exemp-

(footnote continued)

Gilmore v. City of Montgomery, 417 U.S. 556 (1974); South Carolina State Bd. of Educ. v. Brown, 393 U.S. 222 (1968), aff'g mem. 296 F. Supp. 199 (D.S.C.); Wallace v. United States, 389 U.S. 215 (1967), aff'g mem. 267 F. Supp. 458 (M.D. Ala. 1967); Griffin v. County School Bd., 377 U.S. 218 (1964); St. Helena Parish School Bd. v. Hall, 368 U.S. 515 (1962), aff'g mem. 197 F. Supp. 649 (E.D. La. 1961). See generally Note, Segregation Academies and State Action, 82 Yale L.J. 1436, 1436-53 (1973). This state-fostered psychology of reliance on private schools persists today even where the state's action has ceased.

13/ IRS News Release, August 2, 1967, [1967] CCH Standard Fed. Tax Rep. ¶ 6734. Certainly federal policy forbids tax subsidies to an organization whose deliberate practice of racial discrimination violates the Fourteenth Amendment. Compare Hills v. Gautreaux, 425 U.S. 284 (1976) (Constitution forbids federal assistance to discriminatory state agency).

tions for all segregated private schools, regardless of whether they receive state aid. This prohibition rests on two distinct pillars of federal law. One, rooted in the Fifth Amendment and Section One of the Fourteenth Amendment, forbids government support or subsidization of segregated education.[14/] The second source, based ultimately on the Thirteenth Amendment and Section Five of the Fourteenth Amendment, condemns racial discrimination in private business

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14/ See Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954); Norwood v. Harrison, 413 U.S. 455 (1973). Congress has voiced a parallel statutory policy in Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c to 2000c-9, 2000d to 2000d-6, which has been implemented by numerous regulations. See, e.g., 34 C.F.R. part 100 (Department of Education programs); 38 C.F.R. part 18 (Veterans' benefits programs); 45 C.F.R. part 611 (National Science Foundation programs); 7 C.F.R. § 15.3(d)(4) (school lunch program).

transactions.[15/] Since segregated schools, public or private, are in fact unlawful, Congress could not have intended to subsidize them.

Accordingly, in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971), a three-judge district court concluded that the federal policy against government support for racial segregation in schools would be severely frustrated by the availability of tax exemptions and charitable deductions to support those schools. Therefore, it held, Section 501(c)(3) must be read to deny exempt status to private schools that engage in racial discrimination. An intervening

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15/ Congress has articulated these policies in, e.g., the 1866 Civil Rights Act, 42 U.S.C. §§ 1981, 1982, and titles II and VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a to 2000a-6, 200Ce to 2000e-17.

group of white parents appealed to this Court, and this Court affirmed summarily.

The reasoning of Green was followed by another three-judge court, which construed I.R.C. § 501(c)(8) as denying exempt status to racially discriminatory fraternal benefit orders. McGlotten v. Connally, 338 F. Supp. 448, 460 (D.D.C. 1972). That court also held, however, that I.R.C. § 501(c)(7) did permit tax exemption for discriminatory social clubs, reasoning that the conceptually different nature of club income and taxation precluded any actual economic benefit to the clubs from the exemption. Id. at 458.

Congress responded to the Green and McGlotten cases by making a single amendment to the Code. Citing this Court's decision in Green as operative law, Congress acted to overturn the only holding that permitted exemptions for a

discriminatory organization.[16/] In enacting I.R.C. § 501(i), Congress rejected the distinction between social clubs and

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16/ Petitioner Bob Jones University suggests that Congress must have rejected the Green holding because Section 501(i) is the only subsection that explicitly mentions race. This argument is senseless, given the legislative history and the prior state of the law. The committee reports expressly set out as "Present law" this Court's affirmance of Green v. Connally, and the McGlotten holding concerning fraternal benefit societies. S. Rep. No. 1318, 94th Cong., 2d Sess. 7-8 & n. 5 (1976); H.R. Rep. No. 1353, 94th Cong., 2d Sess. 8 & n.5 (1976). The obvious purpose was to bring the treatment of social clubs into conformity with the treatment of other organizations, only amending the Code to the extent necessary to correct the deviation from a consistently recognized policy.

Congress has subsequently reaffirmed the policy against subsidizing racially discriminatory private clubs, in amending Section 501(i). The new version permits discrimination on the basis of religion by certain religiously affiliated clubs and fraternal benefit societies (e.g., the Knights of Columbus and the Catholic Alumni Clubs; see S. Rep. No. 1033, 96th Cong., 2d Sess. 9-10 (1980)), but carefully reiterates that the religious discrimination must be in good faith, and not intended "to exclude individuals of a particular race or color."

other nonprofit organizations, insisting that tax exemptions for racially discriminatory clubs were inappropriate "[i]n view of national policy." S. Rep. No. 1318, 94th Cong., 2d Sess. 8 (1976). The legislative withdrawal of tax exemptions from racially discriminatory private clubs is particularly eloquent testimony to the strength of the federal policy against subsidizing private discrimination even when it is otherwise tolerated: Congress had carefully exempted private membership clubs from the substantive prohibitions of Title II and Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000a(e), 2000e(b). Private schools, of course, enjoy no such privilege.

Even the recent Ashbrook and Dornan Amendments[17/] demonstrate Congress'

17/ Pub. L. No. 96-74, §§ 103, 615, 93 Stat. 559, 562, 577. These were appropri-

(footnote continued)

approval of the Green holding that intentional discrimination deprives a private school of its exempt status. As Representative Ashbrook explained, his target was a new proposed revenue procedure[18/] that might "create a quota or minority affirmative action system for the Nation's private education." 125 Cong. Rec. H5879 (daily ed. July 13, 1979). Representative Ashbrook repeatedly stressed

> that my amendment would not in any way interrupt [the IRS's] continued case-by-case process which they were using up until

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(footnote continued)

ations riders denying the Internal Revenue Service the use of funds to formulate or carry out any new procedures for withdrawing 501(c)(3) status from previously exempted schools, and limiting the Service to those procedures in effect as of August 22, 1978.

18/ Proposed Rev. Proc. 4830-01, 43 Fed. Reg. 37,296 (Aug. 22, 1978); Proposed Rev. Proc. 4830-01-M, 44 Fed. Reg. 9451 (Feb. 13, 1979).

> August 22 and from which point they are going to change.
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> ...
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> As I pointed out, under their current regulation [Rev. Proc. 75-50] they can review schools. . . . I am not trying to take that away.

Id. at H5882; see id. at H5884.[19/] Other supporters of these amendments expressed similar approval of existing procedures,[20/] and even those who questioned the IRS's authority agreed that denial of exempt status was the correct policy.[21/]

19/ The same points were emphasized by Representative Dornan in support of his equivalent amendment. 125 Cong. Rec. H5980 (daily ed. July 16, 1979) (colloquy between Reps. Dornan and Mitchell); id. at H5982 (remarks of Rep. Dornan).

20/ See, e.g., 125 Cong. Rec. at H5883 (remarks of Rep. Sensenbrenner); id. at H5884 (remarks of Rep. Hammerschmidt); id. at H5885 (remarks of Rep. Dickinson); id. at H5982 (remarks of Rep. Miller).

21/ See id. at H5881 (remarks of Rep. Campbell); id. at H5884 (remarks of Rep. Grassley); id. at H5982 (remarks of Rep. Goldwater).

These ongoing expressions of Congressional civil rights policy have great significance for the proper construction of the Code, due to the public interest basis of the exemption at issue and to the very nature of the public policy doctrine. The proper interpretation of Section 501(c)(3) today does not depend on federal civil rights policy in 1913 or 1921 or 1939 any more than this Court's decision in Tank Truck Rentals depended on highway trucking policy in 1913, when the deduction for "necessary" business expenses first appeared in the income tax laws.[22/] Congress is not obliged to amend myriad provisions of the tax laws every time a major federal policy is implemented, at the risk of having authorized federal subsidy of unlawful or antisocial behavior. For

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22/ Tariff Act of 1913, ch. 16, § II(B), 38 Stat. 114, 167.

example, whatever doubt may have existed in the past, organizations created to "educate" the public concerning the on-going operations of the Central Intelligence Agency by disclosing the identities of its agents would surely be denied a Section 501(c)(3) exemption after the passage of the Intelligence Identities Protection Act of 1982.[23/] A fortiori, the Thirteenth and Fourteenth Amendments and the Civil Rights Acts of 1866 and 1964 suffice to articulate a "sharply defined national policy" precluding tax subsidies for racial discrimination in education.

Petitioners' separation-of-powers objections to these well-established principles are frivolous. The Internal Revenue Service has not imposed substantive legislation banning racial discri-

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23/ Pub. L. No. 97-200, 96 Stat. 122.

mination in education and federal assistance to segregated schools -- Congress has done that.[24] Under the circumstances, congressional intent and this Court's decisions leave the Internal Revenue Service no choice but to conform its Section 501(c)(3) exemption rulings to those legislative policies.[25] Congress has delegated to the Executive Branch ample authority to implement the

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24/ In fact, though Congress has enacted statutory prohibitions, the denial of federal tax subsidies to segregated schools is constitutionally compelled. See Part I(B) infra.

25/ Petitioners' suggestions that the Internal Revenue Service exercises capricious value judgments in selecting the policies it enforces are utterly fantastic: the record is only too clear that the Service has acted under the prod of judicial scrutiny, based on constitutional and statutory mandates, in its treatment of segregated private schools. See, e.g., Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 2 (1979) (remarks of Rep. Gibbons); id. at 5, 859 (testimony of Jerome Kurtz).

procedures necessary to carry out this directive.

B. The Fifth Amendment Forbids Federal Tax Benefits For Racially Discriminatory Schools.

Settled principles of constitutional law demonstrate that Congress could not extend the special tax privileges the Internal Revenue Code affords educational corporations to schools that discriminate on the basis of race. Since others have briefed this issue in detail,[26/] Amici wish only to emphasize a few points here.

This Court's decision in Norwood v. Harrison, 413 U.S. 455 (1973), which controls the present cases, was the culmination of a series of holdings condemning tangible government aid to the all-white private schools whose

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26/ See especially Brief for Lawyers' Committee for Civil Rights Under Law as Amicus Curiae at 5-18.

enrollments swelled at the expense of the public schools wherever desegregation occurred.[27/] The first decisions involved deliberate dismantling of public school systems and massive state support through direct grants and tax credits for nominally private schools. By the time of Norwood, however, the Court recognized an affirmative constitutional duty to steer clear of giving any significant aid to schools that practice racial discrimination. 413 U.S. at 467.

Several of the Court's subsidiary holdings in Norwood have particular significance for the present litigation:

> --The private schools need not pose a demonstrable threat to public school desegregation for state aid to be unlawful.

27/ See, e.g., cases cited in note 12 supra.

Id. at 467-68. 28/

--The state's benign motives and the neutrality of the school aid program do not excuse its inclusion of segregated private schools as beneficiaries. Id. at 466.

--Although the state need not cut the schools off from generalized public services provided to the entire community, such as electricity, water, and police and fire protection, it cannot offer tuition grants or educational tools that are supplied to them because they are schools. Id. at 465.

--The leeway for state aid to sectarian schools, created by the tension between Free Exercise and Establishment Clause

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28/ Lest it be assumed, however, that the ban on state aid required by Norwood has eliminated the threat segregation academies pose to unitary public school systems, Amici observe that the Prince Edward Academy, an example familiar to this Court from, e.g., Griffin v. County School Bd., 377 U.S. 218 (1964), still educates nearly two-thirds of the white school children in Prince Edward County, Virginia. See Washington Post, Jan. 25, 1982 at A1.

> values, "has no place in defining the permissible scope of state aid to private racially discriminatory schools." Id. at 464 n.7. 29/

The essential teaching of Norwood was summed up in Gilmore v. City of Montgomery, 417 U.S. 556, 568-69 (1974):

> any tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is

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29/ Needless to say, the Court's rejection of a government stance of benevolent neutrality toward segregation in private schools, and the contrast between the holdings of Norwood and Board of Education v. Allen, 392 U.S. 236 (1968), are fatal to the reliance of Petitioners and Respondent on Walz v. Tax Commission, 397 U.S. 664 (1970), for the formalistic proposition that tax exemptions are not to be considered state aid. Furthermore, Petitioners' naive distinction between "passive" refraining from taxation and "active" state aid is not even valid in the Establishment Clause context. See Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 791-94 (1973).

> constitutionally prohibited if it has a 'significant tendency to facilitate, reinforce, and support pr vate discrimination.'

The tax exemptions demanded by Petitioners in these cases would constitute massive government subsidies to segregated education, dwarfing the textbook loan program condemned in Norwood. Petitioners would be free of hundreds of thousands of dollars in unemployment and social security taxes, as well as excise taxes on fuels and telephone service,[30] and they would be eligible for preferred mailing rates.[31] The availability of "charitable" contri-

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30/ See I.R.C. §§ 4041(g), 4253(j).

31/ See 39 C.F.R. Parts 132, 134. Price discrimination in mailing rates, like the lower rate of unemployment taxation authorized by I.R.C. § 3309(a)(2), constitutes an actual government subsidy of a specific service, and is not a mere "refraining from taxation" even on Petitioners' own theory.

bution deductions would create powerful incentives for donors to contribute to Petitioners, affording matching grants from the Treasury while reducing the donors' income, estate and gift tax liability.[32] All of these would be special favors granted by Congress as a reward to Petitioners for providing educational services in competition with the public schools.[33]

32/ See, e.g., I.R.C. §§ 170(c)(2)(B), 642(c)(2), 2055(a), 2522(a).

33/ Respondent demonstrates its incomprehension of Norwood and Gilmore when it suggests that interest deductions and medical expense deductions might subject individuals to constitutional obligations. Brief for the United States at 39 n.37. These deductions are general benefits made available to every citizen, not special privileges created to reward and encourage educational organizations. The commentators Respondent cites were writing without the guidance of this Court's opinions in Norwood and Gilmore.

Respondent's ultimate effort to avoid the force of Norwood and Gilmore is the

(footnote continued)

Thus, for the reasons clearly stated by this Court in Norwood, and more fully expounded by other amici, the inclusion of racially discriminatory private schools within the exemption granted by Section 501(c)(3) would constitute a denial of equal protection in violation of the due process clause of the Fifth Amendment.

(footnote continued)

invitation to the Court to overrule those cases, see id. at 39 n.36, an action that would prompt the resurrection of state aid schemes that the Court has struggled for years to discourage. Respondent's only basis for this suggestion is a purported inconsistency with Washington v. Davis, 426 U.S. 229 (1976), which held that government employment practices cannot be shown to violate equal protection merely by demonstrating discriminatory impact. That holding has no relevance to the permissible scope of knowing government aid to private schools that concededly engage in deliberate and systematic invidious discrimination. Cf. Hills v. Gautreaux, 425 U.S. 284 (1976). Nor could Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), impair the authority of Norwood, since Norwood was decided after Moose Lodge, and the Chief Justice expressly distinguished that precedent in Norwood. See 413 U.S. at 465.

II. PETITIONERS' RELIGIOUS BELIEFS DO NOT ENTITLE THEM TO PREFERENTIAL TAX TREATMENT UNAVAILABLE TO OTHER RACIALLY DISCRIMINATORY SCHOOLS.

As the foregoing has demonstrated, Section 501(c)(3) must be interpreted to deny tax exempt status to nonsectarian schools that practice racial discrimination, both as a matter of correct statutory construction and as a matter of constitutional law. Petitioners are not entitled to different treatment merely because their religious beliefs are said to require racial discrimination.[34/]

34/ Petitioner Bob Jones University's policies, which deny admission to blacks who have white spouses and which require expulsion of students who engage in interracial dating, are legally indistinguishable from the total exclusion policy of Petitioner Goldsboro Christian Schools. The 1866 Civil Rights Act, like the Constitution itself, forbids discrimination on the basis of interracial marriage or association. See, e.g., Woods-Drake v. Lundy, 667 F.2d 1198 (5th Cir. 1982); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980); Bills v. Hodges, 628 F.2d 844 (4th Cir. 1980); De Matteis v. Eastman

(footnote continued)

The language of Section 501(c)(3) precludes different treatment for sectarian private schools, and Petitioners' insubstantial Free Exercise arguments do not justify a misreading of the statute in their favor.

A. Petitioners Are Not Organized And Operated Exclusively For Religious Purposes, And Therefore Must Satisfy The Same Requirements As Other Schools Under Section 501(c)(3).

Although Petitioners lay great stress on the fact that they are religious organizations as well as educational organizations, their exemption status must stand or fall with the status of nonreligious segregated schools. Petitioners' argument has overlooked a crucial element of Section 501(c)(3) law -- the qualifi-

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(footnote continued)

Kodak Co., 511 F.2d 306 (2d Cir.), modified on other grounds, 520 F.2d 409 (2d Cir. 1975); Faraca v. Clements, 506 F.2d 956 (5th Cir.), cert. denied, 422 U.S. 1006 (1975); Holiday v. Belle's Restaurant, 409 F. Supp. 904 (W.D. Pa. 1976).

cation that an entity must be organized and operated exclusively for one or more of the specified exempt purposes.[35/]

The status of entities organized and operated exclusively for religious purposes, like Sunday schools, churches and monasteries, is not at issue in this litigation. As the findings of the courts below and the records supporting those findings indicate, Petitioners are organized and operated both for religious purposes and for nonreligious "educational"

35/ The dissenting judge of the Fourth Circuit committed the same fallacy:

> I would construe § 501(c)(3) to grant Bob Jones University its exemption for "religious" purposes. That being true, there is no reason to test the grant of an exemption for educational purposes...

Bob Jones University v. United States, 639 F.2d 147, 156 (4th Cir. 1980) (Widener, J., dissenting).

purposes.[36] Petitioner Bob Jones University has continually stressed the academic quality of its secular instructional programs, including the training of qualified teachers and accountants who can meet nationwide standards of professional competence.[37] Petitioner

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36/ See Bob Jones University v. United States, 639 F.2d 147, 150 (4th Cir. 1980) ("The University is an educational institution as well as a religious one."); Bob Jones University v. United States, 468 F. Supp. 890, 895 (D.S.C. 1978) (District Court's findings of fact). It is rarely necessary to distinguish between religious and educational activities for purposes of Section 501(c)(3), since the exemption normally does not turn on which of the enumerated purposes is present. The notion of "exclusively religious" activities is relevant, however, in Section 6033(a)(2)(A) of the Code; regulations and legislative history under that provision make clear that an educational activity within the meaning of Section 501(c)(3) is not considered an "exclusively religious" activity. See 26 C.F.R. § 1.6033-2(g)(5)(ii); H.R. Rep. No. 782, 91st Cong., 1st Sess. 286 (1969) (Conference Report).

37/ See, e.g., Joint Appendix in No. 81-3 at A61-A68 (testimony of

(footnote continued)

Goldsboro Christian Schools emphasizes in its Complaint its record of compliance with North Carolina minimum standards for schools satisfying the compulsory attendance laws.[38/] This Court has long

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(footnote continuted)

President Bob Jones III), id. at A88-A89 (testimony of Director of Admissions David Christ); id. at A260 (Defendant's Exhibit No. 11, "WHY Bob Jones University Was Founded") ("The University is no more a preachers' school or missionaries' school than it is a teachers' school, a business school..."), A263-A264, A267-A268 (training of teachers and CPA's). The Certificate of Incorporation of Bob Jones University states as the corporate object "the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to [certain enumerated religious doctrines]." Bob Jones University v. United States, 468 F. Supp. 890, 893 (D.S.C. 1978). Such a document is determinative under IRS regulations in ascertaining the "purposes" for which a corporation is "organized," see 26 C.F.R. §1.501(c)(3)-1(b).

38/ See Complaint, Joint Appendix in No. 81-1 at 6-7; N.C. Gen. Stat. § 114-255 (1978) (superseded 1979 by id. §§ 115C-547 et seq. (Cum. Supp. 1981))(minimum standards laws); id. § 115-166 (1978) (amended and recodified at id. § 115C-378 (Cum. Supp. 1981)) (compulsory attendance laws). The

(footnote continued)

recognized the secular and public purposes that compulsory attendance laws serve, even when private sectarian schools provide the education.[39/]

The very substantial secular instructional purposes that animate Petitioners' activities must independently satisfy the exemption test of Section 501(c)(3) if Petitioners are to claim its benefits. Subjective religious

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(footnote continued)

Articles of Incorporation of Goldsboro Christian Schools, Inc. state the corporate object in words virtually identical to those used by Bob Jones University. See Goldsboro Christian Schools, Inc. v. United States, 436 F.Supp. 1314, 1316 (E.D.N.C. 1977); note 37 supra.

39/ See Board of Education v. Allen, 392 U.S. 236, 245-47 (1968); Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930). Indeed, if sectarian schools served no substantial nonreligious purposes, even the provision of textbooks to their students would be impermissible state aid under the "secular purpose" and "primary effect" tests of the Establishment Clause. See, e.g., Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 774-76 (1973).

motivation does not render activities "exclusively religious" in purpose within the meaning of the Code if, when viewed objectively, the activities are non-exempt.40/ For religious organizations as for other organizations, "the presence of a single [nonexempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes." Better Business Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 279, 283 (1945).

As this brief has already demonstrated, however, Petitioners' secular

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40/ See, e.g., Scripture Press Foundation v. United States, 285 F.2d 800 (Ct. Cl. 1961), cert. denied, 368 U.S. 985 (1962) (religious publishing house); Fides Publishers Association v. United States, 263 F. Supp. 924 (N.D. Ind. 1967) (religious publishing house); Schoger Foundation v. Commissioner, 76 T.C. 380 (1981) (religious resort); Church in Boston v. Commissioner, 71 T.C. 102 (1978) (religious organization making arbitrary "charitable" grants to individuals).

"educational" purposes are not exempt educational purposes within the meaning of the Code. Segregated schooling is simply not an exempt educational activity. The fact that Petitioners are also organized and operated in part for religious purposes is not enough to make their activities exclusively exempt ones, and therefore does not qualify them for exemption under Section 501(c)(3).

B. Petitioners' First Amendment Claims Are Insubstantial, And This Court Should Not Strain To Avoid Deciding Them.

Even assuming that Petitioners' methods of operating their schools are mandated by their religious beliefs, the First Amendment gives them no right to offer secular education in a manner that injures the rights of black students, let alone to demand tax benefits in support of their operations. Recognizing the weakness of their claims, Petitioners urge

this Court to construe the tax laws in their favor to avoid the constitutional issues.[41/] But no valid principle of statutory interpretation permits such a course.

1. Petitioners Have No First Amendment Right To Offer Secular Education In Schools That Discriminate Against Black Children.

The only First Amendment issue actually raised in these cases is Petitioners' claim that Congress cannot withhold tax subsidies because of their invidious practices. But Petitioners' arguments presuppose their success on a more starkly defined claim: that the First Amendment prevents Congress from proscribing racial discrimination in secular educational activities set up by a religious organization as an alternative to public edu-

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41/ See Brief for Petitioner Goldsboro Christian Schools, Inc. at 25; Brief for Petitioner Bob Jones University at 10-12.

cation. Amici suggest that this underlying assumption, essential to Petitioners' arguments, is groundless.

This litigation does not concern Petitioners' freedom to believe or to teach whatever they wish; Amici do not question their right to preach racial separatism. It does not even involve Petitioners' right to practice racial separatism in the purely religious functions of their organizations. Petitioners demand the right to expand racial discrimination into their secular educational business, a private enterprise they have set up to compete with the public schools.

The government's interest in preventing the harm Petitioners' discrimination inflicts outweighs Petitioners' right to inflict it even under the most rigorous tests of constitutionality. As a preliminary matter, however, Petitioners are not entitled to the most rigorous

scrutiny, because of the context in which their activities occur.

Petitioners ask this Court to extend the most stringent forms of First Amendment protection to a religious organization's conduct of a normally secular business. They claim that a religious group with a suitable calling can enter a field of business and erect its religious beliefs as a shield against neutral regulations that its competitors must obey for the protection of the public.

This Court has never held that the Free Exercise clause permits such assaults on business regulation. Free Exercise decisions of the past two decades have addressed state action unavoidably intruding on religious decisions in the lives of individuals,[42/] and regulations

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42/ See, e.g., Thomas v. Review Board, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406

(footnote continued)

restricting the fundraising and proselytizing functions of religious congregations.[43/] But the Court has not recently given plenary consideration to the class of claims, commonly raised in state courts and lower federal courts, for religious exemption from neutral economic regulation of a normally secular business in which a religious group has chosen to engage.[44/]

(footnote continued)

U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963).

43/ Larson v. Valente, 102 S. Ct. 1673 (1982); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

44/ See, e.g., State v. Heart Ministries, Inc., 227 Kan. 244, 607 P.2d 1102, appeal dismissed for want of substantial federal question, 449 U.S. 802 (1980) (home for children); Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883 (D.C. Cir. 1970) (refusal to bargain with union); United States v. Kissinger, 250 F.2d 940 (3d Cir.), cert. denied, 356 U.S. 958 (1958) (excess production of wheat); Muhammad Temple v. City of Shreveport, 387

(footnote continued)

As Justice Traynor of the California Supreme Court once noted,

> Religious organizations engage in various activities such as founding colonies, operating libraries, schools, wineries, hospitals, farms, industrial and other commercial enterprises. Conceivably they may engage in virtually any worldly activity, but

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(footnote continued)

F. Supp. 1129 (W.D. La. 1974), aff'd mem., 517 F.2d 922 (5th Cir. 1975) (sale of frozen fish); Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972), aff'd, No. 72-1826 (2d Cir. May 30, 1973) (unpublished order) (violation of copyright by religious theatrical group); Butler v. Kavanagh, 64 F. Supp. 741 (E.D. Mich. 1945) (manufacture of oleomargarine); State v. Fayetteville Street Christian School, 258 S.E.2d 459 (N.C. App. 1979) (child care center); Oxford v. Hill, 558 S.W.2d 557 (Tex. Civ. App. 1977) (same). Cf. Church of Scientology of California v. Richardson, 437 F.2d 214 (9th Cir. 1971) (importation of misbranded diagnostic devices); Founding Church of Scientology v. United States, 409 F.2d 1146, 1161, 1163-64 (D.C. Cir.), cert. denied, 396 U.S. 963 (1969) (pseudo-scientific nonreligious healing by religious group unprotected).

> it does not follow that they may do so as specially privileged groups, free of the regulations that others must observe. 45/

The state's power to regulate potentially harmful practices in such areas of economic activity normally receives great deference. When the state recognizes a danger, it is not obliged to convince the courts of the magnitude of the risk or the merit of a particular remedial approach. See, e.g., Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109 (1949); Olsen v. Nebraska, 313 U.S. 236, 246 (1941) ("There is no necessity for the state to demonstrate before us that evils persist...."). Even in the

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45/ Gospel Army v. City of Los Angeles, 27 Cal. 2d 232, 163 P.2d 704, 712 (1945), appeal dismissed, 331 U.S. 543 (1947). The Gospel Army case involved both regulation of solicitation and regulation of dealers in secondhand goods, as applied to a religious organization similar to the Salvation Army.

First Amendment context, neutral laws of general applicability may be enforced against the press without a showing of strict necessity. See Branzburg v. Hayes, 408 U.S. 665, 682-83 (1972) (discussing prior cases); Associated Press v. United States, 326 U.S. 1 (1945) (Sherman Act).

Nor can the state be required to prove the absolute necessity for denying exemptions before including religiously managed businesses in a neutral regulatory scheme. Those entities cannot require the state to accept a higher level of risk to the public or to accommodate the regulatory system to their practices. The First Amendment was not designed to confer such competitive advantages on religious corporations engaged in a normally secular enterprise. See Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961) (plurality opinion); King's Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C. Cir.

1974); Giannella, Religious Liberty, Non-establishment, and Doctrinal Development, 80 Harv. L. Rev. 1381, 1398-1403 (1967).[46/]

These general observations are confirmed by settled law regarding regulation of the business of private education. Petitioners' decision to enter this field of commerce subjects them to a broad spectrum of state and federal laws that are not usually applied to the operation of churches, including minimum educational standards,[47/] occupational safety regula-

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46/ The danger of competitive advantage is extreme in this case. The consumer demand for segregated education remains distressingly strong. If only religious schools can offer that "service", and if they are free to offer it to customers who do not even share their religious belief in the necessity for discrimination, as both Petitioners do (see Joint Appendix in No. 81-1 at 68; Joint Appendix in No. 81-3 at A33-34), the religious schools' enrollment may swell because of factors unrelated to their theological and pedagogical virtues.

47/ See, e.g., State v. Shaver, 294

(footnote continued)

regulations,[48] and minimum wage laws.[49] Private schools are also subject to the employment discrimination prohibitions of the 1964 Civil Rights Act, which expressly permits religious organizations to discriminate in employment on the basis of religion, but not on the basis of race.[50]

This Court has always coupled the right to establish private schools with the substantial authority of the state

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N.W.2d 883 (N.D. 1980); Shapiro v. Dorin, 99 N.Y.S.2d 830, 199 Misc. 643 (1950).

48/ See 29 U.S.C. §§ 651-678 (1979); 29 C.F.R. § 1975.4(c) (1981).

49/ See 29 U.S.C. § 203(s)(5); Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir.), cert. denied, 347 U.S. 1013 (1954) (religious publishing house).

50/ 42 U.S.C. § 2000e-2(e). See EEOC v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982) (religious publishing house). This demonstrates, as does I.R.C. § 501(i), Congress' express judgment that religiously managed businesses are no more entitled to engage in racial discrimination than wholly secular ones.

to regulate their operation. See Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). In Board of Education v. Allen, 392 U.S. 236, 245-47 (1968), this Court described the undoubted power of the government to regulate private education as a corollary of the schools' right to compete with public education: "if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular function." Thus, this Court's prior cases explicitly confirm that Petitioners have chosen to operate in a field of business where the State necessarily has greater control over their activities.

Of course, even if Petitioners' institutional activities were entitled to the greatest measure of First Amend-

ment protection, the rights they claim would clearly be outweighed by the government's interest in preventing the harms Petitioners' conduct inflicts. Eradication of the badges and incidents of slavery is unquestionably a compelling government interest.

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with Brown, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment.

Regents of the University of California v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

In Runyon v. McCrary, 427 U.S. 160, 172 (1976), this Court held that racial exclusion by private schools "amounts to

a classic violation of [42 U.S.C.] § 1981." The private schools insisted that Congress' proscription of discriminatory conduct violated parents' First and Fifth Amendment rights of free association, parental control of child upbringing, and family privacy. But the Court rejected these claims, maintaining that the parents' rights must yield to the government's interest in securing racial equality under the Thirteenth Amendment. Id. at 179. The Court specifically denied that a First Amendment right to promote a belief in racial segregation could be translated into a right to practice racial exclusion. Id. at 176.

The Court reserved deciding the applicability of Runyon v. McCrary to religious schools, which were not before it. But precisely the same reasoning refutes Petitioners' claims. Petitioners' belief in racial separatism does not

entitle them to enforce it by rejecting or expelling black children. Conduct protected by the Free Exercise Clause is entitled to no greater protection than other conduct protected by the First Amendment.[51/] In either case, the burdens placed on asserted rights must be balanced against the government's interest in regulating injurious conduct. The outcome of that balance in the present case is evident: the destruction wrought by racial discrimination in education can only be prevented by outlawing that discrimination.

There is nothing novel or shocking in the conclusion that Congress can restrict Petitioners' freedom to act on

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51/ See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 652-53 (1981); id. at 659 n.3 (Brennan, J., concurring in part and dissenting in part); Prince v. Massachusetts, 321 U.S. 158, 164-65 (1944); Linscott v. Millers Falls Co., 440 F.2d 14, 17 (1st Cir.), cert. denied, 404 U.S. 872 (1971).

their religious beliefs. This Court has never accepted a Free Exercise claim of a right to inflict harm on others. See Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1879).[52] And this Court has denied protection even to fairly innocuous conduct to prevent highly generalized forms of harm.[53]

52/ Even in Wisconsin v. Yoder, 406 U.S. 205, 233-36 (1972), the case most favorable to Petitioners, the Court closely scrutinized the evidence to determine whether the religious conduct would "jeopardize the health or safety of the child, or have a potential for significant social burdens."

The Court ultimately concluded that Yoder had demonstrated the adequacy of his religiously mandated conduct "in terms of precisely those overall interests that the State advances in support of" its prohibition of that conduct. 406 U.S. at 235. Obviously, Petitioners could never make such a showing. They insist that the rights of others must be sacrificed to their own.

53/ See, e.g., United States v. Lee,

(footnote continued)

2. Petitioners Have No First Amendment Right To Federal Tax Subsidies, Regardless Of Whether They May Lawfully Practice Discrimination.

The actual claim Petitioners present in this case is not merely that their racial discrimination should be tolerated, but that the First Amendment compels the federal government to provide tax benefits to assist their operations. Petitioners' demand for subsidization is even weaker than their claim for a right to discriminate. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Maher v. Roe,

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102 S. Ct. 1051 (1982) (maintaining comprehensiveness of social security system); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (efficiency of crowd control); Braunfeld v. Brown, 366 U.S. 599 (1961) (providing common day of rest).

432 U.S. 464, 475 (1977) (footnote omitted).54/

Petitioners seek to escape this general principle by relying on Sherbert v. Verner, 374 U.S. 398 (1963), and Thomas v. Review Board, 450 U.S. 707 (1981). Both cases held that a state unduly burdens religious freedoms when it denies unemployment benefits to individual workers by refusing to recognize religious objection to working conditions as "good cause" for declining employment.

Those cases are wholly inapplicable here. Both dealt with the state's with-

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54/ As this Court pointed out in Maher, the constitutional right of a parent to send his children to private schools imposes no obligation whatsoever on the state to contribute to the cost of that education. Id. at 476-77. The state may even withhold such aid from parents whose religious convictions require them to educate their children in sectarian schools. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 788-89 (1973); Norwood v. Harrison, 413 U.S. 455, 462-63 (1973).

drawal of benefits because of conduct that the state had asserted no interest in regulating outside the benefit context. In Sherbert v. Verner, the employee was fired because she was unable to work on Saturday, her religious Sabbath. The Court carefully noted before commencing its inquiry that her "conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation." 374 U.S. at 403. Indeed, there was no evidence that other employees were refusing Saturday work for nonreligious reasons, or that the state had expressed any interest in preventing them from doing so. Id. at 407. Similarly, in Thomas the state's refusal to recognize conscientious objection to weapons manufacture as "good cause" for leaving employment was not based on any desire to discourage such conduct. Rather, the state relied

on unsubstantiated dangers that permitting religious exemptions in general might induce employers to question job applicants about their beliefs, or might increase unemployment. These cases provide no support for the theory that government must also avoid indirect burdens on religiously motivated instances of conduct that threatens harm to third persons, and that would be unlawful for nonbelievers to engage in.

Furthermore, the Court made clear in Thomas that even where Sherbert applies, an individual's claim for a religious exemption could be overcome by a compelling state interest. 450 U.S. at 718. Incidental burdens on religious activity must be balanced against the legitimate government aims that create them. United States v. Lee, 102 S. Ct. 1051, 1056 (1982). The federal government's overriding interest in refusing to subsidize Petitioners'

racist practices results both from its affirmative efforts to protect black children, and from its statutory and constitutional duty to withhold approval and support from private discrimination. Thus, "[t]he incidental burdens felt by persons in petitioners' position are strictly justified by substantial government interests that relate directly to the very impacts questioned." Gillette v. United States, 401 U.S. 437, 462 (1971). Even assuming that the balancing test of Sherbert v. Verner were applicable, Petitioners' Free Exercise claims to tax benefits would be outweighed by government interests of the highest order.

3. This Court Should Not Imply Exemptions For Petitioners In Order To Avoid Deciding Their Constitutional Claims.

Whether or not the Court agrees with Amici that Petitioners' Free Exercise

claims are wholly insubstantial,[55/] the categorical language of the 1866 Civil Rights Act and Section 501(c)(3) itself affords no foothold for the claim that Congress intended that religiously motivated segregation academies receive more favorable treatment than socially motivated ones. Since no reasonable interpretation of the statutes is available that would justify such a distinction, Petitioners rely on an extraordinary rule of statutory construction, arguing that Congress cannot be assumed to exclude such religious schools from exempt status, unless Congress clearly expresses its affirmative intent to apply the same rule to them as to all others.

Petitioners rely on a single case for this favorable canon of construction,

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55/ Petitioners' Establishment Clause claims are patently frivolous. See Gillette v. United States, 401 U.S. 437, 450-51 (1971).

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979). In that case, the Court considered the National Labor Relations Board's recent decision to extend jurisdiction over lay teachers in parochial schools. The Court observed that the Board's responsibility to police collective bargaining conduct would entangle the Board in all aspects of school management, and would continually enmesh the Board in investigating the good faith of church authorities' claims that various educational policies displeasing to the teachers and their union were religiously mandated. Given the pervasive danger of entanglement, the total absence of evidence that Congress had ever considered such an intrusion desirable, and the fact that Congress had carefully modified customary labor law to accommodate the religious interests of employees in religious hospitals, the Court concluded that

Congress did not contemplate Board jurisdiction over parochial school teachers.

The unique factors that justified the Court's interpretation of the National Labor Relations Act are wholly absent here. First, Petitioners' constitutional claims are simply too insubstantial to require the suggested construction. Indeed, construing the Code to grant Petitioners exemptions would raise far graver constitutional questions than it would avoid. Furthermore, the Internal Revenue Code itself contains a clear indication that Congress, after mature deliberation, viewed religious racism as entitled to no more favorable tax treatment than lay racism. Section 501(i) expressly permits religious social clubs to retain their tax exemptions while engaging in religious discrimination, but not in racial discrimination or in religious discrimination as

a subterfuge for racial discrimination.

More importantly, the Catholic Bishop rule of construction is inappropriate where litigants rely on simple Free Exercise claims rather than unanticipated entanglement problems. Petitioners' Free Exercise arguments are indistinguishable from a broad spectrum of assertions that parties feel religiously compelled to engage in some form of unlawful or antisocial conduct, and that the statutes are too generally phrased to be read as expressly covering their actions.[56/] Surely Congress

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56/ Litigants frequently demand First Amendment exemptions from statutes and rules whose draftsmen did not expressly anticipate such claims. See, e.g., SEC v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976) (securities fraud); United States v. Huss, 482 F.2d 38 (2d Cir. 1973) (refusal to testify against coreligionist); United States v. Best, 476 F. Supp. 34 (D. Colo. 1979) (trespassing on government property); United States v. Thompson, 466 F. Supp. 18 (W.D. Pa. 1978), aff'd, 588 F.2d 825 (3d Cir. 1978) (union

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is not obliged in passing every regulatory statute and every criminal law to state that no person, including persons religiously motivated, shall engage in certain conduct.

Finally, the danger of entanglement in the present context requires denial of Petitioners' claimed exemptions, not allowance. This Court has made clear in Runyon v. McCrary, 427 U.S. 160 (1976), that secular private schools are forbidden to indulge in racial discrimination by the 1866 Civil Rights Act. Such deliberately unlawful conduct compels denial of tax exemptions. Creating a "Free Exer-

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official's receipt of Christmas gift from employer); Turner v. American Bar Association, 407 F. Supp. 451, 481 (N.D. Tex. 1975) (unauthorized practice of law); Welch v. Kennedy, 319 F. Supp. 945 (D.D.C. 1970) (sending medical supplies to enemy nation). In the past, as in the cases cited, the courts have not construed statutes to avoid deciding such claims.

cise" immunity from the general rule would therefore plunge the Internal Revenue Service into endless investigations of the sincerity of segregated schools clamoring for tax exemptions. This is precisely the sort of inquiry the Court sought to avoid in Catholic Bishop. See 440 U.S. at 502.

This potential for entanglement is graphically illustrated by the record in No. 81-1. The evidence compiled, through the close examination by government attorneys that such cases necessarily require, persuasively indicates that the admission policies of Goldsboro Christian Schools are not governed by sincere religious convictions.[57/] Courts have

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57/ The school does not require that its students subscribe to any particular belief, Joint Appendix in No. 81-1 at 68, 85-86; its student body ranges among numerous sects of Protestant and non-

(footnote continued)

been forced to engage in similarly intrusive inquiries so long as they have held open the possibility of a religious exemption from the 1866 Civil Rights Act.[58/]

Thus, the special circumstances justifying the presumption against coverage of religious activities in Catholic Bishop are absent in the present

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(footnote continued)

Protestant Christianity and also includes children adhering to a non-Christian religion or to no religion at all, Id. at 69-70; contrary to its claimed religious belief in educating only the "Japethite" race, the school has admitted "Hamite" children without hesitation so long as they were not black, Id. at 83, 85-87; id. at 91-92; and both the school's founder and its principal trace their opposition to admitting black children to the current political climate in the South, Id. at 84; id. at 90, 92-93.

58/ 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) (en banc), cert. denied, 434 U.S. 1063 (1978); see id. at 323-24 (Goldberg, J., concurring).

case. Section 501(c)(3) is not reasonably susceptible to importing a special rule for schools whose religious beliefs require racial discrimination, and the Court cannot avoid Petitioners' constitutional claims by implying an exception in their favor.

CONCLUSION

For the reasons set forth above, the decisions of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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