F 3:7

No. 81-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF PETITIONER, GOLDSBORO CHRISTIAN SCHOOLS

CLAUDE C. PIERCE
WILLIAM G. MCNAIRY*
EDWARD C. WINSLOW
JOHN H. SMALL
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD
Post Office Drawer U
Greensboro, NC 27402
(919) 373-8850

Counsel for Petitioner

*Counsel of Record

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

1. Whether Goldsboro Christian Schools, Inc., a private church-related school, is precluded from qualifying as a tax-exempt educational organization under 26 U.S.C. § 501(c)(3) because it maintains a racially discriminatory admissions policy which is based on its sincere religious beliefs?

2. Whether the denial of tax-exempt status to Goldsboro Christian Schools, Inc. under 26 U.S.C. § 501(c)(3) solely because it maintains a racially discriminatory admissions policy based on its sincere religious beliefs is an unconstitutional infringement of its guarantees under the Religion Clauses of the First Amendment?

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

CASES:

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

No. 81-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER, GOLDSBORO CHRISTIAN SCHOOLS

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit appears as the appendix to the Petition for Writ of Certiorari at page 1a ("Pet. ——"); the Judgment of the Fourth Circuit appears at Pet. 53a. The district court's Order is reported at 436 F.Supp. 1314 (E.D.N.C. 1977) and appears at Pet. 5a. The Judgment of the district court, filed on May 7, 1980, appears in the Joint Appendix at page 115 ("J.A. ——").

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided this case and entered Judgment on Feb-

ruary 24, 1981. (Pet. 53a). By an Order dated April 7, 1981, the Fourth Circuit denied petitioner's timely Petition for Rehearing. (Pet. 55a). The Petition for a Writ of Certiorari was filed on July 2, 1981 and was granted on October 13, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

Sections 501(a) and (c)(3) of the Internal Revenue Code (1971) (26 U.S.C. §§ 501(a) and (c)(3) (1971)) provide in pertinent part:

> *Sec. 501. Exemption from tax on corporations, certain trusts, etc.*
>
> (a) *Exemption from taxation.* — An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle . . . .
>
> * * * *
>
> (c) *List of exempt organizations.* — The following organizations are referred to in subsection (a):
>
> * * * *
>
> (3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Section 3121(b)(8)(B) of the Internal Revenue Code (1971) (26 U.S.C. § 3121(b)(8)(B) (1971)) provides in pertinent part:

> *Sec. 3121. Definitions.*
>
> (b) *Employment.* — For purposes of this chapter, the term "employment" means any service performed . . . either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, . . . except that such term shall not include —
>
> * * * *
>
> (8)(B) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a), ...

Section 3306(c)(8) of the Internal Revenue Code (1971) (26 U.S.C. § 3306(c)(8) (1971)) provides in pertinent part:

> *Sec. 3306. Definitions.*
>
> (c) *Employment.* — For purposes of this chapter, the term "employment" means . . . (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, . . . except —
>
> * * * *
>
> (8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a); . . . .

The pertinent Treasury Department Regulations, Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959) (26 C.F.R. § 1.501(c)(3)-1(d)(3) (1959)), provide:

> (3) *Educational defined* — (i) *In general.* The term "educational", as used in Section 501(c)(3), relates to —

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or

(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

(ii) *Examples of educational organizations.* The following are examples of organizations which, if they otherwise meet the requirements of this section, are educational:

Example (1). An organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.

STATEMENT OF THE CASE

Petitioner Goldsboro Christian Schools, Inc.,[1] brought this action against the United States, pursuant to 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422, to recover $1,972.10 of Federal Insurance Contributions Act ("FICA") taxes and $748.10 of Federal Unemployment Tax Act ("FUTA") taxes, which it had paid for the years 1969 through 1972. (J.A. 14-17). The United States counterclaimed for $160,073.96 of FICA and FUTA taxes allegedly due it for these same years. (J.A. 61-63).

---

[1] In accord with Rule 28.1, Goldsboro Christian Schools, Inc. states that it is a corporation which has no parent company or subsidiary; however, it is an affiliate of the Second Baptist Church of Goldsboro located in Goldsboro, North Carolina.

At issue is the determination by the Internal Revenue Service ("IRS") that Goldsboro Christian Schools, Inc. ("Goldsboro") does not qualify as a tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code ("Code") because Goldsboro maintains a racially discriminatory admissions policy, even though this policy is based on its sincere religious beliefs. The determination of whether Goldsboro is an organization described in Section 501(c)(3) of the Code will resolve the issue of Goldsboro's liability for FICA taxes and FUTA taxes. If Goldsboro is an organization described in Section 501(c)(3) of the Code, then it is exempt from FICA taxes (26 U.S.C. §3121(b)(8)(B)) and from FUTA taxes (26 U.S.C. §3306 (c)(8)).

Goldsboro was organized as a non-profit corporation exclusively for the purpose of operating a private, fundamentalist religious school in Goldsboro, North Carolina. (Pet. 6a). The district court observed that the Second Baptist Church of Goldsboro had figured prominently in Goldsboro's establishment and operation and provides Goldsboro with "physical facilities and services of various Church employees . . . without cost." (Pet. 6a-7a). The court noted the general religious character of Goldsboro, as set forth in its Articles of Incorporation, which state its purpose to be:

> [T]o conduct an institution or institutions of learning for the general education of *Youth* in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures; combatting all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save

> men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God. (Pet. 6a).

During the years at issue, Goldsboro maintained a regularly scheduled curriculum, a regular faculty, and a regularly enrolled student body for kindergarten and grades one through twelve. (Pet. 6a-7a; J.A. 6). All classes at Goldsboro begin with a prayer, and Goldsboro requires each high school student to take one Bible-related course each semester. (Pet. 7a).

Goldsboro, which is an integral part of the religious mission of the Second Baptist Church of Goldsboro, maintains a racially discriminatory admissions policy as a matter of religious conviction. The district court noted that, Goldsboro's discriminatory policy is "based upon [its] interpretation of the Bible." (Pet. 7a). The court assumed for purposes of deciding the summary judgment motions that Goldsboro's "racially discriminatory admissions policy is based upon a valid religious belief." (Pet. 7a).

In its Order on Cross-Motions for Summary Judgment, the district court held that, in order for an organization to qualify for tax-exempt status under Section 501(c)(3), it must not "violate clearly declared public policy." (Pet. 10a). The district court said this requirement is "inherent in and compelled by both rules of statutory construction and congressional intent" even though "there is no specific language in the statute" to that effect. (Pet. 10a-11a). Because Goldsboro maintains a racially discriminatory policy, it therefore violates "public policy"and is thus not a Section 501(c)(3) organization. (Pet. 14a). In addition, the district court held that the IRS's denial of tax-exempt status did not violate Goldsboro's constitutional rights under the First Amendment Religion Clauses. (Pet. 12a-13a).

On appeal, the Fourth Circuit stated that "[Goldsboro], on religious grounds, denies admission to blacks."

(Pet. 1a). The Fourth Circuit then described this case as an "identical twin" to *Bob Jones University* v. *United States,* 639 F.2d 147 (4th Cir. 1980), and in a *per curiam* opinion, affirmed the decision of "the district court for the reasons advanced in the Bob Jones University case." (Pet. 2a). Judge Field dissented. This case has been consolidated with the *Bob Jones University* case, No. 81-3, for review by this Court.

The Fourth Circuit held in the *Bob Jones University* case that an organization must be "charitable" in the common law sense and thus could not violate public policy in order to qualify as a tax-exempt organization under Section 501(c)(3) of the Code. The Fourth Circuit found that Bob Jones University's racially discriminatory policies violated federal public policy; the Fourth Circuit, therefore, held that the IRS properly revoked Bob Jones University's tax-exempt status. Moreover, the Fourth Circuit found that the government's interest in eliminating racial discrimination is compelling. Consequently, the Fourth Circuit went on to hold that even if the revocation of tax-exempt status impinged upon Bob Jones University's religious freedoms, the revocation of tax-exempt status did not violate the Religion Clauses of the First Amendment.

In a dissenting opinion in the *Bob Jones University* case, Judge Widener stated that the majority had misconstrued Section 501(c)(3) by insisting that the various types of organizations listed therein also qualify as common law "charitable" organizations in order to qualify for tax-exempt status. Judge Widener would have construed Section 501(c)(3) to grant tax-exempt status to each type of organization enumerated in the statute. Because Bob Jones University falls within one of those classes, Judge Widener would have held that the IRS does not have the power to revoke Bob Jones University's tax-exempt status. Finally, Judge Widener stated that the public policy favoring freedom of religion may not be subordinated to the public policy against racial discrimina-

tion in the context of private, non-tax-funded religious institutions.

SUMMARY OF ARGUMENT

Section 501(c)(3) of the Code grants tax-exempt status to organizations "organized and operated exclusively for religious, charitable, . . . or educational purposes." Goldsboro qualifies as a tax-exempt educational organization under the terms of this statute and the applicable Treasury Department Regulations.

The IRS contends that Goldsboro must also comply with the "federal public policy" against racial discrimination in order to qualify for tax-exempt status. Application of the rules of statutory construction clearly demonstrates, however, that there is no merit in the IRS's position.

In addition, the legislative history of Section 501(c)(3) reveals a total absence of any intent on the part of Congress to deny tax-exempt status to schools that maintain racially discriminatory admissions policies. On the other hand, the position advanced by the IRS that Goldsboro must maintain racially nondiscriminatory policies in order to qualify for tax-exempt status under Section 501(c)(3) raises serious constitutional questions under the First Amendment Religion Clauses. Thus, based on this Court's holding in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979), Section 501(c)(3) must be construed to permit Goldsboro to qualify as a tax-exempt organization, thereby avoiding the necessity of having to "resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

Moreover, the decision of the Fourth Circuit upholding the IRS's denial of tax-exempt status to Goldsboro on the ground that its racially discriminatory admissions policy violates federal public policy gave judicial approval to an unconstitutional exercise of legislative powers by an

administrative agency in the executive branch of government. If Congress should determine that religious schools which maintain racially discriminatory policies should not qualify as tax-exempt organizations under Section 501(c)(3), then Congress must amend the statute to deny tax-exempt status to such organizations. This is precisely the procedure followed by Congress when it denied tax-exempt status under Section 501(c)(3) to certain Communist organizations on the grounds of public policy. This same legislative process should be followed here.

If the Fourth Circuit's decision is not overturned, the IRS will have successfully denied tax-exempt status to a religious school that practices unorthodox, unpopular and minority views which the IRS—and not the Congress—has decided violate federal public policy. If the IRS has the power to deny tax-exempt status to religious schools on the grounds that their racially discriminatory policies violate federal public policy, then it would appear that the IRS also has the power to deny tax-exempt status to any organization, educational or otherwise, that violates some public policy sought to be enforced by the IRS. If this is permitted, the end result would be that the specific criteria for granting an organization tax-exempt status under Section 501(c)(3) would be constantly changing, and these changes would take place at the whim of the IRS. Thus, subjective and arbitrary judgments by IRS bureaucrats would be substituted for objective standards enacted by Congress.

Finally, if this Court determines that the IRS has the statutory authority to deny tax-exempt status to organizations which maintain racially discriminatory admissions policies, this Court must then balance the competing interests of church and state to determine whether the denial of tax-exempt status to Goldsboro violates its First Amendment rights. Goldsboro is a pervasively religious school that discriminates out of a firmly held religious belief that separation of the races is scripturally mandated. Ap-

plication of the IRS's policy to Goldsboro would severely burden the free exercise of that belief.

On the other hand, the secular value underlying the IRS policy sought to be enforced in this case is different in both kind and degree from those government regulations which this Court has found in the past to outweigh religious liberty. The IRS policy is not directed at any practice that poses a substantial threat to public safety, peace or order, and, more importantly, that policy has never been codified by Congress nor delineated by any court. Finally, the creation of a religious exemption to the IRS's policy would have only a minor effect on the IRS's goal of eradicating discrimination, and that goal could be pursued more directly through private actions under the civil rights laws.

In this case, the scales tip heavily in favor of religious freedom. Thus, the Court should hold that the Free Exercise Clause prohibits the IRS from denying tax-exempt status to private, religious schools, such as Goldsboro, that maintain racially discriminatory policies based on sincere religious beliefs.

ARGUMENT

I.

THE FOURTH CIRCUIT ERRED IN HOLDING THAT GOLDSBORO DOES NOT QUALIFY AS A TAX-EXEMPT ORGANIZATION DESCRIBED IN SECTION 501(c)(3) BECAUSE IT MAINTAINS A RACIALLY DISCRIMINATORY ADMISSIONS POLICY.

Section 501(c)(3) of the Code grants tax-exempt status to organizations "organized and operated exclusively for religious, charitable, . . . or educational purposes." Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959) defines an "educational" organization to include "a primary or secondary school . . . which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students."

During the years at issue, Goldsboro maintained a regularly scheduled curriculum, a regular faculty and a regularly enrolled student body for kindergarten and grades one through twelve and was certified by the North Carolina Department of Public Instruction to be an "approved nonpublic school." (Pet. 7a, J.A. 6-7). Goldsboro is operated as part of the religious mission of the Second Baptist Church of Goldsboro. (Pet. 6a-7a). Thus, Goldsboro clearly qualifies as a tax-exempt organization under Section 501 (c)(3) and Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959).

The IRS does not dispute that during the years at issue in this case—1971 and 1972—Goldsboro satisfied all of the express requirements of Section 501(c)(3). Nonetheless, the Fourth Circuit held, as contended by the IRS, that Goldsboro failed to qualify as a tax-exempt organization under Section 501(c)(3) solely because its racially discriminatory admissions policy, which is based on its sincere religious beliefs, violates public policy. The Fourth Circuit relied primarily on *Green* v. *Connally,* 330 F.Supp. 1150 (D.D.C.) (three-judge court), *aff'd per curiam sub nom. Coit* v. *Green,* 404 U.S. 997 (1971) in reaching its decision.

In order to place this case in proper prospective, it is necessary to briefly review the history of the *Green* litigation and the vacillating positions taken by the IRS over the years with respect to the tax-exempt status of private schools that maintain racially discriminatory policies.

Prior to 1965, the IRS routinely granted tax-exempt status to private schools which maintained racially discriminatory admissions policies. Then, from 1965 to 1967, the IRS maintained a freeze on Section 501(c)(3) applications of educational organizations with discriminatory admissions policies. This freeze was terminated on August 2, 1967, when the IRS issued a press release stating that if such organizations did not receive any unconstitutional

state aid they were entitled to tax-exempt status under Section 501(c)(3). The IRS's position set forth in the 1967 press release was attacked in a lawsuit brought by a group of taxpayers and their children who were attending public schools in Mississippi. *See Green* v. *Kennedy,* 309 F.Supp. 1127 (D.D.C. 1970) (three-judge court).

In its early responses in the *Green* litigation, the IRS asserted not only that it should grant tax-exempt status to private segregated schools, but also that it was required to do so. However, before a final decision was entered, the IRS changed its position and announced, in a news release dated July 10, 1970, that private schools which maintain racially discriminatory admissions policies no longer qualify for tax-exempt status under Section 501(c)(3). (J.A. 113-14).

Because the IRS changed its position with regard to the tax-exempt status of racially discriminatory private schools before the district court in *Green* reached its final decision, this Court has made clear that its affirmance in *Green* lacks the precedential weight of a case involving a truly adversary proceeding.[2] But more importantly, the district court in *Green* left open the very issue involved in this

---

[2] In *Bob Jones University* v. *Simon,* 416 U.S. 725, 740 n. 11 (1974), this Court said:

> The question of whether a segregative private school qualifies under § 501(c)(3) has not received plenary review in this Court, and we do not reach that question today. Such schools have been held not to qualify under § 501(c)(3) in *Green* v. *Connally,* 330 F.Supp. 1150 (D.C.) (three-judge court), *aff'd per curiam sub nom. Coit* v. *Green,* 404 U.S. 997 (1971). As a defendant in *Green,* the Service initially took the position that segregative private schools were entitled to tax-exempt status under § 501(c)(3), but it reversed its position while the case was on appeal to this Court. Thus, the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy.

case—the tax-exempt status of religious schools that practice racial discrimination because of their religious beliefs.[3]

In this case, the IRS initially assessed FICA and FUTA taxes against Goldsboro for the years 1969 through 1972, even though Goldsboro clearly qualified as a tax-exempt educational organization in 1969 and for most of 1970 under the IRS policy announced on August 2, 1967. (J.A. 61-63). Because Goldsboro did, in fact, qualify as a Section 501 (c)(3) organization under the IRS policy in effect prior to July 10, 1970, the IRS decided to abate the FICA and FUTA taxes assessed against Goldsboro for the period prior to November 30, 1970, when the IRS began enforcing the change in position announced in the July 10, 1970 press release. (J.A. 111-12).

Consequently, the IRS has acknowledged that Goldsboro qualified as a tax-exempt educational organization under Section 501(c)(3) of the Code prior to July 10, 1970, but now the IRS contends that Goldsboro does not qualify as a tax-exempt organization for 1971 and 1972 solely because the IRS—which is simply an agency in the executive branch of the government—and not the Congress decided that, as a July 10, 1970, tax-exempt status would no longer be granted to private schools which maintained racially discriminatory policies.

The reasoning relied on by the IRS in issuing the July 10, 1970 press release, as well as the justification advanced for denying tax-exempt status to Goldsboro, is that all organizations described in Section 501(c)(3) must also be "charitable" in the common law sense. The IRS then

---

[3] In *Green* v. *Connally*, 330 F.Supp. at 1169, the district court wrote:

> We are not now called upon to consider the hypothetical inquiry whether tax-exemption or tax-deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion.

argues that in order to qualify as a common law charity, the purpose of the organization must not be contrary to public policy. The IRS then contends that racially discriminatory policies are contrary to public policy, even if those policies are based on sincere religious beliefs. Thus, the IRS concludes that Goldsboro does not qualify as a common law charity [4] and therefore is not entitled to tax-exempt status under Section 501(c)(3). *See* Rev. Rul. 71-447, 1971-2 C.B. 230.

An examination of the statute itself, as well as the legislative history of Section 501(c)(3), clearly establishes that there is no support for the position advanced by the IRS that, in order for an educational or religious organization to qualify for tax-exempt status under Section 501(c)(3), the organization must also be "charitable" in the common law sense. To the contrary, the legislative history of Section 501(c)(3) and the applicable rules of statutory construction clearly establish that Goldsboro does, in fact, qualify as a tax-exempt organization under Section 501(c)(3).

---

[4] The Government's statement of the requirements for qualifying as a common law charity is incorrect. It was made clear many years ago in cases such as *Pennsylvania Co. for Insurance* v. *Helvering,* 66 F.2d 284 (D.C. Cir. 1933), and *Girard Trust Co.* v. *Commissioner,* 122 F.2d 108 (3rd Cir. 1941), that the determination of whether an organization violates federal public policy is not the test for determining whether the organization qualifies as a common law charity. Rather the test is whether the purpose of the organization promotes some public benefit or good to humanity.

In view of the undisputed facts in this case, it is patently absurd for the IRS to contend that Goldsboro does not satisfy the threshold test of providing that degree of benefit or good to humanity necessary to qualify as a common law charity. The IRS has consistently misapplied the test for a common law charity by confusing the difference between "public policy" and "public benefit".

A. Application Of The Rules Of Statutory Construction Establishes That Goldsboro Qualifies As A Tax-Exempt Organization Under Section 501(c)(3).

This Court has repeatedly held that "[i]n matters of statutory construction, it is appropriate to begin with the words of the statute itself," *Northwest Airlines, Inc.* v. *Transport Workers Union,* 451 U.S. ——, 101 S.Ct. 1571, 1580 (1981), and that the words of a statute, including revenue acts, should be interpreted where possible in their ordinary, everyday senses. *Malat* v. *Riddell,* 383 U.S. 569, 571 (1966); *Hanover Bank* v. *Commissioner,* 369 U.S. 672, 687 (1962).

Section 501(c)(3) describes several different types of organizations which are entitled to tax-exempt treatment, all of which are connected by the disjunctive "or". By use of the word "or", Congress obviously intended to grant tax-exempt status to an organization if it is organized and operated for any one of the enumerated purposes. Separate references are made to "religious", "educational" and "charitable". These separate references do not support the position now advanced by the IRS that Congress intended that all organizations must also be "charitable" (as that term is used at common law) in order to receive tax-exempt status. In *Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 339 (1979), this Court said that the "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." Most significantly, the IRS's own regulations follow the construction of Section 501(c)(3) dictated by the plain words of the statute by stating that an organization is exempt "if it is organized and operated exclusively for one or more" of the enumerated purposes. Treas. Reg. § 1.501(c)(3)-1(d)(1)(i) (1959).

Not only does the position advocated by the IRS in this case, which was adopted by the Fourth Circuit, ignore the plain, unambiguous words of the statute, but the IRS's

position also violates the fundamental rule of statutory construction which requires that a statute be construed if possible to give separate effect to each word in it and no one part of a statute should be interpreted in a manner so as to render another part of the same statute redundant. *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307-08 (1961); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

The word "charitable" in its common law sense, as expressed by Lord McNaughten in the famous case of *Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531, 583, comprises four principal divisions: "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." If Congress had intended to use the word "charitable" in its common law sense, it would have been unnecessary to separately refer to "educational" and "religious" organizations. The latter two terms are obviously included in the first. Yet, the construction of Section 501(c)(3) advocated by the IRS makes the separate reference to "educational" and "religious" organizations completely superfluous. This construction of the statute clearly violates the requirement that Section 501(c)(3) be construed to give effect to each word in it and that no one part of the statute be interpreted so as to render another part of the statute redundant. As Professor Boris I. Bittker recently noted, the construction advanced by the IRS makes "the reference in IRC § 501(c)(3) to 'educational' purposes . . . subservient . . . to 'charitable' purposes, so that a school or college cannot rest its case for tax exemption solely on the statutory reference to 'educational purposes.'" 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 100.1.2, at 100-5 (1981).

Neither the words of the statute, the applicable Treasury Department Regulations nor the basic rules of statutory construction provide any support for the construction of Section 501(c)(3) advocated by the IRS and adopted by

the Fourth Circuit. Goldsboro satisfies all the express requirements of the statute and the applicable Treasury Department Regulations, and thus qualifies as a tax-exempt educational organization under Section 501(c)(3).

B. The Legislative History Of Section 501(c)(3) Establishes That Congress Did Not Intend To Deny Tax-Exempt Status To Religious Schools Such As Goldsboro.

This Court has repeatedly held that, in construing the validity of an IRS interpretation of a statute, the courts should inquire as to whether the IRS's policy sought to be enforced "is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent", *National Muffler Dealers Association, Inc.* v. *United States*, 440 U.S. 472, 477 (1979); and, if not, courts should also consider "the consistency of the Commissioner's interpretation and the degree of scrutiny Congress has devoted to the [policy] during subsequent re-enactments of the statute." *Id. Accord, Rowan Companies, Inc.* v. *United States*, 452 U.S. ——, 101 S.Ct. 2288, 2292-93 (1981). The interpretation of Section 501(c)(3) sought to be enforced by the IRS is obviously not a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. Nor has the IRS maintained a consistent position with respect to the tax-exempt status of organizations which maintain racially discriminatory policies. Moreover, except for the Ashbrook Amendment (discussed in Part I.C. *infra*), Congress has never scrutinized the vacillating positions taken by the IRS over the years with respect to this issue.

More importantly, in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979), this Court held that, in the absence of a clear congressional intent to the contrary, courts should construe a federal statute in a manner so as to avoid having to "resolve difficult and sensitive questions

arising out of the guarantees of the First Amendment Religion Clauses." The doctrine enunciated in *Catholic Bishop* is applicable in any situation in which the interpretation of a federal statute creates possible First Amendment conflicts. *See, e.g., St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. ——, 101 S.Ct. 2142, 2147 (1981).

The initial determination to be made under *Catholic Bishop* is not whether a First Amendment violation has, in fact, occurred, but whether a violation might occur if the suggested interpretation of the statute is adopted by the court. Goldsboro's racially discriminatory policies are based on its sincere religious beliefs. (Pet. 7a, J.A. 40-45). Thus, the position advanced by the IRS that Goldsboro must maintain racially nondiscriminatory policies in order to qualify for tax-exempt status under Section 501(c)(3) obviously raises serious constitutional questions under the First Amendment Religion Clauses. *See* Part II *infra*. The legislative history of Section 501(c)(3), on the other hand, reveals a total absence of any intent on the part of Congress to deny tax-exempt status to religious schools that maintain racially discriminatory policies based on sincere religious beliefs. Thus, Section 501(c)(3) must be construed to permit Goldsboro to qualify as a tax-exempt organization, thereby avoiding the necessity of having to "resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

The exemptions from taxation now contained in Section 501(c)(3) originated as a part of the Tariff Act of 1894, 28 Stat. 556.[5] That original statutory provision provided:

> [N]othing herein contained shall apply to corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes.

---

[5] This corporate income tax act was later declared unconstitutional by this Court in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

There are several indications that Congress did not intend to incorporate the common law of charitable trusts into this corporate income tax statute. First, there was no federal common law. Second, the common law of charitable trusts varied from state to state (not all states had adopted the Statute of Charitable Uses, 43 Eliz.I, ch. 4 (1601)). Finally, from the words of the statute, it is clear that Congress intended to distinguish religious and educational corporations from charitable corporations. The listing of three separate categories of exempt organizations irresistibly points to the conclusion that Congress intended for the term "charitable" to describe organizations that provide relief of the poor.

After the ratification of the Sixteenth Amendment, Congress passed the Tariff Act of 1913, ch. 16, § II, 38 Stat. 114, 166. Section II(G)(A) exempted from the income tax:

> [A]ny corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholders or individual.

This legislation broadened the exemption to include "scientific" corporations. However, if Congress had intended for the word "charitable" to be used in its common law sense, the inclusion of the term "scientific" in the list of exempt purposes would have been unnecessary because "scientific" corporations were regarded as "charitable" under the common law. *See Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. at 583.

In the Tariff Act of 1913, Congress also added the requirement that in order for a corporation to be exempt from taxation, no part of its net earnings could inure to the benefit of any private stockholder or individual. Under the common law, no income of a charity could inure to the benefit of a private person. *See* 4 A. Scott, *The Law of Trusts* § 376 (2d ed. 1956). Thus, the inclusion of a requirement to that effect in the statute was unnecessary if Con-

gress had intended for all organizations to qualify as common law charities in order to be exempt from taxation.

The conclusion that Congress did not incorporate the common law of charitable trusts into the exemption is further supported by the IRS's contemporaneous construction of the early revenue acts. In a ruling issued in 1921, the IRS stated that charitable trusts were *not* exempt from taxation under the predecessor provisions of Section 501(c)(3) contained in the Revenue Acts of 1913, 1916 and 1918. A.R.M. 104, 4 C.B. 262 (1921). This same position is contained in the regulations promulgated under the Revenue Act of 1918. Treas. Reg. 45, Art. 517 (Revenue Act of 1918).

In subsequent revenue acts, Congress continued to broaden the list of exempt purposes. The Revenue Act of 1918, ch. 254, § 231(6), 40 Stat. 1057, added to the list of exempt corporations those organized "for the prevention of cruelty to children or animals." The Revenue Act of 1921, ch. 98, § 231(6), 42 Stat. 227, further expanded the statute to exempt "any community chest, fund or foundation" and added "literary" organizations to the list of exempt purposes. Goldsboro again points out that these additions would have been unnecessary if Congress had intended to use the word "charitable" in its broad common law sense. Moreover, in 1923, the IRS stated in I.T. 1800, II-2 C.B. 152, 153 (1923), that the word "charitable" as used in Section 231(6) of the Revenue Acts of 1918 and 1921 meant relief for the poor:

> It will be seen that "charitable" in this broad sense includes, among other things, education, religion, relief of the poor, social service, and civic or public benefactions. On the other hand, "charitable" in its popular and ordinary sense pertains to the relief of the poor. . . .
>
> In section 231(6) of the Revenue Acts of 1918 and 1921 the organizations enumerated are religious, charitable, scientific, literary, and educational, . . . It seems obvious that the *intent must have been to use the word*

> *"charitable" in section 231(6) in its more restricted and common meaning and not to include either religious, scientific, literary, educational, civic, or social welfare organizations.* Otherwise, the word "charitable" would have been used by itself as an all-inclusive term, for in its broadest sense it includes all of the specific purposes enumerated. That the word "charitable" was used in a restricted sense is also shown from its position in the section. The language is "religious, charitable, scientific, literary, or educational . . . ." (Emphasis added).

The term "charitable" was construed by the Commissioner in 1923 exactly as Goldsboro contends that it should be construed here. Likewise, in interpreting the meaning of the word "charitable" under the early revenue acts, the courts held that the term should be construed in its narrow and restricted sense to mean relief for the poor. *See, e.g., Schuster* v. *Nichols,* 20 F.2d 179 (D.Mass. 1927).

The exemption from taxation contained in the Revenue Act of 1921 remained unchanged in the Revenue Acts of 1924, 1926, 1928 and 1932.[6] Moreover, the regulations issued by the IRS under the Revenue Act of 1924 defined the term "charitable" to mean "relief of the poor":

> Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor.

Treas. Reg. 65, Art. 517 (Revenue Act of 1924). The regulations issued by the IRS under the Revenue Acts of 1926, 1928 and 1932 continued to define the term "charitable" to mean "relief of the poor."[7]

---

[6] Revenue Act of 1924, ch. 176, § 231(6), 43 Stat. 253; Revenue Act of 1926, ch. 20, § 231(6), 44 Stat. 9; Revenue Act of 1928, ch. 562, § 103(6), 45 Stat. 791; Revenue Act of 1932, ch. 154, § 103(6), 47 Stat. 169.

[7] Treas. Reg. 69, Art. 517 (Revenue Act of 1926); Treas. Reg. 74, Art. 527 (Revenue Act of 1928); Treas. Reg. 77, Art. 527 (Revenue Act of 1932).

The Revenue Act of 1934, ch. 216, § 101(6), 48 Stat. 680, exempted from taxation the identical categories of organizations that were exempt under prior revenue acts, but the Revenue Act of 1934 added the requirement that no substantial part of the activities of an organization could involve the "carrying on of propaganda" or "attempting to influence legislation." Once again, the addition of this requirement was unnecessary if Congress had intended for all organizations to qualify as common law charities in order to be exempt from taxation. *See* 4 A. Scott, *The Law of Trusts* § 374.6 (2d ed. 1956).

The Revenue Act of 1936, ch. 740, § 101(6), 49 Stat. 1648, and the Revenue Act of 1938, ch. 554, § 101(6), 52 Stat. 447, carried forward the same exemption. In addition, the regulations promulgated under these Revenue Acts continued to define the term "charitable" as "relief of the poor."[8]

In enacting the Internal Revenue Code of 1939, ch. 1, 53 Stat. 1 ("1939 Code"), Congress continued to exempt from taxation the identical categories of organizations that had been exempt from taxation under the Revenue Acts of 1934, 1936 and 1938.[9] During the fifteen years in which the 1939 Code remained in effect, the IRS issued

---

[8] Treas. Reg. 86, Art. 101(6)-1 (Revenue Act of 1934); Treas. Reg. 94, Art. 101(6)-1 (Revenue Act of 1936); Treas. Reg. 101, Art. 101(6)-1 (Revenue Act of 1938).

[9] Section 101(6) of the 1939 Code exempted the following organizations from taxation:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise, attempting to influence legislation.

three sets of regulations, each of which defined the term "charitable" to mean relief of poverty.[10]

Section 501(c)(3) of the Internal Revenue Code of 1954, ch. 591, 68A Stat. 163 (the "1954 Code") continued to exempt the same categories of organizations that had been exempt from taxation under the 1939 Code, with the exception that the 1954 Code added to the list of exempt organizations those organizations which are organized and operated for the purpose of "testing for public safety". In addition, Congress tightened the restrictions on political activities of tax-exempt organizations.[11] Again, these changes would have been unnecessary if Congress had intended to use the word "charitable" in its common law sense.

The Report of the House Ways and Means Committee on the 1954 Code stated that Section 501 "is derived from sections 101 and 421 of the 1939 Code. *No change in substance has been made* except that employees' pension trusts, etc., are brought in the scope of this section." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A165 (1954), *reprinted in* [1954] U.S. Cong. & Ad. News 4025, 4034 (emphasis added). The changes between Section 101(a) of the 1939 Code and Section 501(c)(3) of the 1954 Code described above originated in the Senate; the House accepted these changes in conference. *See* S. Rep. No. 1662, 83d Cong., 2d

---

[10] Each set of regulations provided in pertinent part:

> Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor.

Treas. Reg. 103, § 19.101(6)-1 (1939 Code); Treas. Reg. 111, § 29.101(6)-1 (1939 Code); Treas Reg. 118, § 39.101(6)-1(b) (1939 Code).

[11] The 1954 Code does not permit tax-exempt organizations to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Sess. 310 (1954), *reprinted in* [1954] U.S. Cong. & Ad. News 4621, 4950; H.R. Rep. No. 2543, 83d Cong., 2d Sess. (1954), *reprinted in* [1954] U.S. Cong. & Ad. News 5280, 5306.

The legislative history of Section 501(c)(3) clearly demonstrates that from the very beginning Congress has consistently used the term "charitable" in its restricted sense to mean "relief of the poor." The IRS also interpreted the term "charitable" to mean "relief of the poor" until 1959.[12] There is absolutely no indication that Congress ever intended that an "educational" or "religious" organization must also be "charitable" in the common law sense in order to qualify for tax-exempt status under Section 501(c)(3). To the contary, it is clear that over the years, Congress has developed a definition of the types of organizations that are exempt from tax which can be uniformly applied without reference to the common law of the various states. Moreover, the position now advanced by the IRS is obviously not "a substantially contemporaneous construction of the statute by those presumed to be aware of Congressional intent," *National Muffler Dealers Association, Inc.* v. *United States,* 440 U.S. at 477, but is simply the last in a series of vacillating positions taken by the IRS with respect to the tax-exempt status of schools which maintain racially discriminatory admissions policies. Finally, and most significantly, the legislative history of Section 501(c)(3) reveals a total absence of any intent

---

[12] In the regulations originally proposed under the 1954 Code, the definition of the term "charitable" was similar to the definition contained in the regulations promulgated under the 1939 Code:

> Organizations formed and operated exclusively for charitable purposes include generally organizations for the relief of poverty, distress, or other conditions of similar public concern.

21 Fed. Reg. 460, 464 (1956). It was not until the final regulations were issue in 1959 that the IRS interpreted the term "charitable" for the first time in the broader, common law sense. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

on the part of Congress to deny tax-exempt status to religious schools that maintain racially discriminatory policies based on their sincere religious beliefs. On the other hand, the IRS's position, which has been adopted by the Fourth Circuit, raises serious First Amendment issues. Therefore, in accordance with the mandate of *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. at 507, this Court should "decline to construe [Section 501(c)(3)] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" and should hold that Goldsboro qualifies as a tax-exempt organization under Section 501(c)(3).

C. The Attempt By The IRS To Deny Tax-Exempt Status To Goldsboro Violates The Doctrine Of Separation Of Powers.

The decision of the Fourth Circuit upholding the IRS's denial of tax-exempt status to Goldsboro on the ground that its racially discriminatory policies violate federal public policy sanctioned an unconstitutional exercise of legislative powers by an administrative agency of the executive branch of government.

The language of Section 501(c)(3) is clear and unambiguous, and the IRS admits that Goldsboro satisfies all the express requirements of the statute for qualification as a tax-exempt organization. The IRS's additional requirement that Goldsboro maintain racially nondiscriminatory policies in order to qualify for tax-exempt status is therefore nothing more than an attempt by the IRS to amend the statute by administrative action. This it cannot do.

This Court has consistently refused to permit administrative agencies to rewrite the laws enacted by Congress. For example, in *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134-35 (1936), this Court stated:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and

> regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.
>
> * * * *
>
> . . . The *statute* defines the rights of the taxpayer and fixes a standard by which such rights are to be measured.

(Emphasis added); *accord, United States* v. *Larionoff*, 431 U.S. 864, 873 n.12 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14 (1976); *Dixon* v. *United States*, 381 U.S. 68, 74-75 (1965). Until Congress amends the statute to deny tax-exempt status to organizations that maintain racially discriminatory policies, Goldsboro cannot be denied that status under Section 501(c)(3) by administrative action of the IRS.

Moreover, this Court has repeatedly held that, when the language of a statute is clear, the courts do not have the power under the guise of statutory construction to repeal or amend that statute even though they may disagree with the result; rather it is their function to give the natural and plain meaning to the statute as passed by Congress. In *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625-26 (1978), this Court said:

> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. . . . Perhaps the wisdom we possess today would enable us to do a better job . . . than Congress did [years ago] . . . , but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute.

Similarly, in *Evans* v. *Abney*, 396 U.S. 435, 447 (1970), this Court stated:

> The responsibility of this Court . . . is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.

Accord, United States v. *Great Northern Railway Co.*, 343 U.S. 562, 575 (1952); *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 199 (1952); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 599 (1951).

Although the Fourth Circuit ignored the doctrine of separation of powers, Congress has expressed considerable reservation about the IRS's authority to deny tax-exempt status to organizations which maintain racially discriminatory policies. In the Ashbrook Amendment to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, § 103, 93 Stat. 559, Congress prohibited the IRS from using any funds appropriated therein to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious, or church-operated schools under Section 501(c)(3) . . . unless in effect prior to August 22, 1978." The House Report on this bill stated in pertinent part:

> This Committee, too, is concerned about the Internal Revenue Service issuing revenue procedures in an area where legislation may be more appropriate. The responsibility of the Internal Revenue Service is to enforce the tax laws. The purpose of the Internal Revenue Service procedures ought to be to clarify these laws, not to expand them.

H.R. Rep. No. 96-248, 96th Cong., 1st Sess. 14-15 (1979).

The sponsor of the Amendment, Congressman Ashbrook, argued:

> For the administrative branch to create such a policy without direction from Congress is a violation of the doctrine of the separation of powers.
>
> * * * *
>
> So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS or any other branch of the Federal government to seek denial of tax-exempt status. . . .

> Such policy determinations, when made without the action of Congress, become dangerous encroachments upon congressional authority.

125 Cong. Rec. H5879-80 (daily ed., July 13, 1979) (remarks of Congressman Ashbrook).

Although the Ashbrook Amendment does not apply to this case because it was pending prior to the August 22, 1978 effective date of the amendment, this legislation nevertheless expresses Congress' view that the issue of the tax-exempt status of private, religious, or church-operated schools which maintain racially discriminatory policies is a matter to be resolved by Congress and not by the IRS.[13]

In view of the IRS's vacillation with respect to the tax-exempt status of schools that maintain racially discriminatory policies, particularly during the years at issue in this case, this Court should follow the policy enunciated in *United States* v. *Byrum*, 408 U.S. 125, 135 (1972):

> Courts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences. When a principle of taxation requires re-examination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences. When courts readily undertake such tasks, taxpayers may not rely with assurance on what appear to be established rules lest they be subsequently overturned. Legislative enactments, on the other hand, although not always free from ambiguity, at least afford the taxpayers advance warning.

---

[13] This amendment was the result of compromises on the floors of both the House of Representatives and the Senate. Several Congressmen voiced opposition to the enforcement policies of the IRS in effect. Others objected only to proposed policies of the IRS. The amendment was clearly designed to maintain the status quo until Congress had an opportunity to study this issue and to decide what action was needed.

If Congress should determine that organizations which maintain racially discriminatory policies should not qualify as tax-exempt organizations under Section 501(c)(3), it should amend the statute to deny tax-exempt status to such organizations. This is precisely the procedure followed by Congress when it denied tax-exempt status under Section 501(c)(3) to certain Communist organizations on the grounds of public policy.[14] Congress also followed this procedure when it denied tax-exempt status to certain social clubs otherwise exempted from taxation under Section 501(c)(7) of the Code.[15] The same legislative process must be followed here; the IRS has no power to substitute its judgment for that of Congress.

---

[14] Internal Security Act of 1950, ch. 1024, tit. I, § 11, 64 Stat. 996, *codified at* 50 U.S.C. § 790(b). The pertinent provision currently provides:

> No organization shall be entitled to exemption from Federal income tax, under section 501 of Title 26, for any taxable year if at any time during such taxable year there is in effect a final order of the Board determining such organization to be a Communist-action, Communist-front, or Communist-infiltrated organization.

[15] In the Act of Oct. 20, 1976, Pub. L. No. 94-568, § 2(a), 90 Stat. 2697, Congress denied tax-exempt status to an organization described in Section 501(c)(7) if its "charter, bylaws or other governing instrument or any written policy statement" provides for racially discriminatory policies. The amendment does not condition the granting of tax-exempt status under Section 501(c)(7) upon an organization ceasing any racially discriminatory policies. A footnote in the Senate Report indicates an awareness of the IRS policy involved in this case. S. Rep. No. 94-1318, 94th Cong., 2d Sess. 8 n. 5 (1976), *reprinted in* [1976] U.S. Cong. & Ad. News 6051, 6058. This Report was issued after the years involved in this case. Moreover, any inference of congressional approval of the IRS's actions is dubious in light of the Ashbrook Amendment. Indeed, the opposite inference arguably is to be drawn from the failure of Congress to enact a similar provision with respect to Section 501(c)(3) organizations.

Furthermore, if the IRS has the power to deny tax-exempt status to private schools which maintain racially discriminatory policies on the grounds that the schools' discriminatory policies violate federal public policy, it would appear that the IRS also has the power to deny tax-exempt status to any organization, educational or otherwise, that violates some public policy sought to be enforced by the IRS. As Professor Boris I. Bittker has noted, "[n]othing in the public policy standard . . . confines it to racial discrimination." 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 100.1.2, at 100-8 (1981). *See* Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration,* 48 Fordham L. Rev. 229, 272-73 (1979).

The federal public policy against employment discrimination codified in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* provides an example of the potentially far-reaching consequences of the Fourth Circuit's decision in this case. If the IRS were to determine that a school, or any other type of organization described in Section 501(c)(3) of the Code, had violated some provision of Title VII (even though the organization may have otherwise maintained racially nondiscriminatory policies), does the IRS have the power to deny the organization tax-exempt status because the organization violated federal public policy with respect to employment discrimination?

The possibility that such a scenario may, in fact, come to pass is very real. The IRS has already been pressured by the United States Commission on Civil Rights to "specifically prohibit racial, ethnic and sex discrimination in the treatment and selection of faculty." *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means,* 96th Cong., 1st Sess. 298 (1979) (statement of William B. Ball) (quoting Letter from Jeffrey M. Miller, Assistant Staff Director for Federal Evaluation of the United States Com-

mission on Civil Rights (March 20, 1978)) (emphasis deleted) [hereinafter cited as *Hearings*].

There is absolutely no evidence in the legislative history of Section 501(c)(3) that Congress intended to permit the IRS to be the arbiters of public policy in this country or that Congress intended to permit the IRS to selectively use the taxing power granted to Congress to enforce those public policies which the IRS, based on its own value judgment, has determined to be worthy of enforcement. Moreover, federal public policy is constantly changing and the determination of public policy at any point in time always requires the exercise of subjective judgments. Consequently, if the IRS is permitted to deny tax-exempt status to an organization on the ground that it has not complied with federal public policy, the ultimate result would be that the specific criteria for determining an organization's tax-exempt status under Section 501(c)(3) would change every time the IRS determines that there has been a change in federal public policy. Thus, subjective and arbitrary judgments by IRS bureaucrats would be substituted for objective standards enacted by Congress. If this Court now sanctions the IRS's refusal to grant tax-exempt status to those private schools that have racially discriminatory policies, the Court may someday look back with remorse on the day it first allowed the IRS to determine federal public policy.

II.

THE IRS'S CONSTRUCTION OF SECTION 501(c)(3) VIOLATES GOLDSBORO'S RIGHTS UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Last term this Court construed a provision of the Federal Unemployment Tax Act to exempt certain religious schools from mandatory state coverage under the Act in order "to avoid raising doubts of its constitutionality." *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. at ——, 101 S.Ct. at 2147. Difficult and sensitive

First Amendment questions are again before the Court in this case. If this Court determines that the IRS has the authority under Section 501(c)(3) to deny tax-exempt status to a school that maintains a racially discriminatory admissions policy, then it must determine whether such a denial violates the First Amendment rights of a pervasively religious school that discriminates because of its firmly held religious conviction that separtion of the races is scripturally mandated. *Cf. Lemon* v. *Kurtzman*, 403 U.S. 602, 657 (1971) (Brennan, J., concurring in part) ("the secular education [parochial] schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence").

The Constitution's mandates regarding religion are stated in the opening clauses of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." In this case, the IRS's construction of Section 501(c)(3) contravenes the second of these mandates—the Free Exercise Clause.

Recognizing religious liberty to be a "preferred" freedom, *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943), and the free exercise of religion to be a "transcendent value," *Norwood* v. *Harrison*, 413 U.S. 455, 469 (1973), this Court has held that the right to religious freedom should be "zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972). In this case, the IRS has attempted to reject any contention that its policy impinges on First Amendment rights. It relies on early Free Exercise Clause decisions in which this Court declared that only religious beliefs, not religiously-motivated actions, were constitutionally protected. *See, e.g., Mormon Church* v. *United States*, 136 U.S. 1 (1890); *Reynolds* v. *United States*, 98 U.S. 145 (1879). Reliance on these decisions is unfounded, however, because this Court has

long since rejected the simplistic belief/action dichotomy and recognized that the First Amendment guarantees both the freedom to believe and the freedom to act, with the caveat that the latter is not absolute. *See, e.g., Murdock* v. *Pennsylvania,* 319 U.S. at 109; *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-04 (1940).

In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), this Court was required, as it may be here, to perform a delicate balancing of interests; this Court held that, when an ostensibly neutral governmental policy restricts a person's right to act in accordance with his or her religious beliefs, "'[o]nly the gravest abuses, endangering paramount interests, give occassion for permissible limitation.'" *Id.* at 406 (quoting *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945)). The Court continued that, when such a conflict arose, it "would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation" would achieve the compelling government interest. *Id.* at 407. This Court reaffirmed *Sherbert* in *Wisconsin* v. *Yoder,* 406 U.S. at 215, when it held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Accord, Thomas* v. *Review Board,* 450 U.S. 707, ——, 101 S.Ct. 1425, 1432 (1981).

Under the "balancing approach" formulated by this Court in *Sherbert* and *Yoder,* a court confronted with a claim for a religion-based exemption from a government regulation must first determine whether the claim is, in fact, based upon a sincerely held religious belief. Then, it must consider the degree to which the challenged regulation interferes with the religious practice or belief in light of the centrality of the practice or belief to the religion. The court must then weigh, on the other side of the balance, the importance of the secular value underlying the rule, the impact of an exemption on the regulatory scheme and the availability of a less restrictive alternative. *See* Note, *Religious Exemptions Under the Free Exercise Clause: A*

Model of Competing Authorities, 90 Yale L. J. 350, 355 (1980); Note, *The Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations,* 54 Notre Dame Law, 925, 945 n. 125 (1979) [hereinafter cited as *IRS Treatment*]. When this balancing approach is followed in the present case, the scales tip heavily in favor of religious freedom and the creation of an exemption for religious schools, such as Goldsboro, that maintain discriminatory practices based on their sincere religious beliefs.

A. Goldsboro's Discriminatory Admissions Policy Is Based On A Sincere Religious Belief.

With regard to the sincerity of Goldsboro's religious belief mandating its racially discriminatory admissions policy, neither the IRS nor the Fourth Circuit disputes the district court's statement that Goldsboro's "policy is based upon a valid religious belief." (Pet. 7a).

In determining whether a belief or practice is "religious," it is important to note that "resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection." *Thomas* v. *Review Board,* 450 U.S. at ——, 101 S.Ct. at 1430. Thus, although Goldsboro's racially discriminatory admissions policy may be reprehensible to many, it is nevertheless protected by the First Amendment since it is based on a genuine religious belief. *See United States* v. *Ballard,* 322 U.S. 78, 87 (1944).

B. The IRS's Policy Imposes A Heavy Burden On Goldsboro's Observance Of Its Religious Beliefs.

The Court must next weigh the severity of the burden imposed on Goldsboro's religious practices by permitting the IRS to deny Goldsboro tax-exempt status. Although the

coercive effect of denying tax-exempt status to Goldsboro is indirect, it is nonetheless substantial. In *Thomas* v. *Review Board*, 450 U.S. at ——, 101 S.Ct. at 1432, this Court recently stated:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

See Everson v. *Board of Education*, 330 U.S. 1, 16 (1947).

Moreover, this Court has recognized that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock* v. *Pennsylvania*, 319 U.S. at 112. In this case, Goldsboro has been given the option of adopting a policy that is diametrically opposed to its firmly held religious convictions and publicly advertising that fact, *see* Rev. Proc. 75-50, 1975-2 C.B. 587, § 4.03, or of continuing to follow what it believes to be God's will as revealed in the Holy Scriptures and annually incurring substantial tax liabilities which would threaten its continued existence.

Moreover, like the traditional way of life of the Amish considered by this Court in *Yoder*, Goldsboro's discriminatory policy is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Wisconsin* v. *Yoder*, 406 U.S. at 216. Goldsboro sincerely believes that its educational mission must be conducted in a segregated setting because the Scriptures reveal that God has mandated the separation of the races and that the intermixing of the races "destroys the fear of God in the hearts of men and will bring about the judgment of the entire human race." (J.A. 40). Thus, a central and funda-

mental tenet of Goldsboro's religious beliefs—the salvation of mankind—is burdened by the IRS's denial of its tax-exempt status.

In addition to the reversal of Goldsboro's admissions policy, compliance with the rulings and procedures promulgated by the IRS would require that Goldsboro cease the teaching of its religious belief in the separation of the races. This Court has recognized that the government may not unreasonably interfere with "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35 (1925), including the right under the First Amendment to send their children to educational institutions that "promote the belief that racial segregation is desirable." *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976). As a practical matter, however, it would be impossible for Goldsboro's teachers to continue to promote separation of the races in the presence of the students who favor integration (which Goldsboro's compliance with Revenue Procedure 75-50 would most assuredly attract) without inciting outbursts and disruptions that would be detrimental to the educational process.

Finally, while the immediate burden imposed on the free exercise of religion by the IRS's policy is onerous, the prospect for the future is even more frightening. Considerable pressure is being put on the IRS to extend its public policy rationale to deny tax-exempt status to those private schools that practice gender-based discrimination. *See* Part I.C. *supra*. Such an extension would effectively deny tax-exempt status to schools operated by a number of religions, including the Catholics, Mormons and Moravians, that differentiate between the roles of men and women. In addition, Professor Bernard Wolfman has indicated that there is even pressure on the IRS to eliminate religious discrimination in private schools. *Hearings, supra,* at 275. Therefore, it is not surprising that the religious commu-

nity has, in response to the IRS's actions, adopted Madison's admonition that "it is proper to take alarm at the first experiment on our liberties." J. Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 *Writings of J. Madison* 183, 185 (G. Hunt ed. 1901).

C. The Secular Value Underlying The IRS's Policy Differs In Both Kind And Degree From Those That This Court Has Held To Outweigh The Free Exercise Of Religion.

Turning to the other side of the balance, the first factor that this Court should weigh is the importance of the secular value underlying the IRS's policy. The IRS has taken the position that "[i]t is well-settled that a religious basis for an activity will not serve to preclude governmental interference with that activity if it is otherwise clearly contrary to Federal public policy." Rev. Rul. 75-231, 1975-1 C.B. 158. This ambitious statement, however, is at odds with this Court's pronouncements on the subject. Indeed, this Court concluded that on balance the State's interest in universal education under consideration in *Yoder* impinged too greatly upon and was outweighed by the right of the Amish to the free exercise of religion even though it ranked the provision of public schools "at the very apex of the function of a State." *Wisconsin* v. *Yoder*, 406 U.S. at 213. Moreover, at least one court has noted that, to the extent there can be any absolute hierarchy of constitutional values, "the rights protected by the First Amendment occupy a preferred position in our Constitutional scheme." *Kosydar* v. *Wolman*, 353 F.Supp. 744, 756 n. 11 (S.D. Ohio 1972) (three-judge court), *aff'd per curiam sub nom. Grit* v. *Wolman*, 413 U.S. 901 (1973).

The effort of the IRS to stamp out the last vestiges of racial discrimination by conditioning the granting of tax-exempt status to a private school on its compliance with racially nondiscriminatory policies would certainly be hailed

by many people. The public policy underlying this effort, however, differs in both kind and degree from those governmental interests that this Court has found to "overbalance" the free exercise of religion in prior decisions.

This Court has stated that governmental regulations which outweigh religious freedom have "invariably [involved] some substantial threat to public safety, peace or order." *Sherbert* v. *Verner*, 374 U.S. at 403. A survey of the cases in which this Court has permitted some infringement of religious liberty reveals that the government regulations upheld were either criminal statutes designed to protect the public welfare, *see, e.g., Reynolds* v. *United States*, 98 U.S. 145 (1879) (prohibiting polygamy), statutes protecting public health or promoting safety, *see, e.g., Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (child labor law), or regulations that had an incidental effect on, and therefore did not unconstitutionally burden, the practice of religion, *see, e.g., Braunfeld* v. *Brown*, 366 U.S. 599 (1961) (Sunday closing law). The "public policy" against racial discrimination that is the subject of this case falls into none of these categories.

The position of the IRS at issue in this case also differs in degree from the government regulations that have been upheld by this Court in the face of First Amendment challenges in that the policy against racially discriminatory admissions practices based on the sincere religious beliefs of sectarian schools has not been mandated by either Congress or the courts but rather has been independently formulated by the IRS itself. Although this Court stated in *Bob Jones University* v. *Simon*, 416 U.S. at 750, that it considered Congress to be "the appropriate body to weigh the relevant policy-laden considerations" involved in how tax-exempt organizations should be treated, there is no explicit congressional authorization to justify the IRS's policy of denying tax-exempt status to religious schools that do not admit blacks. Further, any contention

by the IRS of implicit authorization has now been seriously undercut, if not totally rebutted, by Congress' passage of the Ashbrook Amendment. *See* Part I.C. *supra.*

Neither can the IRS find support for its policy in the decisions of this Court.[16] The IRS attempts to rely on this Court's decision in *Runyon* v. *McCrary,* 427 U.S. 160 (1976), that 42 U.S.C. § 1981 prohibits racial discrimination in private schools. The *Runyon* Court was careful to point out, however, that the case before it did not present a question of "the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds." *Id.* at 167 (emphasis deleted).

Thus, the IRS stands alone as the propounder of its "public policy" against racial discrimination by a sectarian school practiced in observance of a fundamental tenet of its religion. This Court has remarked on the dangers inherent in premising a decision on "public policy":

> The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.

---

[16] Nor is the IRS's policy supported by the decisions of the lower federal courts. As previously discussed, the *Green* litigation did not consider religious schools that maintained racially discriminatory policies based on their religious beliefs. *See* footnote 3 *supra.* Moreover, the two courts which have applied Section 1981 to private sectarian schools have based their decisions on the fact that the schools' racially discriminatory actions were *not* based on the schools' religious beliefs. *Fiedler* v. *Marumsco Christian Schools,* 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).

Patton v. *United States,* 281 U.S. 276, 306 (1930). Moreover, this Court has refused to permit administrative regulation in the highly sensitive arena of church-operated schools in the "absence of an 'affirmative intention of the Congress clearly expressed.'" *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. at 506.

Indeed, IRS Commissioner Kurtz has himself expressed a concern that "questions of religion and civil rights . . . are far afield from the more typical tasks of tax administrators—determining taxable income." Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race,* 23 Cath. Law. 301, 301 (1978). In addition, Mr. Kurtz has suggested that "the basic purpose of the tax system is to raise revenue in a way which is consistent with general economic growth and prosperity—rather than assuming that it is a system designed to cure social problems." Kurtz, *Tax Incentives: Their Use and Misuse,* 20 U.S.C. Law Center Tax Institute 1, 16 (1968). The Commissioner's concern about the ability of tax administrators, whose expertise is financial, to balance sensitive considerations of religion and civil rights has been shared by others of eminent qualification. *See* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code,* 82 Yale L. J. 51, 86 (1972); Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison With Direct Government Expenditures,* 83 Harv. L. Rev. 705, 729 (1970).

These doubts appear to be well founded given the IRS's cavalier treatment of the free exercise question raised by the denial of tax-exempt status to sectarian schools. *See* Rev. Rul. 75-231, 1975-1 C.B. 158. The attempt by the IRS to skirt the issue by relying on the now discredited belief/action dichotomy of *Reynolds* has been charitably described as "unrealistic," Neuberger & Crumplar, *supra,* at 268, and more accurately labeled "a totally erroneous statement of law." *IRS Treatment, supra,* at 943. Thus, this

Court's careful approach to decisions involving sectarian schools "stands in sharp contrast to the IRS's treatment of the free exercise claim in Revenue Ruling 75-231." *Id.* at 944. Further, that ruling implements a "public policy" that can only be regarded as far different in both kind and degree from the secular values that this Court has found to "overbalance" religious liberty.

D. The Creation Of A Religious Exemption Would Have Only A Minor Effect On The IRS's Goal Of Eradicating Discrimination.

This Court must, of course, consider the impact that a religious exemption from the IRS's policy announced in its July 10, 1970 press release would have on its goal of eradicating discrimination in education. That impact, however, can only be described as minor in the present case. In 1976, less than nine percent of the approximately 50 million children enrolled in elementary and secondary schools in America attended church-related private schools. *See* Note, *The IRS, Discrimination, and Religious Schools: Does the Revised Proposed Revenue Procedure Exact Too High a Price?* 56 Notre Dame Law. 141, 141 (1980). Moreover, any exemption from the IRS's policy required out of deference to the free exercise of religion could only be claimed by those sectarian schools that base their racially discriminatory policies on sincerely held religious beliefs. Therefore, the IRS's policy would continue to be applicable to all but the smallest fraction of schools in the United States.

Moreover, the IRS's assertion that the extension of tax-exempt status to racially discriminatory private schools results in constitutionally prohibited state involvement in discrimination is simply not supported by the decisions of this Court. This Court's decision in *Norwood* v. *Harrison,* 413 U.S. at 466, that the government may not extend financial support to discriminatory schools was limited to "tangible financial aid" that has "a significant tendency to facilitate, reinforce, and support private discrimination."

This term does not encompass the granting of tax-exempt status to religious schools because tax exemptions "constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy." *Walz* v. *Tax Commission*, 397 U.S. 664, 691 (1970) (Brennan, J., concurring). In addition, this Court has stated that the relevant inquiry in deciding a "state action" question is whether there has been *significant* state involvement in the private discrimination alleged. *See Gilmore* v. *City of Montgomery*, 417 U.S. 556, 574 (1974). Thus, the IRS's policy of denying tax-exempt status to private religious schools that practice racial discrimination is not constitutionally compelled, *see IRS Treatment, supra*, at 934-35, and an exemption for religious schools from that policy accordingly does not violate the Constitution.

E. An Action Under 42 U.S.C. § 1981 Provides A Less Restrictive Means By Which Racial Discrimination May Be Attacked.

The IRS cannot burden First Amendment freedoms unless it can show its policy "is the least restrictive means of achieving some compelling state interest." *Thomas* v. *Review Board*, 450 US. at ——, 101 S.Ct. at 1431. A less restrictive, and indeed more direct, means of challenging the right of religious schools to discriminate on the basis of race lies in a cause of action under 42 U.S.C. § 1981. Although no court has applied this statute to prohibit racial discrimination based on the religious beliefs of a sectarian school, neither has any court foreclosed that avenue.

An action under Section 1981 would provide a less restrictive vehicle for addressing the issue of racial discrimination in religious schools by focusing on those sectarian schools that have, in fact, rejected the application for admission of a minority student as opposed to those schools that have discriminatory policies but have never been forced to implement them. Goldsboro clearly falls into the

latter category; there is no evidence in this case that Goldsboro has ever been forced to utilize its racially discriminatory admissions policy in response to the application for admission of a black student. The position of the IRS, on the other hand, that tax-exempt status must be denied to all schools that maintain racially discriminatory policies requires religious schools, such as Goldsboro, to follow a course of action that is diametrically opposed to their sincerely held religious beliefs in order to preserve their tax-exempt status. This needless restriction on religious freedom could be avoided if the IRS left the eradication of racial discrimination to private enforcement under Section 1981.

Moreover, in an action under Section 1981, the interest of a sectarian school in religious freedom on one side and the interest of the minority applicant in being free from discrimination on the other side would be clearly and directly presented to a court for resolution. *See* Neuberger & Crumplar, *supra*, at 273-75; *IRS Treatment, supra*, at 947-49. Such a context is certainly preferable to the present one, in which sensitive policy decisions have been made by an administrative agency which has no expertise in this area and is instead responsible only for the collection of taxes. Therefore, the IRS's policy should not be applied to religious schools that discriminate out of obedience to a sincerely held religious belief because there is a less restrictive alternative that could be utilized to test the respective interests that underlie the policy.

F. Goldsboro's Religious Freedom Overbalances The Government's Interests In This Case.

Based on the factors that this Court has traditionally balanced in ruling on free exercise claims, this Court should hold that the Free Exercise Clause of the First Amendment prohibits the IRS from denying tax-exempt status to religious schools that maintain racially discriminatory policies based on their sincere religious beliefs. The Government acknowledges that Goldsboro's discriminatory

admissions policy is based on a sincerely held religious belief, and the district court stated that Goldsboro's "racially discriminatory admissions policy is based upon a valid religious belief." (Pet. 7a). The application of the IRS's policy to Golsboro, on the other hand, would severely burden the free exercise of that belief.

On the other side of the balance, the secular value underlying the IRS policy sought to be enforced in this case differs in both kind and degree from those regulations which this Court has found in the past to outweigh religious liberty. Further, the creation of a religious exemption to the IRS policy would not have a significant impact on the goal of eradicating racial discrimination. Finally, a cause of action under Section 1981 provides a less restrictive alternative for attacking racial discrimination. The scales tip heavily in favor of Goldsboro in this case. Accordingly, Goldsboro must be exempted from the IRS policy.

CONCLUSION

For the foregoing reasons the judgment of the Fourth Circuit should be reversed; this case should be remanded to the Fourth Circuit with directions to remand it to the district court for the entry of summary judgment in favor of Goldsboro on the issue of its qualification as a tax-exempt educational organization under Section 501(c)(3).

Respectfully submitted,

CLAUDE C. PIERCE
WILLIAM G. MCNAIRY*
EDWARD C. WINSLOW
JOHN H. SMALL
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD
Post Office Drawer U
Greensboro, NC 27402
(919) 373-8850

Counsel for Petitioner

*Counsel of Record