Nos. 81-1 and 81-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BOB JONES UNIVERSITY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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INTEREST OF AMICUS

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a nonprofit corporation established under the laws of the State of New York. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of race discrimination issues in the field of education and government sponsorship of education. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954); Cooper v. Aaron, 358 U.S. 1 (1958); Norwood v.

Harrison, 413 U.S. 544 (1973). The parties have consented to the filing of this brief and letters of consent are appended to this brief.

QUESTION PRESENTED

Is an educational institution, conferring secular degrees, whose racially discriminatory policies are motivated by religious belief, barred from governmental support (in the form of tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 and eligibility for receipt of tax deductible contributions under Section 170(c)(2)) which is denied similar institutions lacking religious motivation?

SUMMARY OF ARGUMENT

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. as amicus curiae, supports the Government's position that nonprofit corporations operating private schools that, on the basis of religious doctrine, maintain racially discriminatory admissions policies and other racially discriminatory practices, do not qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954 and that donations to such corporations do not qualify as deductible charitable contributions under Section 170(c)(2).

As the Government urged,[1] and

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[1] Nos. 81-1 and 81-3, Brief for the United States on Petitions for Writs of Certiorari ("Government's Cert. Brief"), at 11.

as the Court of Appeals for the Fourth Circuit held,[2] the Internal Revenue Service acted within its statutory authority in denying Bob Jones University ("Bob Jones") and Goldsboro Christian Schools, Inc. ("Goldsboro") the claimed tax benefits. Educational institutions (including religious institutions performing secular education functions) that racially discriminate in violation of public policy are not eligible for tax exemption and deduction support. (The status of Sunday schools, seminaries or similar non-secular religious schools is not here at issue.) Even if discriminatory practices are the

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2 Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980); Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), aff'd without published opinion (4th Cir. 1981) (No. 81-1, Petition for a Writ of Certiorari, at 1a.)

outgrowth of sincere religious faith, the schools' unquestioned First Amendment right to adhere to religiously motivated racist beliefs does not entitle them to a governmental benefit denied secular or religious schools which derive their racism from sources other than religious mandate.[3]

Indeed, we believe that any governmental support, direct or indirect,[4] of Bob Jones and Goldsboro would violate the First, Fifth and Thirteenth Amendments to the Constitution, as well as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. While it is unnecessary to

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3 Government's Cert. Brief at 13; Bob Jones University v. United States, supra, 639 F.2d at 150.

4 Such basic services as police and fire protection, which are provided as a matter of general community interest, are, of course, distinguishable.

reach these issues since Section 501(c)(3) and Section 170(c)(2) statutory grounds are sufficient to affirm the Fourth Circuit's decision, the constitutional dimension of the public policy underlying the statutory interpretation cannot be overemphasized. The eradication of racial discrimination, particularly in education, is on the highest constitutional plane and must ordinarily prevail even when balanced against other constitutional rights.

ARGUMENT

I. THE I.R.S. WAS BOUND BY, AND CORRECTLY APPLIED, GREEN v. CONNALLY TO DENY TAX EXEMPT STATUS TO BOB JONES AND GOLDSBORO

This is not a case of capricious frolic by the Internal Revenue Service ("IRS") into the realm of social policy. A decade ago, in Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C. 1971), aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), this Court affirmed a declaratory judgment that:

> A. Section 501(c)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and Section 170(a)-(c) of the Code, does not provide a deduction for a contribution to, any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students.
>
> B. As used in this Order, the term "racially nondiscriminatory

> policy as to students" means that the school or other educational institution admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school, and which includes, specifically but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extracurricular programs.

In Green, the parents of black Mississippi school children sought an injunction against the IRS approving any Section 501(c)(3) exemptions or Section 170(c)(2) deductions[5] with respect to

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5 Section 501(a) exempts from federal income tax organizations described in subsection (c). Section 501(c)(3), quoted in pertinent part, includes:

> Corporations ... organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,
>
> (Footnote Continued)

Mississippi private schools discriminating against black students.[6] In

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5 (Footnote Continued)

> ... no part of the net earnings of which enures 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....

Pursuant to § 170(a) charitable contributions are allowed as a deduction in computing taxable income. Section 170(c)(2), quoted in pertinent part, defines a charitable contribution as a contribution to:

> A corporation ... organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes ...

Similar deductions for estate and gift tax purposes are created by §§ 2055 and 2522.

6 While § 501(c)(3) exempt status confers a substantial benefit on organizations because it means their exempt purpose income and passive

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granting the requested relief,[7] the three-judge court described the combined

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6 (Footnote Continued)

investment income will not be subject to tax, qualification under § 170(c)(2) is of far greater significance. Organizations meeting the requirements of § 170(c)(2) are able to advertise to potential donors that their contributions will result in a tax deduction, obviously a great inducement to contribute to an organization so qualified. Thus if a donor subject to the 50% marginal rate could afford to make a gift of $50 after taxes to an organization, where the intended recipient qualifies as a § 170(c)(2) organization, the donor can give $100 because his after tax cost is only $50. Economically there is little distinction between this form of government support and a direct grant of $50. See, Wright v. Regan, 656 F.2d 820, 822 n. 1 (D.C. Cir. 1981).

7 The IRS had already adopted the Court's interpretation of §§ 501(c)(3) and 170(c)(2) on a nationwide basis after issuance of a preliminary injunction in Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), relating to certain Mississippi schools.

effect of Sections 501(c)(3) and 170(c)(2) as "in the nature of a matching grant," 330 F. Supp. at 1164-1165, and found further that these benefits "mean a substantial and significant support" to a pattern of segregation. Id. at 1155, citing Green v. Kennedy, supra, 309 F. Supp. at 1134. After reviewing the legislative history and historical antecedents of Section 501(c)(3), the court held:

> The case at bar involves a deduction given to reduce the tax burden of donors, a meaningful, though passive, matching grant, that would support a segregated school pattern if made available to racially segregated private schools. We think the Government has declined to provide support for, and in all likelihood would be constitutionally prohibited from providing tax-exemption- and deduction support for, educational institutions promoting racial segregation. Green v. Connally, supra, 330 F. Supp. at 1169 (footnote omitted).

Moreover, the court emphasized that the ultimate basis of its holding was federal public policy,[8] which is not dependent upon possible future changes in the common law of charitable trusts on which the IRS had predicated its then recent position that an educational institution must be "charitable" in the common-law sense, in order to qualify under Sections 501(c)(3) and 170(c)(2).

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8 This Court has long recognized that the propriety of a deduction "depends upon legislative grace; and only as there is a clear provision therefor can any particular deduction be allowed." New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934). Commissioner v. National Alfalfa Dehydrating, 417 U.S. 134, 148-149 (1974). Further, this legislative grace does not encompass deductions that would have the effect of frustrating sharply defined public policy, e.g., Hoover Motor Express Co., Inc. v. United States, 356 U.S. 38 (1958); Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958).

Accordingly, the court reasoned that a racially discriminatory school would not qualify under this standard. The court relied upon a broader and more permanent rationale than the Commissioner of Internal Revenue had espoused:

> The Commissioner advised a committee of Congress that the new interpretation of the Code is based upon the common law of charities, and that the IRS impliedly finds that private schools which practice racial discrimination are not "'charitable' in the common-law sense." Even if the Service had not claimed complete administrative discretion to change its interpretation once again, it might have claimed the authority and even the necessity of modifying its 1970 interpretation in the light of some future changes in or reevaluation of the common law of charitable trusts. Plaintiffs are entitled to more definite and assured relief than that provided by a reading of the Code based on the evolution of state law doctrines. As we have indicated, the ultimate reason why the Code will not support tax exempt status and deductibility of contributions for such schools is based on Federal public policy.

> The declaratory paragraphs in our decree provide more enduring relief than the 1970 declarations of the Service, and it is relief to which plaintiffs are entitled. Id. at 1171 (footnote omitted) (emphasis added).

The court expressly declined to become enmeshed in the intricacies of the IRS' reliance upon charitable trust law, although noting that there is "at least a grave doubt whether an educational organization that practices racial discrimination can qualify as a charitable trust under general trust law." Id. at 1157. Rather, it relied upon "the general and well-established principle that the Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy." Id. at 1161. The policy here implicated was "federal public policy against support for

racial segregation of schools, public or private":

> The sources and evidences of that Federal public policy are various. Perhaps the ultimate source is the strife-sprung national policy against slavery, culminating in its abolition in the Thirteenth Amendment. The Enabling Clause of that Amendment is a constitutional source for Congressional legislation "for abolishing all badges and incidents of slavery." Civil Rights Cases, 109 U.S. 3, 20, 3 S.Ct. 18, 28, 27 L.Ed. 835 (1883).
>
> The constitutional strength of the government's interest in preventing even private racial discrimination is underscored by the recent decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), interpreting the Civil Rights Act of 1866, 42 U.S.C. §1982, wherein that interest was held to prevail over the ordinary liberty of a citizen to buy and sell land and other property. Cf. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

The policy against racial segregation in education was broadly proclaimed as to public education by the states in the historic decision in Brown v. Board of Education, 347 U.S. 483, 74 U.S. 686, 98 L.Ed. 873 (1954). That was a seminal case and it has had numerous progeny, the latest to issue being Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). In Bolling v. Sharpe, 347 U.S. 497, 500, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954), the companion case to Brown applying the prohibition against state school segregation to the Federal Government through the Fifth Amendment, the Supreme Court declared, "Segregation in public education is not reasonably related to any proper governmental objective * * *."

The national policy against support for segregated education emerged in provisions adopted by the Congress in the Civil Rights Act of 1964, 42 U.S.C. §§2000c to 2000d-4 (1964). . . .

Id. at 1163.

While finding it unnecessary to adopt a constitutional basis for its holding, the Green court emphasized that a contrary view would raise "serious constitutional questions" and refused to distinguish "indirect" tax exemptions and deductions from constitutionally infirm "direct financial aid to schools practicing racial discrimination." Id. at 1164-65. This construction of the tax statutes adopted by the Green court fully comports with this Court's rule that "federal statutes are to be so construed as to avoid serious doubt of their constitutionality." International Association of Machinists v. Street, 367 U.S. 740, 749 (1961).

Although the IRS had changed its construction of the relevant Code provisions during the pendency of Green, the

court felt that permanent injunctive relief was required to establish that the new interpretation was statutorily mandated, rather than discretionary:

> If defendants' construction were discretionary, it could be changed in the future. We think plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion.
>
> Our decree will have no declaration of constitutional rights, but rather a declaration that the Internal Revenue Code requires a denial of tax exempt status and deductibility of contributions to private schools practicing racial discrimination. Green v. Connally, 330 F.Supp. at 1170-1171.

To the extent that the Fourth Circuit's present opinion can be read as holding merely that the IRS acted within its discretion in denying tax-exempt status

to Bob Jones and Goldsboro,[9] we urge that the Supreme Court once again -- as it did by affirming Green -- find that such denial

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9 Bob Jones University v. United States, supra, 639 F.2d at 152. While the Government's Cert. Brief at 12, recites only that the IRS "acted well within its statutory authority in concluding that a 'religious' organization such as petitioners must satisfy the 'charitable' requirement of Section 501(c)(3) in order to qualify for tax exemption," the Government's Fourth Circuit brief in Bob Jones, at 16, made clear the Government's unqualified support of Green: "It follows ... as held by the Green court and reaffirmed in Goldsboro ... that granting the less direct federal tax benefits to racially discriminatory schools would contravene public policy. Federal tax collectors take the full measure of federal exactions from black as well as white citizens. Fundamental fairness dictates that the charitable tax benefits, which are designed as a substitute for governmental expenditures, not be allowed to help sustain those institutions which engage in racially discriminatory educational programs. Any other interpretation of the tax statute would, as the Green court held, raise serious Fifth Amendment questions."

was statutorily, if not constitutionally mandated.[10] Indeed, the correctness of

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10 The Green case went up to this Court in 1971 upon the direct appeal of intervenors claiming to represent private schools affected by the three-judge court's order. These intervenors briefed many of the same points raised in the instant case, framing issues inter alia going to the district court's holdings "that withdrawal of federal tax exemptions from private white schools does not abridge the constitutional freedom of parents," and "that a 'federal public policy' having 'Constitutional ingredients' governs the applicability of the tax laws," and "that there is such a present federal public policy to discourage the continuance of private white schools." Coit v. Green, supra, Intervenors' Jurisdictional Statement on Appeal. In response, the Government questioned intervenors' standing to assert the class action claims they had raised. Id., Government's Motion to Dismiss at 5-8. Yet, rather than dismissing the appeal, this Court affirmed the order below, in effect confirming the district court's view that the Government's policy change neither mooted the proceedings nor gave the plaintiffs the relief to which they were entitled.

(Footnote Continued)

Green's statutory construction is even

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10 (Footnote Continued)

Moreover, in a predecessor case to that before the Court today, Green was cited as support for the proposition that Bob Jones' contentions with respect to its alleged entitlement to tax-exempt status despite its religiously motiv ted racially discriminatory practices were "sufficiently debatable to foreclose any notion that 'under no circumstances could the Government ultimately prevail.'" Bob Jones University v. Simon, 416 U.S. 725, 749 (1974). Although this Court noted in Simon that the Coit affirmance "lacks the precedential weight of a case involving a truly adversary controversy," Id., at 740 n.11, as the excerpts quoted above demonstrate, the recent characterization of the affirmance as a situation where "no controversy remained" misses the mark. Prince Edward School Foundation v. United States, 450 U.S. 944, 945 n.1 (1981) (Rehnquist, J., dissenting from denial of certiorari). As the District of Columbia Circuit noted recently in Wright v. Regan, supra, 656 F.2d at 823, 832 n.29 (a successor/companion case to Green): "a sharp adversary contest remained ... [following the

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more apparent today than a decade ago. In the interim, Congress has explicitly adopted the rationale of Green's statutory construction of Section 501(c)(3). In 1976, Pub. L. 94-568, 90 Stat. 2697, added Section 501(i) of the Internal Revenue Code to deny tax-exempt status to racially discriminatory social clubs. The Senate Report in support of that bill approvingly cited, and followed, Green's holding to

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10 (Footnote Continued)

> IRS change of position] between plaintiffs and intervenors, a class of parents and children who supported or attended private schools in Mississippi with an enrollment limited to members of the white race.... It should be noted ... that the plaintiffs sought and obtained relief in Green beyond the measures the Service agreed to take. See, 330 F. Supp. at 1170, 1174-77. More significantly, the intervenors who appealed to the Supreme Court in Green remained uncompromisingly adverse to the plaintiffs."

the effect that "discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2))."[11]

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11 S. Rep. No. 94-1318, 94th Cong., 2d Sess., at 7-8 and n.5 (1976), reprinted in [1976] U.S. Code Cong. & Adm. News 6051, 6058. Pub. L. 94-568 added § 501(g) (since redesignated § 501(i)):

> (i) an organization which is described in subsection 501(c)(7) [social clubs] shall not be exempt from taxation under subsection (a) for any taxable year, if at any time during such taxable year the charter, by-laws or other governing instrument of such organization or any written policy statement of such organization contains a provision which provides for discrimination against any person on the basis of race,

(Footnote Continued)

Moreover, post-Green judicial

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11 (Footnote Continued)

color, or religion.

The Finance Committee Report, S. Rep. No. 94-1318, indicates that the purpose of this amendment was to extend to private social clubs the holdings of Green and McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972). In McGlotten, plaintiff brought a class action to enjoin the IRS from granting tax benefits to fraternal orders and social clubs that excluded non-whites from membership. Finding that the "tax deduction for charitable contributions is a grant of federal financial assistance within the scope of the 1964 Civil Rights Act" and that the exemption from taxation for fees and passive investment income "operates in fact as a subsidy in favor of the particular activities these groups are pursuing," the three-judge court enjoined the extension of the challenged benefits to racially discriminatory fraternal orders, but found the benefits granted to private clubs to be a matter of general policy having merely an effect of refraining from taxing the fees which members charged themselves for use of the facilities.

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decisions -- including several decisions of this Court -- further establish the broad constitutional dimensions of the public policy against government support of racially segregated schools. See, e.g., Norwood v. Harrison, 413 U.S. 455 (1973) (state loans of textbooks to students at racially segregated private schools unconstitutional); Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (exclusive temporary use of public recreation facilities by segregated private schools unconstitutional); Runyon v. McCrary, 427 U.S. 160 (1976) (racial denial of admission to private commercially operated nonsectarian school violative

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11 (Footnote Continued)

Id. at 462. Pub. L. 94-568 thus approved and further extended McGlotten's rationale.

of 42 U.S.C. § 1981); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) (expulsion of white student from sectarian school for interracial relationship with classmate held violative of 42 U.S.C. § 1981 where no sincere religious belief for expulsion present); Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), cert. denied 434 U.S. 1063 (1978) (racial denial of admission to private church-affiliated sectarian school violative of 42 U.S.C. § 1981 where no sincere religious belief found).

Aside from the economic benefit that would inure to petitioners and their donors if Section 501(c)(3) status were granted, the significance of apparent government encouragement and approval of racially segregated schools cannot be

understated. At least since Brown v. Board of Education, 347 U.S. 483 (1954), this Court has understood that a "feeling of inferiority" is generated and enhanced in impact by government sanction of racial exclusion in education at any level. This fostering of a public perception that private discrimination has the sanction or approval of the government is itself a matter of constitutionally significant dimension. Gilmore v. City of Montgomery, supra, 417 U.S. at 582 (White, J. concurring); Reitman v. Mulkey, 387 U.S. 369, 375-377 (1967); McGlotten v. Connally, supra, 338 F. Supp. at 454.

Especially in the area of education, a quarter of a century of this Court's constitutional precedent emphatically rejects all forms of government complicity in segregation. "State

support of segregated schools through any arrangement, management, funds or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws."

Cooper v. Aaron, 358 U.S. 1, 19 (1958).

II. THERE IS NO BASIS FOR AN EXEMPTION FROM GREEN v. CONNALLY FOR EDUCATIONAL INSTITUTIONS WHICH RACIALLY DISCRIMINATE THROUGH RELIGIOUS MOTIVATION

There is no statutory, public policy or constitutional ground for creating an exemption from Green for educational institutions whose racially discriminatory practices are religiously motivated. Indeed, while it is not necessary to reach such a holding in the present case, any such exemption would itself be unconstitutional.

In 1975, the IRS issued Rev. Proc. 75-50, 1975-2 C.B. 587, and Rev. Rul. 75-231, 1975-1 C.B. 158, which made clear that Green applies to private religious schools with policies of racial discrimination whether or not religiously

motivated.[12] The Senate Report with respect to Section 501(i), referred to supra at 23, came a year later than these guides but expressed no disapproval of them. Rather, Congress took no action -- as, indeed, it constitutionally could not have -- to grant racially discriminating religious schools a preferred status.[13]

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12 See infra, at 39-43. Whether a religious school can discriminate on grounds of religion was not addressed by the IRS and need not be reached by this Court in the present case. It can be suggested, however, that the Government's overriding interest against racially segregated schooling stands upon higher constitutional ground than the arguable right of attendance at a religious school not of one's own faith.

13 Cf. Congress' amendment of § 501(i) again in December 1980 to provide that the prohibition against discrimination by social clubs on religious grounds shall not apply to an auxiliary of a fraternal beneficiary society that limits membership to members of a particular religion, or "a club which

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Indeed, the IRS' 1975 interpretations have been cited with approval in the floor debate on Representative Ashbrook's amendment to the Treasury Department Appropriations Act of 1980, 92 Stat. 562, to bar IRS enforcement of a proposed revenue procedure concerning

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13 (Footnote Continued)

in good faith limits its membership to the members of a particular religion in order to further the teachings or principles of that religion, and not to exclude individuals of a particular race or color." Clearly, when Congress wanted carefully and constitutionally to create a rule of special applicability to religious-affiliated entities under § 501, it knew how to do so. Where Congress' attention had been focused on § 501 and Green by McGlotten and the two subsequent amendments of § 501(i), the absence of Congressional actior to accord tax-exempt status to schools discriminating racially through religious motivation can be read as expressing Congressional policy that all private schools be treated alike under Green.

race discrimination by private secular and religious schools that created certain presumptions based on a numerical impact analysis.[14] Mr. Ashbrook himself stated:

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14 125 Cong. Rec. H5879 (daily ed. July 13, 1979). The Ashbrook Amendment was directed at the 1978 revenue procedures, proposed 43 Fed. Reg. 37296 (August 22, 1978), revised 44 Fed. Reg. 9451 (February 13, 1979). The Congressional bar on the enforcement of these 1978 standards, which in effect created an impact test for determining tax-exemption eligibility for private schools, in no way impugned the 1975 intentional discrimination standards, which fully govern the case herein. Indeed, the debate indicates that Congress viewed the 1975 procedures as necessary and appropriate. Representative Ashbrook remarked, "My colleague surely knows that existing revenue procedure 75-50 would be in effect, they can continue to review, they still impose detailed record-keeping requirements on the schools... As I pointed out, under their current regulation... they can review schools. They can bring schools in effect before the mast, even though they have given them prior tax-exempt status. I am not trying to take that away." 125 Cong. Rec. at H5882. Thus, both Goldsboro's

(Footnote Continued)

> My amendment very clearly indicates on its face that all the regulations in existence as of August 12, 1978, would not be touched.[15]

Similarly, Representative Campbell conceded:

> While I oppose on principle efforts by the IRS, a tax-gathering organization, to make public policy, I cannot argue with the actual effect of the 1975 declaration.[16]

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14 (Footnote Continued)

argument that the Ashbrook Amendment indicates "that the issue of 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," (Goldsboro Brief, at 28) and the comparable contentions in Judge Widener's dissent below, 639 F.2d at 160-161, are misleading. As to schools found to be practicing intentional discrimination, Congress if anything approved the IRS enforcement effort and the Green holding.

15 125 Cong. Rec. H5882 (daily ed. July 13, 1979).

16 125 Cong. Rec. H5881 (daily ed. July 13, 1979).

While difficult questions may sometimes be presented as to whether an institution's purposes are charitable or otherwise in accord with public policy,[17]

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17 For example, this Court grappled with thorny issues surrounding the exemption from local real property taxation afforded churches in Walz v. Tax Commission, 397 U.S. 664 (1970). There, the majority turned away on Establishment Clause challenge, recognizing the significant practical economic benefit afforded by the exemption but deeming the resultant church/state involvement sufficiently minimal and remote to withstand attack. In separate concurrences, Justice Brennan placed more weight upon the longstanding historical tradition of the exemption for church property, and Justice Harlan emphasized the broad class of voluntaristic charitable endeavors intended to be benefitted by the challenged exemption as evidence of its neutrality. Whether tax-exempt status can be denied churches whose membership policies or rituals discriminate against blacks is a serious question not before the Court today. While certain kinds of indirect governmental assistance to religion may survive Establishment Clause scrutiny, we submit that even indirect assistance to racial

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the present case is an easy one. Green has already held that the grant of tax benefits to racially discriminating schools would violate constitutionally-based public policy of the highest importance. Given

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17 (Footnote Continued)

discrimination in education (even where religiously motivated) is impermissible as a matter of public policy and constitutional law. It has been held that, under established precedent, a lesser degree of government assistance violates Title VI of the Civil Rights Act of 1964 than would violate the Establishment Clause. See, Bob Jones University v. Johnson, 396 F. Supp. 597, 605 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1979), citing Norwood v. Harrison, supra, and Board of Education v. Allen, 392 U.S. 236 (1968), and holding that inasmuch as Walz deals primarily with entanglement issues it is inapposite. Further, to the extent that Walz relies upon historical and common law concepts of voluntarism, it provides an analogy supportive of the government's position herein.

the unique nature of the affected public interest -- "abolishing all badges and incidents of slavery" -- it seems, on any conceivable balancing test, that even other constitutional rights would be, if necessary, subordinated.[18] Where religious institutions or individuals have ventured into the secular world to establish educational institutions granting secular

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18 While the states cannot lend school books to students attending racially segregated schools, Norwood v. Harrison, supra, book loans can be made to parochial school students, Board of Education v. Allen, supra. Because of the different public policies implicated, this Court has recognized that government support to racially discriminatory and religiously discriminatory educational institutions cannot be glibly equated; carefully circumscribed accommodations of church and state under the Establishment Clause should not be used as a basis for bootstrap arguments for Government subsidies to segregated schools. Norwood v. Harrison, supra, 413 U.S. at 465 n.7.

degrees,[19] the denial of all government aid (whether grants or tax benefits) to those violating the constitutionally mandated public policy in favor of integrated schools, regardless of their motivation, is statutorily -- if not constitutionally -- compelled.[20]

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19 A different rule might obtain for religious educational institutions not offering secular degrees, but those are not the present facts.

20 It is not necessary to reach the issue of whether an action for damages or injunctive relief would lie under 42 U.S.C. § 1981 against an educational institution discriminating through religious motivation. The question of government subsidization of racial discrimination presented on this appeal is an easier one, not involving the use of the compulsory powers of government to change conduct. On this same basis, any implication that, for purpose of the Free Exercise Clause balancing test, § 1981 would clearly be the less intrusive alternative (Goldsboro Brief at 42-43), must be rejected as simplistic and on the present facts incorrect. [Note,

(Footnote Continued)

Any fear that the IRS will abuse its discretion to deny Section 501(c)(3) exemptions in violation of First Amendment rights if a public policy rationale is endorsed in this case is a presently unwarranted imputation of bad faith. As administration of Section 501(c)(3) has demonstrated during the decade since Green, exemptions have been denied for conduct violative of constitutional values, not for mere speech. Should administrative abuses occur, they are remediable through the judicial process. Moreover, Section 501 and its administration is an area particularly open to public view and to

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20 (Footnote Continued)

however, that even under § 1981 the right to hold and promote racist beliefs is protected. Runyon v. McCrary, supra, 427 U.S. at 176.]

Congressional scrutiny, debate and remedy. See, 30-33, supra.

While Bob Jones and Goldsboro allege that the denial of Section 501(c)(3) status interferes with the free exercise of their religious beliefs, any impact is merely the incidental result of the "benevolent neutrality"[21] mandated by the Establishment Clause. While "religious institutions need not be quarantined from public benefits that are neutrally available to all," Roemer v. Maryland Public Works Bd., 426 U.S. 736, 746 (1976), they have no preferred claim to benefits denied similarly situated secular institutions.

This Court's recent decision in Heffron v. International Society for

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21 Walz v. Tax Commission, supra, 397 U.S. at 676.

Krishna Consciousness, Inc., ___ U.S.___, 69 L.Ed.2d. 298 (1981), is instructive on the issue of disproportionate impact on one religious sect of a religion-neutral regulation of general applicability. In Heffron, a "booth rule" confining distribution, sales and solicitation activities at the Minnesota State Fair to fixed locations was upheld as a valid exercise of the police power to protect the state's interest in maintaining the orderly movement of crowds as a matter of safety and convenience. A decision of the Minnesota Supreme Court, holding that the booth rule, as applied, unconstitutionally restricted the Krishna's religious practice of a peripatetic solicitation ritual known as Sankirtan was reversed on a rationale applicable to the present appeal:

> As we see it, the Minnesota Supreme Court took too

narrow a view of the State's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds. The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON. That organization and its ritual of Sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds. None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature. Id. at 309-310 (emphasis added).

This holding, as explicated by Justice Brennan's concurring opinion,[22] goes far toward resolving the present case. In Heffron, all solicitors --

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22 "Our cases are clear that governmental regulations which interfere with the exercise of specific religious beliefs or principles should be scrutinized with particular care. See, e.g., Sherbert v. Verner, 374 U.S. 398, 402-408 (1963). As we stated in Wisconsin v. Yoder, 406 U.S. 205, 220 (1972), 'there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.' I read the Court as accepting these precedents, and merely holding that even if Sankirtan is 'conduct protected by the Free Exercise Clause,' it is entitled to no greater protection than other forms of expression protected by the First Amendment that are burdened to the same extent by Rule 6.05." Id. 69 L.Ed.2d at 314 n.3.

those obeying a religious mandate to solicit peripatetically, those soliciting for religious or other charitable causes, and those soliciting for commercial purposes -- are equally subject to a neutral regulation aimed at a valid public purpose.

In this case, we urge that all private schools -- those obeying a religious mandate to discriminate racially, those religious schools discriminating for secular reasons, and those secular schools discriminating for secular reasons -- are equally subject to neutral application of Green's denial of Section 501(c)(3) status to all racially discriminatory private schools. Indeed, this is an even more compelling case than Heffron because the public purpose being vindicated is the product of the highest constitutional

mandate, rather than the exercise of the police power. Moreover, while in Heffron the Krishnas were barred (at least at a specified time and place) from fulfilling their religion's requirement of peripatetic solicitation, Bob Jones and Goldsboro merely suffer some financial detriment by being deprived of a governmental benefit available to all who meet neutral criteria.[23]

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23 The neutral criteria applied to petitioners threaten their actual religious belief and practice of non-miscegenation to a far lesser degree than present in Braunfeld v. Brown, 366 U.S. 599 (1961), where this Court upheld Sunday closing laws challenged by Orthodox Jewish merchants who were thereby deprived of a sixth working day. Even more so than in Braunfeld, the financial burden eventually traceable to the government's action is speculative and indirect depending as it does upon the decisions of independent contributors. Moreover,
(Footnote Continued)

The same result should obtain in this case as in Bob Jones University v. Johnson, supra. There, the court upheld termination of Bob Jones' status as an approved school for veterans' benefits under 38 U.S.C. § 1681 et seq. Such termination was held required under the Civil Rights Act of 1964 and the due process clause of the Fifth Amendment because of Bob Jones' racially discriminatory policies. 396 F. Supp. at 608. The court found no violation of the

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23 (Footnote Continued)

in Braunfeld nothing in the merchants' claim invoked government disapprobation to the degree here present; they merely sought a sixth day of work different from that sanctioned by the state, whereas here subsidization of conduct which is on a direct collision course with a quarter century of government anti-discrimination policies is involved.

freedom of association, free exercise or establishment clauses of the First Amendment in denying Bob Jones approved status, noting that:

> There is no judicial support for the proposition that unlawful discrimination accretes constitutionality by virtue of its duration, nor for the asserted principle that religiously based racism is immune from the prescriptions of constitutional law. Id. at 605 n.28.

The court emphasized further that free exercise claims have been regularly held not to require exemption from general law,[24] and that free exercise should be rejected as a defense to racial discrimination just as free association

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24 Id. at 607, citing Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1878); Prince v. Massachusetts, 321 U.S. 158 (1954).

repeatedly has been.[25] Moreover, even assuming a sincere protected religious belief, "a refusal to fund a protected activity, without more, cannot be equated with the imposition of a penalty on that activity." Harris v. McRae, 448 U.S. 297, 317 n.19 (1980).

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25 Id. at 606. While the court did not cite any support for this latter proposition, the principle, as set forth in the following cases, is clear:

> We must also be aware that the very exercise of the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action. Gilmore v. City of Montgomery, supra, 417 U.S. at 575.

III. PETITIONERS ARE NOT ENTITLED TO SECTION 501(c)(3) STATUS AS "RELIGIOUS" INSTITUTIONS

In an attempted end run around the holding of Green that Section 501 (c)(3) status be denied racially discriminatory educational institutions, the district court labeled Bob Jones "primarily religious" and held it entitled to Section 501(c)(3) status with respect to all of its activities under the "religious" rather than "educational" branch of the statute. This, we submit, is improper as a matter of statutory and constitutional law.[26]

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26 The district court in Goldsboro Christian Schools, Inc. v. United States, supra, 436 F. Supp. at 1316, properly took notice of the fact that Goldsboro had undertaken to qualify under state secular education requirements, providing a religious setting within this secular framework.
(Footnote Continued)

Where educational and religious activities are combined in one entity, the burden is on the applicant for Section 501(c)(3) status to demonstrate that the

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26 (Footnote Continued)

In light of these facts, and the summary judgment posture of the case below, the court did not have to consider the actual sincerity of Goldsboro's asserted religious belief. However, record testimony from Goldsboro's principal concerning his application of a nonmiscegenation policy only to blacks casts a long shadow over any such assertion of sincerity:

> Where a climate exists whereby you have a certain race clamoring for certain things within the school's curriculum. Certain--making certain demands of society, every aspect of society, then I think you are on very thin grounds when you, particularly in a southern region where you open your doors to them in a Christian school situation. (No. 81-1, JA at 84)

educational activities independently qualify.[27] Rev. Proc. 75-50 and Rev. Rul. 75-231, discussed supra at 29-33. Under the guidelines, where a racially discriminatory school is incorporated separately from its sponsoring religious organization, the school can be denied Section 501(c)(3) benefits for this violation of public policy while the affiliated church's status is unaffected. However, where religious and educational

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27 The First Amendment does not create a per se entitlement to a tax exemption for organizations with a religious orientation, any more than creating an exception from the application of general law. Whether or not religious organizations are exempted from a particular tax is a matter within the discretion of the legislature enacting the taxing statute, Cf. Walz v. Tax Commission, supra, 397 U.S. 664, 677-679 and Gibbons v. District of Columbia, 116 U.S. 404 (1886).

functions are performed by the same legal entity, the entire organization's tax-exempt status is lost if the educational activities are racially discriminatory:

> A racially or ethnically discriminatory policy as to students is as contrary to Federal public policy under these circumstances as it is when the educational institution is separately incorporated. An analysis of the historical development of this fundamental expression of national policy reaffirms the conclusion that the form of the educational organization is not relevant for these purposes. See Norwood v. Harrison, 413 U.S. 455 (1973), in which the Supreme Court held that a state may not provide free textbooks to a private school if their availability would have a "significant tendency to facilitate, reinforce, and support private discrimination." In that case the Court made no exception for the schools that were not separate legal organizations but were directly operated by churches that were receiving free textbooks. It follows that the legal organization operating Y [the non-separately incorporated school] is frustrating Federal

> public policy by having a racially or ethnically discriminatory policy as to students. Under these circumstances, that organization is not operated exclusively for charitable purposes within the meaning of section 501(c)(3) of the Code and the regulations thereunder. Rev. Rul. 75-231, supra, at 159.

Requiring religious institutions to separate secular from religious functions as a condition for receipt of government aid is neither unreasonable nor unprecedented. Churches routinely account separately for their unrelated business income under Section 511 et seq. of the Internal Revenue Code of 1954. Parochial colleges seeking government grants to their secular activities separate expenditures for secular and religious purposes.[28]

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28 See, e.g., Roemer v. Maryland Public
(Footnote Continued)

The district court's finding of fact 8, Bob Jones University v. United States, 468 F. Supp. 890, 895 (D.S.C. 1978) which is the apparent basis for the legal conclusion that Bob Jones qualifies as a religious organization under Section 501(c)(3), does not justify the proposition asserted. Rather, this finding recognizes that Bob Jones "serves educational purposes." While the finding recites that Bob Jones "cannot be termed a sectarian school"

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28 (Footnote Continued)

Works Bd., 426 U.S. 736 (1976), upholding, against an Establishment Clause (entanglement) challenge, a Maryland statute authorizing subsidies to private institutions of higher learning (excluding seminarian or theological academic programs) with the proviso that the grants not be used for sectarian purposes and the requirement that the aided non-sectarian expenditures be reported and be subject to government verification.

and is "not an educational appendage," and that Bob Jones' "primary purpose is religious" and that it exists as a "religious organization," these labeling judgments are conclusions of law (or mixed questions of fact and law) appropriate for judicial review.[29] More to the point, and more genuinely fact findings, are findings

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29 "Whether particular beliefs constitute 'religion' is not simply a question of fact. The inquiry is a mixed question, a question of the application of law to facts." Brown v. Dade Christian Schools, supra, 556 F.2d at 316 (Goldberg, J., specially concurring). Similarly, this Court has reviewed the determination of the applicability of I.R.C. sections to specific facts as a legal conclusion or mixed question. Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491 (1936). See also, Hope School v. United States, 612 F.2d 298, 301 (7th Cir. 1980) (treating determination of the applicability of I.R.C. § 511 unrelated business income provisions to tax-exempt school as "matter of law").

of fact 1 and 3, which establish that Bob Jones' charter set up an "institution of learning," that it offers instruction in grades kindergarten through college and graduate schools, and that it offers fifty degrees.[30] As Bob Jones' president, Dr. Bob Jones III, stated in testimony in support of the school's alleged entitlement

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30 There are secular degrees in such subjects as French, Premed, Home Economics, Prelaw, Art, Broadcast Engineering, Health and Physical Education, and Accounting (No. 81-3, JA at A127-A128). Bob Jones also offers a nondegree program in its Institute of Christian Service which instills "knowledge of the Bible principles of the word of God and Christian character training" (id. at A75). That Bob Jones distinguishes between the religious program of its Institute and the University programs leading to secular degrees is clear. While Bob Jones could arguably separately incorporate and seek § 501 (c)(3) status for the Institute as a religious institution, it has not elected to do so despite Rev. Rul. 75-231 offering this alternative.

to veterans' benefit approved status: this is "not a glorified Sunday School" but a "valid, educational institution."[31]

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31 Bob Jones v. United States, supra, Brief for the Government Appellant in the Fourth Circuit, at 30.

IV. BOB JONES IS NOT DISTINGUISHABLE FROM GOLDSBORO: RACIAL DISCRIMINATION NEED NOT AMOUNT TO EXCLUSION

The point that racial discrimination not amounting to total exclusion is unconstitutional requires little discussion. The law is settled that treating racially mixed couples differently from those of the same race, Loving v. Virginia, 388 U.S. 1 (1967), and racially separating students in school facilities, McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950), are constitutionally impermissible. The Fourth Circuit's equation of Bob Jones and Goldsboro as "identical twins" was correct. No. 81-1, Petition for a Writ of Certiorari, at 2a.

To characterize the issue as a restriction on "dating," comparable to traditional parietals, is to trivialize it. As written and applied, Bob

Jones' interracial dating ban prohibits any social contact from kindergarten through post-graduate between black and white students of opposite sexes. Eating together in the school dining room or snack bar, walking across campus together, playing tennis or attending a sports event: all are proscribed racially mixed pairs although available to fellow students of the same race. Bob Jones v. United States, supra, Brief for the Government Appellant in the Fourth Circuit at 10.

Indeed, in addition to operating as a disincentive to black enrollment -- the record[32] below revealed a black enrollment of only five students out of a total of over 5,000 -- Bob Jones'

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32 No. 81-3, JA at A36, A73.

racial policies punish violators with expulsion from a secular degree program. While Bob Jones may constitutionally espouse its religious belief against racial intermarriage, and students may certainly choose their dating or marriage partners on whatever basis they like, government aid to an educational institution which expels students from secular degree programs for noncompliance with bans on interracial social contact violates constitutionally-based public policy.

CONCLUSION

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

Respectfully submitted,

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APPENDIX OF LETTERS OF CONSENT TO FILING AS AMICUS CURIAE

EMBLEM

U.S. Department of Justice
Office Of The Solicitor General

Washington, D.C. 20530
December 18, 1981

Leon Silverman, Esq.
Fried, Frank, Harris, Shriver
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One New York Plaza
New York, New York 10004

RE: Goldsboro Christian Schools, Inc. v. United States, No. 81-1; and Bob Jones University v. United States, No. 81-3

Dear Mr. Silverman:

As requested in your letter of December 14, 1981, I hereby consent to the filing of a brief amicus curiae on behalf of the NAACP Legal Defense & Educational Fund, Inc.

Sincerely,

/s/ Lawrence G. Wallace

Lawrence G. Wallace
Acting Solicitor General

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December 21, 1981

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Mr. Leon Silverman, P.C.
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One New York Plaza
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Re: Goldsboro Christian Schools, Inc. v. United States of America, No. 81-1

Dear Mr. Silverman:

Pursuant to Rule 26, petitioner Goldsboro Christian Schools, Inc. hereby gives its written consent to the NAACP Legal Defense and Educational Fund, Inc. filing an amicus curiae brief on the merits in the above referenced case.

Very truly yours,

/s/ William G. McNairy

Willliam G. McNairy
Counsel of Record for Goldsboro
Christian Schools, Inc.

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Telephone
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December 22, 1981

Leon Silverman, Esq.
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& Jacobson
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New York, New York 10004

Re: Bob Jones University v. United States of America, Supreme Court, No. 81-3

Dear Mr. Silverman:

On behalf of petitioner, Bob Jones University, we hereby consent to the filing of a brief amicus curiae by NAACP Defense & Educational Fund, Inc., in the above entitled case.

Very truly yours,

/s/ William B. Ball

William B. Ball