Nos. 81-1 and 81-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA.

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

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

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee has over the past eighteen years enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education, housing, municipal services, the administration of justice, and law enforcement. Since 1965 the Committee has maintained an office in Jackson, Mississippi with full-time staff attorneys to assist black citizens in that state.

The Lawyers' Committee has long had a strong interest in effective public school desegregation, particularly in Mississippi. For example, it filed a brief *amicus curiae* and its then Co-Chairman (now U.S. District Judge) Louis F. Oberdorfer presented oral argument in support of the petitioners in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969). Following the Court's decision in that case, many new all-white, segregated private schools were established, and existing all-white schools expanded, in Mississippi. These schools provided white students and their parents with an opportunity to avoid public school desegregation and frustrated the efforts of federal courts and the U.S. Department of Health, Education, and Welfare to carry out this Court's *Alexander* mandate. Nevertheless, the Internal Revenue Service considered these private schools' racially discriminatory policies irrelevant to their status as charitable institutions, and the Service recognized all of them as exempt from federal taxation pursuant to 26 U.S.C. § 501(c)(3), thus qualifying third-party gifts to the schools as tax-deductible charitable donations. Accordingly, in 1969 the Committee's Mississippi office filed suit against the Service on behalf of a class of Mississippi black parents and schoolchildren. The Committee has continued to provide counsel to the plaintiffs in that case, in which proceedings are still pending in the U.S. District Court for the District of Columbia, *sub nom. Green v. Regan*, Civ. No. 1355-69.

After the plaintiffs obtained a preliminary injunction in that suit in 1970, *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970), the Internal Revenue Service announced that it could "no longer justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes."[1] The

[1] Internal Revenue Service News Release, July 10, 1970, 7 STAND. FED. TAX REP. (CCH) ¶ 6790 (1970). The change of policy was then codified in Rev. Proc. 71-447, 1971-2 C.B. 230.

three-judge court nonetheless granted the plaintiffs' request for injunctive relief to assure that the Service effectuated its new policy, which the court held was the only correct interpretation of the Internal Revenue Code. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). Subsequently, the district court has granted further injunctive relief to carry out the 1971 decree. *Green v. Regan*, Civ. No. 1355-69 (D.D.C., May 5 and June 2, 1980).

In their petitions for certiorari and briefs, both Bob Jones University and Goldsboro Christian Schools, Inc. not only raise First Amendment claims with respect to the application of *Green* principles to religious institutions, but they also seek a determination from this Court that *Green* itself was wrongly decided. Such a ruling would directly undercut the judgments which Lawyers' Committee attorneys have secured in *Green*, and it would also seriously weaken anew the desegregation of Mississippi's public schools. Because *amicus* believes that there is no credible argument for an interpretation of the Code which would have this tragic result and, indeed, that the *Green* ruling is constitutionally compelled, we file this brief in support of the United States.[2]

SUMMARY OF ARGUMENT

There are two important issues raised by these cases: whether the federal government can constitutionally confer tax benefits on racially discriminatory private schools; and whether the First Amendment *requires* the federal government to confer those benefits on such schools if their discrimination is religiously based. The first issue was effectively resolved in *Norwood v. Har-*

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[2] The parties' letters of consent are being lodged with the Clerk pursuant to Rule 36.1.

rison, 413 U.S. 455 (1973), in which a unanimous Court declared it unconstitutional for government to lend "tangible financial aid" to private discriminatory schools. There is no doubt that the tax benefits at issue in these cases constitute such "aid," both as a matter of fact and as a matter of law. *See Committee for Public Education v. Nyquist*, 413 U.S. 756, 790-91 (1973); *Green v. Connally, supra.*

The First Amendment issue requires a balancing of the public's interest in precluding tax-benefit support to racially discriminatory schools against the right of those schools which discriminate racially on religious grounds not to be unduly penalized for conduct based upon religious belief. Since the government's obligation to preclude the benefits is constitutionally compelled, and is, in addition, premised on a constitutionally rooted national policy against racial discrimination in education; and since the burden on religious exercise in the present case is minimal, the public interest in precluding benefits must prevail.[3]

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[3] The first question which petitioners raise in these cases is whether sections 501(c)(3) and 170(a)-(c) of the Internal Revenue Code are properly read to bar the granting of tax benefits to racially discriminatory private schools. As indicated above, this has been the Service's consistent construction of the Code since 1970. It was upheld in 1971, Green v. Connally, *supra*, and has been followed by every federal court which has considered it since that time. We do not address the question separately in this brief but fully support the government's arguments. Based upon *amicus'* experience, however, we wish to direct the Court's attention to two matters:

The first point we wish to make on the statutory construction issue concerns this Court's ruling in Coit v. Green, 404 U.S. 997 (1971), which this Court has said "lacks the precedential weight of a case involving a truly adversary controversy" since the Service had "reversed its position while the case was on appeal to this

ARGUMENT

I. THE FEDERAL GOVERNMENT IS CONSTITUTIONALLY PROHIBITED FROM GRANTING TAX BENEFITS TO RACIALLY DISCRIMINATORY PRIVATE SCHOOLS.

While we believe the IRS, the *Green* court, and now, the Fourth Circuit in the present cases, have all correctly construed Sections 501 and 170 to authorize the

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Court." Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974). Even though the case may not have been "truly adversary" in the sense that the Service did not, before this Court, oppose the *Green* plaintiffs' construction of the Code, nevertheless, as we will explain, the case was an "adversary" proceeding as to the statutory issue pressed by the present petitioners. Under well-settled principles, the Court's affirmance of *Green* therefore is a holding on the merits of that issue not to be overturned lightly.

Following the issuance of the preliminary injunction, the *Green* three-judge district court permitted certain intervenors to enter the case in January, 1970 as representatives of parents and children who attended or supported private racially discriminatory schools in Mississippi. After the Service changed its position in July, 1970, *see* note 1 *supra* and accompanying text, the only issues which the United States litigated in the lower court in *Green* were the appropriate *procedures* for effectuating the denial of tax benefits to discriminatory schools and the necessity for any injunctive relief. *See* Defendants' Memorandum in Opposition to Plaintiffs' Proposed Injunctive Decree, Green v. Kennedy, Civ. No. 1355-69 (D.D.C., filed Jan. 25, 1971). The intervenors, however, attacked the statutory interpretation proffered by the plaintiffs and the Service, and which was ultimately adopted by the three-judge court. The intervenors were also the parties adversary to the plaintiffs and the United States before this Court in 1971. In their papers, they described the federal questions before this Court as whether the IRS could lawfully withdraw tax benefits from racially discriminatory private schools, and whether such withdrawal violated intervenors' First Amendment rights. Jurisdictional Statement, Coit v. Green, *supra*, at 13-16. In response, both the United States and the plaintiffs moved to dismiss the appeal, primarily on the ground that the intervenors lacked standing to raise these issues. However, the *Green* plaintiffs alternatively asked this Court

withholding of tax benefits from racially discriminatory private schools, the real issue here, in our view, is not

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to affirm the lower court's judgment. Motion to Dismiss or Affirm, Coit v. Green, *supra*. The Court did, in fact, summarily affirm rather than dismiss the appeal. For this reason, *amicus* has always understood this Court's affirmance in *Green* to have rejected intervenors' two contentions on their merits, and to have confirmed the holding (if not necessarily the specific reasoning) of the lower court. Mandel v. Bradley, 432 U.S. 173, 176 (1976); Hicks v. Miranda, 422 U.S. 332, 344 (1975); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring). The fact that the Court treated its *Green* affirmance as both a decision on the merits and a holding of some importance was evident in the holding two years later in Norwood v. Harrison, 413 U.S. 455, 463 & n.6 (1973), discussed in Argument I *infra*.

We are not contending, of course, that the Court may not, upon reconsideration of the *Green* holding, now reverse its previous affirmance of that holding; nor do we suggest that there is not more jurisprudential leeway for such a reversal in the case of a prior summary affirmance. Rather, we mean only to underscore that it is in fact a reversal that is being sought, and that petitioners are now making essentially the same challenges to the same 1970 IRS construction which intervenors made over ten years ago. In such a situation, we submit that the Court should hesitate now to reach a different outcome, *see* McKeesport Area School Dist. v. Pennsylvania Dept. of Educ., 446 U.S. 970, 971-72 (1980) (White, J., concurring). This is especially so in light of Congress' acceptance of the *Green* holding, *see infra*, and the long reliance by the Service, the courts, and the private schools themselves, on the previous affirmance. *Cf.* Runyon v. McCrary, 427 U.S. 160, 190-92 (1976) (Stevens, J., concurring); Flood v. Kuhn, 407 U.S. 258, 273-76, 278-79, 283 (1971); Radovich v. National Football League, 352 U.S. 445, 450-52 (1957).

Second, we believe that congressional action since the Service announced its construction of the Code in 1970 has confirmed and approved that construction. In 1976, the Congress enacted 26 U.S.C. § 501(i) to deny tax-exempt status to discriminatory social clubs. As explained in the Senate Report on the bill, its purpose was to overturn McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), which had held that discriminatory fraternal beneficiary societies were not entitled to such status, but that social clubs were. S. REP. No. 1318, 94th Cong., 2d Sess. 8 n.5 (1976), *reprinted in* [1976] U.S. CODE CONG. & ADM. NEWS 6057. The "reason for change" in

one of statutory authorization; it is one of constitutional command.

The constitutional prohibition of racial discrimination in education was first articulated by this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Bolling v. Sharpe*, 347 U.S. 497 (1954) (companion case to *Brown* applying prohibition against state-supported school segregation to the federal government). In *Brown* the Court noted that education is "perhaps the most im-

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the law was that "[i]n view of national policy," it was considered "inappropriate" for a discriminatory "social club or similar organization" to be accorded tax-exempt status. *Id.* at 6058. The Report expressly noted that *McGlotten* had denied tax-exempt status to racially discriminatory fraternal societies and that this Court had affirmed the *Green* decision denying tax benefits to racially discriminatory educational institutions. *Id.* at 6058 n.5. We submit that this legislative history demonstrates (a) Congress' commitment to the national policy against racial discrimination; (b) that the policy must be taken into account in determining eligibility for tax benefits; (c) that Congress stands ready to amend section 501 to overturn judicial decisions at odds with this national policy; and (d) that Congress was aware of, and approved, the decision in *Green*.

These conclusions are further supported by events in 1979, after the Service had published proposed procedures for identifying racially discriminatory private schools not entitled to tax-exempt status. 43 Fed. Reg. 37296 (August 22, 1978); 44 Fed. Reg. 9451 (February 13, 1979). *See Tax-Exempt Status of Private Schools: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 96th Cong., 1st Sess. 5 (1979) (statement of Jerome Kurtz) [hereinafter cited as "*1979 Hearings*"]. Although Congress adopted riders to Treasury Department appropriations acts to prevent the effectuation of the new procedures, *see* P.L. No. 96-74, §§ 103, 615, 93 Stat. 559, 562, 577, it did not suspend the Service's authority under its existing procedures to withhold tax benefits from racially discriminatory private schools. The supporters of the appropriations riders strongly endorsed the *substance* of the Service's 1970 construction of the Code. *See, e.g.*, 125 CONG. REC. H5883 (daily ed., July 13, 1979) (remarks of Rep. Sensenbrenner); *id.* at H5884 (Rep. Hammerschmidt), H5885 (Rep. Dickinson), H5982 (daily ed., July 16, 1979) (remarks of Reps. Dornan, Goldwater, and Miller).

portant function of state and local governments" and, further, that government-sponsored separation of students "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their minds and hearts in a way unlikely ever to be undone." 347 U.S. at 493, 494. The Court also recognized that "[t]he impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group," *id.* at 494 (quoting with approval the findings of the district court in *Brown*).[4] Because the stigma and harm are the same whenever black children are excluded from educational opportunities on the basis of race with governmental sanction,[5] this Court promptly and consistently applied *Brown* to affirm lower court rulings which enjoined programs of state-furnished assistance to "private" schools established to circumvent public school desegregation.[6]

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[4] *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1880): the Fourteenth Amendment protects blacks from "unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society . . . ."

[5] In Runyon v. McCrary, *supra*, this Court sustained Congress' authority, in enacting 42 U.S.C. § 1981 to enforce the Thirteenth Amendment, to bar racial discrimination by private schools whether or not the institutions were the recipients of government largesse.

[6] Faubus v. Aaron, 361 U.S. 197 (1959), *aff'g* Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark. 1959); Orleans Parish School Bd. v. Bush, 365 U.S. 569 (1961); *aff'g* 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960); St. Helena Parish School Bd. v. Hall, 368 U.S. 515 (1962), *aff'g* 197 F. Supp. 649 (E.D. La. 1961); Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964); Wallace v. United States, 389 U.S. 215 (1967); *aff'g* Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967); Louisiana Fin. Assistance Comm'n v. Poindexter, 389 U.S. 571 (1968), *aff'g* 275 F. Supp. 833 (E.D. La. 1967); South Carolina State Bd. of Educ. v. Brown, 393 U.S. 222 (1968); *aff'g* 296 F. Supp. 199 (D.S.C. 1968); *cf.* Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

These developments culminated in the decision in *Norwood v. Harrison*, *supra*, which makes clear that government may not lend "tangible financial aid" to private, racially discriminatory schools, even under a facially neutral program which benefits all private schools. There, the Court reviewed the constitutionality of a Mississippi statute which made free textbooks available to schoolchildren in both public and private schools, without regard to whether the schools were racially discriminatory. On reasoning clearly applicable to the present cases, the Court declared the loaning of textbooks to racially discriminatory schools to be unconstitutional.

"Racial discrimination in state-operated schools," said the Court, "is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" 413 U.S. at 465 (quoting *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 475-76 (M.D. Ala.), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967)). Hence, said the Court, government may not provide "tangible financial aid" to an educational institution "if that aid has a significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 466.

The essential issue in *Norwood*, then, was whether the textbooks amounted to "tangible aid" that had a "significant tendency" to "support" private discrimination in the schools. The Court said they did, noting that textbooks are "not legally distinguishable from the forms of state assistance foreclosed by the prior cases." *Id.* at 463. The "prior cases" relied on were several of the lower court decisions cited in note 6 *supra*, which "[t]his Court has consistently affirmed[,] . . . enjoining state tuition grants to students attending racially discriminatory private schools," *id.*, as well as *Green v. Connally*, *supra*, the very case which prohibited the granting of the tax benefits at issue here.

On the remaining question, whether the provision of the textbook aid had a "significant tendency" to "support private discrimination," the Court concluded that since textbooks are "[a]n inescapable educational cost," and since the state was bearing that cost, "the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the state by tangible aid in the form of textbooks thereby gives support to such discrimination." *Id.* at 464-65.[7]

We do not see how *Norwood* can be read other than to declare unconstitutional the issuance of tax benefits to racially discriminatory schools.

It can hardly be doubted that government benefits made available under Sections 501 and 170 provide "tangible financial aid" to the schools. As this Court explicitly recognized when Bob Jones was last before it, "[R]evocation of a § 501(c)(3) ruling letter and consequent removal from the Cumulative List [approving deductibility of donor contribution under Section 170] is likely to result in serious damage to a charitable organization." *Bob Jones University v. Simon*, 416 U.S. 725, 730 (1974).[8] "Many contributors simply will not

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[7] Significantly, *Norwood* did not require any showing that government aid to private schools interfered with public school desegregation. *See* 413 U.S. at 465-66; *cf.* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163 (1978). However, even if *Norwood's* holding were limited to situations in which government aid to segregated private schools followed upon public school desegregation orders, it would apply here. Bob Jones and Goldsboro are both located in or near desegregating school districts. *See* Whittenberg v. Greenville County School Dist., *decided sub nom.* Stanley v. Darlington County School Dist., 424 F.2d 195 (4th Cir. 1970); Smith and United States v. North Carolina State Bd. of Educ., Civ. No. 2572 (E.D.N.C., May 18, 1971) (consent decree providing for desegregation of Goldsboro city schools).

[8] The considerable value of these tax benefits to educational and other charitable institutions is demonstrated in numerous economic studies. *See, e.g.*, J. PERLMAN, FEDERAL TAX POLICY 88 (3d ed. 1977) and Feldstein, *The Income Tax and Charitable Contributions:*

make donations to an organization that does not appear on the Cumulative List." *Id.* Indeed, Bob Jones contended in that case that if it lost its tax exemption it would lose *all* contributions from those who otherwise take charitable deductions. *See id.* at 725 n.2. Consistently, in the present case evidence in the record shows that, barely two weeks after Bob Jones' tax exemption was revoked, "as a result" the school experienced "a decrease in the giving." Joint Appendix in No. 81-3, at 250.

The fact that the tax benefits have consistently been and continue to be of considerable tangible assistance to private schools in general is well-documented. For example, in *Green v. Kennedy, supra*, the court rested its conclusion that federal tax benefits constituted "substantial and significant" government support in part upon the evidence, placed before it by the parties, which was offered in an earlier federal court action involving Mississippi private schools. In the earlier case, *Coffey v. State Educational Finance Commission*, 296 F. Supp. 1387 (S.D. Miss. 1969), a three-judge court invalidated a state law providing tuition grants to students attending private, racially discriminatory schools. The *Coffey* evidence showed that private discriminatory schools had "flourished in the wake of desegregation rulings," [9] that the schools were operated "on the thinnest financial basis," and that the tax benefits were an important, if not indispensable, factor in the establishment and con-

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Part I—Aggregate and Distributional Effects, 28 NAT'L TAX J. 81, 82 (1975), *cited in* Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378, 387 n.50 (1979).

[9] In this regard, evidence from the IRS demonstrated that while no private school exemptions had been sought by Mississippi schools prior to the state's first desegregation suit (1963), such exemptions were sought and applications were received steadily thereafter as desegregation activity increased. Green v. Kennedy, *supra*, 309 F. Supp. at 1135-36. *See also* note 23 at 23-24 *infra*.

tinued operation of the schools. *Green v. Kennedy, supra*, 309 F. Supp. at 1135.[10]

In addition, the court took special note that officials of the private schools themselves regarded the tax benefits as "psychological help to the school, from the public reaction to what was considered as approval by the Federal Government." *Id.*[11] Moreover, this federal "help" became of even greater importance to the schools after the state tuition grants were eliminated. According to evidence relied upon by the court, solicitations for support from the private schools stressed the loss of the state grants, underscored the deductibility of contributions, and stated that, in the absence of such deductible contributions, many students would be "forced" to return to the public schools. *Id.* at 1135.[12]

Finally, the continuing importance of the tax benefits to private schools was recently stressed by representatives of the schools in congressional hearings.[13]

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[10] For a summary of further evidence concerning the contribution of the tax benefits to southern discriminatory private schools, *see* Spratt, *Federal Tax Exemptions for Private Segregated Schools*, 12 WM. & MARY L. REV. 1, 3-5 (1970).

[11] *See* McGlotten v. Connally, *supra*, 338 F. Supp. at 456, enjoining the Secretary of the Treasury from granting tax exemptions and deductibility of contributions to racially discriminatory fraternal organizations and their donors, in part because by ruling that an organization is "charitable" under 26 U.S.C. § 170 "the government has marked certain organizations as *'Government Approved'* with the result that such organizations may solicit funds from the general public on the basis of that approval"; *see also* note 4 *supra* and accompanying text.

[12] A solicitation letter quoted by the court stated that: "[U]nless we receive substantial contributions to our Scholarship Fund there will be many, many students, whose hands and bodies are just as pure as any of their classmates and playmates . . . who for financial reasons alone, will be forced into one of the intolerable and repugnant 'other schools,' . . . or into dropping out of school entirely . . . ." 309 F. Supp. at 1135.

[13] *E.g., 1979 Hearings* at 555 ("Tax deductible contributions to an independent religious school are critical in keeping tuition with-

Inasmuch as the tax benefits are, thus, of continuing "tangible financial aid" to tax-exempt private schools, and inasmuch as that aid is plainly used to finance various necessary expenses of operating those schools—for example, evidence in *Coffey* and in the cited hearing statements indicates that tax-deductible contributions are used to subsidize students' tuition expenses—the "economic consequence" is, as the Court held in *Norwood*, "to give aid" to those schools. 413 U.S. at 464. And if any such school "engages in discriminatory practices," as the Court also held, the government through the aid necessarily "gives support to such discrimination." *Id.* at 465.

There is no dispute in the present cases that through the federal government's conferral of tax benefits Bob Jones and Goldsboro receive tangible financial aid which is (or would be) used to meet continuing expenses of those schools. Neither do those schools deny that they engage in racially discriminatory practices which would be constitutionally prohibited were they practiced in the public schools.[14] Instead, the two schools argue that the

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in reach . . .") (statement of Paul Kienel, Association of Christian Schools International); *id.* at 388 ("Private schools are heavily dependent on tax-free contributions") (statement of W. Wayne Allen, Chairman of the Board, Briarcrest Baptist School System, Memphis, Tennessee); *id.* at 400 (tax-exemption and deductible gifts are "of vital importance" for independent schools, accounting for "23% of the operating budgets of our boarding schools and 11% in our day schools") (statement of John Esty, Jr., President, National Association of Independent Schools).

[14] Before this Court, Bob Jones has abandoned its claim, urged below, that its anti-miscegenation policies would be permissible if enforced in the public schools. That such policies are racially discriminatory is well settled. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). As this Court said in *Loving*: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S. at 12. The fact that Bob Jones' racial classifications apply to members of *all* races

federal aid supplied to them should not be constitutionally prohibited by *Norwood*, since it amounts to only an "indirect economic benefit" flowing from a "passive" governmental decision not to tax the schools or the schools' contributors. Brief for Bob Jones at 20-21; Brief for Goldsboro at 41-42. The schools' sole support for this claim is this Court's decision in *Walz v. Tax Commission*, 397 U.S. 644 (1970). Petitioners' reliance on that case is altogether misplaced.

The issue in *Walz* was whether granting property tax exemptions to churches violated the Establishment Clause of the First Amendment. Recognizing that the exemptions did, necessarily, "afford an indirect economic benefit" to the churches, *id.* at 664, the Court held that, for purposes of Establishment Clause analysis, that fact in itself was not controlling. Rather, the "judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Id.* at 669. As to the purpose of the exemption, the Court relied on the historic, universally approved tax exemption of churches in this country—an approval that antedated the First Amendment itself—and determined that this long practice was not based on an effort by the state to support religion, but to assure a "benevolent neutrality toward churches and religious exercise generally . . . ." *Id.* at 676-77. Confirming this "neutrality" of purpose was the fact that the tax exemption was provided to various charitable institutions, not solely to churches. *Id.* at 672-73. Regarding the second issue, state "entanglement" with religion, the Court determined that the tax exemption helped reduce rather than increase the risk of such entanglement, since "[e]limination of exemption would tend to expand the involvement of government by giving rise to tax valua-

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does not make them any the less objectionable. Racial classifications that are "even-handed", are nevertheless "repugnant to the Fourteenth Amendment." *Id.* at 12 n.11.

tion of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.* at 674.

For at least four separate reasons, the *Walz* decision is of no assistance to petitioners in the present cases.

First, the fact that aid, by way of a tax exemption, to churches is permitted under the Establishment Clause does not mean that a tax exemption (and other important tax benefits) can be granted to racially discriminatory schools consistent with the Equal Protection Clause. Indeed, that is precisely what this Court held in *Norwood*:

> The leeway for indirect aid to sectarian schools [for Establishment Clause purposes] *has no place in defining the permissible scope of state aid to private racially discriminatory schools.* "State support of segregated schools *through any arrangement*, management, funds, or property cannot be squared with the [Fourteenth] 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).

Norwood v. Harrison, supra, 413 U.S. at 464 n.7 (emphasis supplied).

Second, while neutrality of purpose is the touchstone of Establishment Clause analysis, and although in *Walz* it was important that the tax exemption was afforded to other charitable institutions, a neutral and legitimate governmental purpose will not validate a statute which has the effect of supporting racially discriminatory schools.[15] As the Court said in *Norwood*, 413 U.S. at 466:

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[15] Thus, while a state may, consistent with the Establishment Clause, make textbooks available to private religious schools if its purpose is a "neutral" one, *i.e.*, to make books available to all schoolchildren in public and private schools alike, Board of Educ. v. Allen, 392 U.S. 236 (1968), it cannot make those same books available to private schools that are racially discriminatory, regardless of the "neutrality" of its purpose, Norwood v. Harrison, *supra*, 413 U.S. at 466.

> We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violations of a constitutional duty.

Third, even if neutrality of governmental purpose were more important to a determination of the legitimacy of the tax benefits in the present case than it is, *Walz* does not control the outcome here. As stated above, that decision rested in large measure on the long history of tax exemptions accorded to churches and the "benevolent neutrality" evidenced by that history. But, as the Court has made explicit in cases examining other benefits to sectarian schools, "[w]e have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemptions for churches." *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971). In fact, quite the opposite is true of sectarian schools. "Strong opposition has been evident throughout our history to the use of the state's taxing powers to support private sectarian schools." *Id.* at 642, 653-54 (separate opinion of Brennan, J.). "In sharp contrast to the undeviating acceptance given religious tax exemptions from our earliest days as a Nation, [citing *Walz*], subsidy of sectarian educational institutions became embroiled in bitter controversies very soon after the Nation was formed." *Id.* at 645 (Brennan, J.).

Finally, if petitioners mean to argue, relying on *Walz* and the Establishment Clause cases, that tax benefits are not governmental aid at all because they are not a direct payment to the schools, the argument is completely without foundation. As previously discussed, this Court indicated in *Norwood* that for constitutional purposes it considers tuition grants and tax benefits (which are used to stimulate and indirectly pay for, among other things, tuition expenses) to be identical. Moreover, in *Committee for Public Education v. Nyquist, supra*, the Estab-

lishment Clause case decided the same day as *Norwood*, the Court made explicit that governmental aid in the form of tax benefits to sectarian schools is *constitutionally indistinguishable* from direct governmental payments made to those schools:

> In practical terms there would appear to be little difference, for purposes of determining whether . . . aid has the effect of advancing religion, between the tax benefit . . . and the tuition grant . . . . "[I]n both instances the money involved represents a charge made upon the state for the purpose of religious education."

413 U.S. at 790-91 (quoting statement of Circuit Judge Hays, dissenting below).

There is therefore no support in *Walz* and the Establishment Clause cases for the view that "indirect" government aid by way of tax benefits can be excused when "direct" aid would be constitutionally prohibited.[16] Indeed, we submit that any other view of such aid would flout the general principle, expressly applied in *Norwood*, that government may not bring about indirectly what it cannot constitutionally bring about directly: "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, *supra*, 413 U.S. at 465.

In sum, we submit that the *Norwood* decision—which has been consistently reaffirmed by this Court[17] and by

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[16] For a further analysis of the constitutional and economic similarity between tax benefits and direct payments, *see* Brown, *State Action Analysis of Tax Expenditures*, 11 HARV. C.R.-C.L. L. REV. 97 (1976); Comment, *Tax Incentives as State Action*, 122 U. PA. L. REV. 414 (1973); *cf.* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 711 (1970) (Mr. Surrey was Assistant Secretary of the Treasury for Tax Policy from 1961 to 1969).

[17] *See* Gilmore v. City of Montgomery, 417 U.S. 556, 568-69 (1974); Runyon v. McCrary, *supra*, 427 U.S. at 171, 175-77; Maher

the lower courts in circumstances very similar to those presented here [18]—compels the conclusion that the government's conferral of the tax benefits at issue amounts to unconstitutional support of Bob Jones' and Goldboro's discrimination. We urge the Court to say so, unmistakably, in these cases, making clear beyond any doubt whatever that the United States government cannot constitutionally support racially discriminatory practices in the schools of this nation.

II. THE GOVERNMENT'S DECISION NOT TO SUPPORT RACIALLY DISCRIMINATORY PRIVATE SCHOOLS DOES NOT VIOLATE PETITIONERS' FIRST AMENDMENT RIGHTS.

Petitioners' final contention is that the government's failure to support their schools with tax benefits violates their rights under the Religion Clauses of the First Amendment. They argue, first, that even if the government's refusal to support racially discriminatory schools is valid as a general rule, an exception to that rule must be made in favor of those schools whose racial discrimination is religiously based; otherwise, say petitioners, those schools' Free Exercise rights would be violated. Second, petitioners argue that failure to make an exception for their religiously based discrimination would violate the Establishment Clause in that religions which do not discriminate would be favored over those that do. Neither

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v. Roe, 432 U.S. 464, 477 (1977); Flagg Bros., Inc. v. Brooks, *supra*, 436 U.S. at 163 (holding that the sovereign-function doctrine did not support a finding that warehouseman's proposed sale of goods in storage was attributable to state and thus "state action" under Fourteenth Amendment, but noting that its holding does not impair the precedential value of cases such as *Norwood* and *Gilmore*).

[18] *See, e.g.*, Brown v. Califano, 627 F.2d 1221, 1235 (D.C. Cir. 1980); Bob Jones University v. United States, 639 F.2d 147, 152-53 (4th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3278 (U.S., Oct. 13, 1981); Iron Arrow Honor Soc. v. Hufstedler, 499 F. Supp. 496, 505-06 (S.D. Fla. 1980), *aff'd* 652 F.2d 445 (5th Cir. 1981), *pet. for cert. filed*, 50 U.S.L.W. 3377 (Oct. 31, 1981); Grove City College v. Harris, 500 F. Supp. 253, 267-68 (W.D. Pa. 1980).

of these arguments is in accord with the controlling standards announced by this Court. The acceptance of either would compromise the constitutionally rooted national policy against racial discrimination in the country's schools. We treat only the Free Exercise claim here.

Before addressing this contention, however, we make the following two observations about the assumptions underlying petitioners' arguments. If either assumption is in error, then the petitioners' Religion Clause arguments must fail.

First, if petitioners' *Walz* argument—that the tax benefits disputed in this case cannot be deemed tangible government aid for Equal Protection Clause purposes—were correct, then *a fortiori* the withdrawal of the schools' tax-exempt status by the Service involves the loss of such inconsequential assistance as not to trigger Free Exercise or Establishment Clause concerns.[19] As the Court held in *Norwood*, "[h]owever narrow may be the channel of permissible state aid to sectarian schools, it permits *a greater degree of state assistance* than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system," 413 U.S. at 470 (emphasis supplied) (citations omitted). We therefore proceed in this Argument on the basis that the tax benefits at issue here do constitute "tangible government aid" to the schools.

Second, while we are also assuming in this discussion that the withdrawal of benefits was in fact a "penalty" upon petitioners' exercise of a constitutional right, that assumption may not be correct. In *Harris v. McRae*, 448 U.S. 297, 314-17 (1980), the Court distinguished a refusal by government to finance a constitutionally protected activity from a penalty imposed by government upon the activity itself. In *Harris* the Court held that

[19] *See, e.g.*, O'Hair v. Paine, 312 F. Supp. 434, 437 (W.D. Tex. 1969), *appeal dismissed*, 397 U.S. 531 (1970), *aff'd* 432 F.2d 66 (5th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971).

the government could choose to subsidize certain medical services, intentionally excluding abortions, even though the right to an abortion is constitutionally protected.[20] Similarly, the government here has chosen to support only certain charitable institutions, excluding those that are racially discriminatory; the excluded institutions may have a constitutional right to be discriminatory, but they have no constitutional right to receive government support for that discrimination.

We are in general agreement with petitioners concerning the basic elements to be considered in reviewing their claim that the government's refusal to grant them tax benefits has unconstitutionally interfered with their Free Exercise rights: (1) the nature of the burden, if any, which has been placed on their right; (2) the nature of the governmental interest at stake; and (3) an assessment whether, on balance, the governmental interest is sufficiently compelling to justify the particular burden placed upon the Free Exercise right. *See* Brief for Goldsboro at 33; Brief for Bob Jones at 23. We differ with petitioners, however, concerning the nature of the burden, the nature of the governmental interest, and the appropriate balancing of the two.

A. The Burden on Petitioners' Free Exercise Rights Is Not Significant.

The most comprehensive description of the showing necessary to demonstrate that a significant burden has been placed upon Free Exercise rights was given by this Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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[20] The result would be different, said the Court, analogizing to Sherbert v. Verner, 374 U.S. 398 (1963), if the government chose to withdraw *all* medical benefits from a woman because she chose to have an abortion; such withdrawal would be similar to the withdrawal of *all* employment benefits from Mrs. Sherbert because she chose not to work one day per week on her Sabbath. 448 U.S. at 317 n.19. The present cases, we believe, are much more like *Harris* than *Sherbert*.

A comparison of this case with *Yoder* illustrates how minimal a burden on their religious beliefs and practices has been suffered by Goldsboro and Bob Jones.

In *Yoder*, members of the Amish religion challenged the constitutionality of a statute which required them to send their children to public schools through age 16. This Court acknowledged the state's considerable interest in the education of its citizens but concluded that the Amish had carried their burden of overcoming that interest:

> Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education.

406 U.S. at 235. The Court's opinion underscored four factors important to its decision.

First, the burden of the challenged statute on the Amish practices was "not only severe, but inescapable," in that it directly compelled them to violate their religious beliefs. In this respect, the Court indicated that the Amish burden was greater than that presented in *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961), where no such compulsion was presented, but merely a state regulation which made religious practices more expensive. Second, the Court stressed the importance of the fact that the case was "not one in which any harm to the physical or mental health of the child or to the public

safety, peace, order, or welfare has been demonstrated or may be properly inferred. *Id.* at 230. "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Id.* at 224. Third, the Court stated that "[i]t cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." 406 U.S. at 235. Finally, the Court made plain that since the state's educational interest is a "strong" one, it is important that the courts move with "great circumspection" before requiring that exemptions be made from that interest, and that the entitlement to an exemption demonstrated by the Amish was one that "few other" religious groups could make. *Id.* at 235, 236.

Quite unlike *Yoder*, Bob Jones and Goldsboro are unable to demonstrate that racial discrimination is at the heart of their religious beliefs.[21] Even more significant, neither school suffers a direct, inescapable burden upon its religious practices. Rather, as was true in *Braunfeld v. Brown, supra*, the government's decision not to confer tax benefits on those schools which are racially discriminatory has merely made operation of petitioners' schools more expensive. It is clear that this is a lesser burden than would be a direct governmental compulsion forbidding Bob Jones' or Goldsboro's discriminatory practices.[22]

We submit, therefore, that the burden on petitioners' Free Exercise rights is not substantial. They have shown

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[21] *See* Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 314, 321-22 (5th Cir. 1977) (*en banc*) (Goldberg, J., concurring), *cert. denied*, 434 U.S. 1063 (1978).

[22] In fact, the *Braunfeld* plurality specifically listed, as an example of an indirect burden on free exercise, a limitation on the tax deductibility of a religious contribution. 366 U.S. at 606. *See also* Johnson v. Robison, 415 U.S. 361, 385 (1974) (denial of veterans' benefits to conscientious objector who performed alternative service imposed only indirect burden on free exercise).

nothing more than that the exercise of one particular religious practice has become somewhat more costly. We do not say that this is no burden at all. We do say, however, that the burden has not been shown to be significant under the standards set by this Court.

B. The Governmental Interests at Stake are Compelling and Constitutionally Based.

Bob Jones contends in its brief (at 29) that the only governmental interest furthered by the withdrawal of tax benefits is "an indefinitely stated federal policy respecting race." Goldsboro goes even further and claims (at 38) 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." These assertions are simply not true. The public interest being furthered in these cases has been explicitly and repeatedly articulated by the Congress and by this Court. The source of this interest is most certainly not the IRS' independent, open-ended view of public policy; rather, it is derived from the Constitution itself. Thus, affirmance of the judgment below does not confer upon the Service unbridled discretion to define "the national interest" and to deny or withdraw tax exemptions on that basis.

As we described earlier, the constitutionally based national policy against racial discrimination in education was first given recognition by this Court in *Brown v. Board of Education*, *supra*. It extends to private schools both because black children excluded from such schools on the basis of race suffer the same injury and humiliation as black children excluded from public schools on the basis of race, and because the growth of discriminatory private schools tends to undermine governmental efforts to end racial discrimination in the public schools.[23]

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[23] The relationship between public school desegregation and the creation or expansion of segregated private schools—as well as the detrimental effects of such schools on constitutionally mandated

As described in the previous Argument, beginning in the late 1950's and culminating in the 1973 decision in *Norwood v. Harrison*, the federal courts gave specific

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public school desegregation—has been well documented. For example, the Fifth Circuit noted as early as 1966:

> Private schools, aided by state grants, have mushroomed in some states in this circuit. The flight of white children to these new schools and to established private and parochial schools promotes resegregation.

United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 848-49 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967) (footnote omitted). *See also* U.S. COMM'N ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67 71 (1967).

Many others have documented the relationship between the development of private academies and public school desegregation. *See, e.g.*, D. BELL, RACE, RACISM AND AMERICAN LAW 496-97 (1973); D. NEVIN & R. BILLS, THE SCHOOLS THAT FEAR BUILT—SEGREGATIONIST ACADEMIES IN THE SOUTH 12 (1976); SOUTHERN REGIONAL COUNCIL, THE SOUTH AND HER CHILDREN: SCHOOL DESEGREGATION 1970-71 69-70 (1971); U.S. COMM'N ON CIVIL RIGHTS, SCHOOL DESEGREGATION IN TEN COMMUNITIES 17, 29, 36, 80 (1973); *Part 3D: Desegregation Under Law, Hearings Before the Select Committee on Equal Educational Opportunity of the United States Senate*, 91st Cong., 2d Sess. (1970); Commentary, *Civil Rights—42 U.S.C. 1981: Keeping a Compromised Promise of Equality to Blacks*, 29 U. FLA. L. REV. 318, 324 n.40 (1977); Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1445-46 (1973); Brown, *Academies: Many Parents Would Give Children Bad Educations*, SOUTH TODAY, Dec., 1970, at 12; Brown & Provizer, *The South's New Dual School System: A Case Study*, NEW SOUTH, Fall, 1972, at 59; Miles, *Private Schools: Enrollment Almost Triples in Tarheel State*, SOUTH TODAY, Dec., 1971, at 5-6; Tergen, *Closeup on Segregation Academies*, NEW SOUTH, Fall, 1972, at 50; Tergen, *Private Schools*, Charleston Style, SOUTH TODAY, Jan./Feb., 1971, at 1; *Instant Schools*, NEWSWEEK, Jan. 26, 1970, at 59.

Courts have also long recognized the relationship between private academies and public school desegregation. *See, e.g.*, Gilmore v. City of Montgomery, *supra*; Norwood v. Harrison, *supra*; Griffin v. County School Bd. of Prince Edward County, *supra*; Brumfield v. Dodd, 405 F. Supp. 338 (E.D. La. 1975); Green v. Connally, *supra*; Coffey v. State Educ. Fin. Comm'n, *supra*; Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd* 389 U.S. 571 (1968); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd* 368 U.S. 515 (1962).

application to this clear national policy against private discrimination in education. Some of the decisions were premised on the Fifth and Fourteenth Amendments. Others, such as *Green v. Connally*, *supra*, were premised on the nation's policy against racial discrimination as reflected in civil rights statutes and the pronouncements of this Court.[24]

The Congress ratified the *Brown* holding and reinforced the ban on federal support for segregated education in the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-2000d-4. This statute, which rests upon Congress' power under the Fourteenth Amendment, has been construed to prohibit recipients of federal assistance from permitting students attending racially discriminatory private schools to participate in federally funded programs.[25] The Congress also exercised its Thirteenth Amendment power to prohibit all racial discrimination in education, whether or not supported with federal funds. 42 U.S.C. § 1981; *see Runyon v. McCrary*, 427 U.S. 160 (1976).[26]

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[24] *See also* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51, 76 (1972) ("There is an abundance of evidence supporting the *Green* theory that segregated educational facilities contravene public policy; while public rather than private schools are the primary focus of this emphasis on racially open education, in *Green* the court was able to muster a number of earlier judicial decisions extending the same principle to private education").

[25] *See* 41 Fed. Reg. 35553 (August 23, 1976). Section 601 of the Act, 42 U.S.C. § 2000d, provides that racial discrimination cannot be practiced in "any program or activity receiving Federal financial assistance." Tax benefits to private schools are included within this prohibition. *See, e.g.*, McGlotten v. Connally, *supra*, 338 F. Supp. at 460-61, in which the three-judge court held that assistance provided through the tax system is "Federal financial assistance" within the meaning of the Act.

[26] In an effort to lend support to its contentions that the IRS is the sole source of our nation's policy against racial discrimination in private schools, Goldsboro argues that *Runyon* is irrelevant to the present case because it reserved the question of the appropriate application of § 1981 to a school that discriminates on religious grounds. Brief for Goldsboro at 39. But this is not so. Even if in a particular case the First Amendment might give rise

In summary, we submit that this nation has a strong, clearly defined, constitutionally rooted policy against racial discrimination in all schools of this country, and has a constitutional ban against any governmental support for such discrimination. The sources of this policy and ban are the Fifth, Thirteenth, and Fourteenth Amendments to our Constitution. As is next discussed, petitioners have not shown themselves to be entitled to an exemption from these compelling governmental interests.

C. The Government's Interests are Sufficiently Compelling to Outweigh the Minimal Burden on Petitioners' Free Exercise Rights.

We agree with petitioners that resolution of their Free Exercise claim requires a balancing of their interests against those of the public. This Court has recently indicated that such a balancing is a "delicate" process, *McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978), one that requires a "sensitive and difficult accommodation of the competing interests involved." *Id.* at 635 n.8 (Brennan, J., concurring in the judgment). It is for this reason that the inquiry into the precise nature of

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to a *defense* sufficient to defeat § 1981's application to a sectarian school's racial discrimination, it would not be because § 1981 and the government's constitutionally rooted policies did not apply to that school. Rather, it would be because § 1981 and its underlying policies were overridden by a more important policy. Fiedler v. Marumsco Christian Schools, 631 F.2d 1144, 1150 (4th Cir. 1980) (holding that in a § 1981 action, "the sectarian nature of the school is important only insofar as it may give rise to a constitutional defense to the claim [of racial discrimination]"). *See* Note, *Section 1981 after Runyon v. McCrary: The Free Exercise Right of Private Sectarian Schools to Deny Admission to Blacks on Account of Race*, 1977 DUKE L.J. 1219, 1252 [hereinafter cited as "1977 DUKE L.J."] ("Although *Runyon's* holding was limited to non-sectarian schools, this governmental interest remains unchanged when a sectarian school asserts a free exercise claim as a defense to a section 1981 action. The only difference is that the courts must now determine whether the government's interest is sufficient to outweigh the opposing first amendment claim").

each of the competing interests—including an examination of the ramifications of preferring one or the other interest—must be as thorough as that undertaken by this Court in *Yoder*. In our view, petitioners have either overlooked or misjudged most of the important elements in this balancing process.

First, petitioners have woefully mischaracterized the government's interest. As we have shown above, what is at stake here is not a vaguely conceived, unsupported IRS view of public policy, but rather, constitutionally rooted and constitutionally compelled public interests of the highest order—interests that have been given explicit voice and definition by this Court and the Congress. There can be no doubt that the government's interest in carrying out *constitutional obligations* is a "compelling" one, even in the face of a First Amendment claim. *See Widmar v. Vincent*, 50 U.S.L.W. 4062, 4064 (U.S., Dec. 8, 1981).

Second, quite unlike the cases heavily relied on by petitioners—*Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board*, 101 S.Ct. 1425 (1981)[27]—here the government's interest is enhanced still further by the number of other exemptions that may have to be granted were petitioners to prevail.[28] Thus, there are thousands of private schools in this country which are currently recognized as tax exempt under Section 501(c)

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[27] In both those cases, the only governmental interests advanced to balance against the plaintiffs' Free Exercise rights were the state's concern with protecting unemployment insurance funds, and a speculative contention concerning the avoidance of inquiry into religious beliefs. Since in neither case was there any reason to expect that the number of people seeking a religious exemption (and therefore unemployment benefits) would be significant, and since there had been no showing that there had been or likely would be any inquiries into religious beliefs, the Court concluded that the State's interest was minimal. Hence, the plaintiffs' rights prevailed. 374 U.S. at 407; 101 S. Ct. at 1432.

[28] *Cf.* Braunfeld v. Brown, *supra*, 366 U.S. at 606-09.

(3), or are claiming that status.[29] 80% of these private schools are church-affiliated, and they enroll 86% of all students attending private schools.[30] The threat to the public policy against governmental support of racial discrimination in private schools will be considerable if the petitioners' exemptions are granted.[31]

Third, there is another important factor ignored by petitioners which weighs heavily against them in the balancing process. "When balancing the interests of the State against the free exercise interests of individuals or institutions, invariably the first determination made by the courts is whether the religious practice affects or collides with the rights of others." [32] This is because the government's interest in regulating religiously based conduct is greater when that conduct adversely affects the welfare of others. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 630 (1943).

Thus, while in *Sherbert, Yoder*, and *Thomas* the plaintiffs' religious exercise threatened no harm to the interests of others, here that is not so. Here, petitioners'

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[29] *See* NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEPT. OF EDUC., PRIVATE SCHOOLS IN AMERICAN EDUCATION 15, 17 (1981).

[30] *See id.*; Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U.L. REV. 847; Note, *The IRS, Discrimination, and Religious Schools: Does the Revised Proposed Revenue Procedure Exact Too High a Price?*, 56 NOTRE DAME LAW. 141 (1980).

[31] *See* Brown v. Dade Christian Schools, Inc., *supra*, 556 F.2d at 323 n.17, where Judge Goldberg expressly noted that, unlike the situations presented in *Yoder* and *Sherbert*, if religiously based discrimination were allowed to create an exemption to § 1981, numerous fraudulent claims might follow. He reasoned that the first exemption granted for such discrimination is "not one that we could recognize without inviting numerous additional claims. . . . Those who turned to white academies in response to public school integration will undoubtedly seek ways to avoid *Runyon v. McCrary*'s mandate. . . . We therefore cannot view Dade Christian's claim in isolation." *Id.* at 324.

[32] 1977 DUKE L.J. at 1255; *see* cases cited therein.

discrimination directly affects those who are refused admission to their schools on racial grounds (and, in the case of Bob Jones, those who are denied the opportunity to freely associate with persons of other races). Moreover, the government's continued support of such racially discriminatory private schools cannot help but frustrate the equal-protection rights of children attending public schools.[33]

Finally, contrary to the contentions of petitioners, numerous cases have already been decided where public interests of lesser, as well as equal, magnitude as those presented here have prevailed over Free Exercise rights; in some, unlike the instant matter, government directly prohibited a religious practice;[34] in others, the Free Exercise claim asserted was, as here, religiously based racial discrimination.[35] One of the latter cases involved Bob Jones itself. *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).[36]

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[33] *See* note 4 and accompanying text, *supra*; note 23 *supra*.

[34] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (state's interest in protecting minors held sufficient to support application of statute prohibiting minors from selling merchandise in public places to distribution of religious literature by minor); Reynolds v. United States, 98 U.S. 145 (1878) (state's interest in restricting "odious" practice of polygamy held to justify application of statutory ban to adherents of Mormon religion).

[35] *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941 (D.S.C. 1966), *rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *modified on other grounds and aff'd per curiam*, 390 U.S. 400 (1968).

[36] The court held that Bob Jones' racially discriminatory policies required the termination of federal assistance programs to veterans at the school, under the proviso of the Civil Rights Act, 42 U.S.C. § 2000d, forbidding such federal assistance for discriminatory schools. In upholding the termination of benefits, the court rejected the same Free Exercise claim being made here, noting (as we have stressed in this brief) that the policies underlying the Civil Rights Act are of great weight, and that the indirect burden on Bob Jones was minimal. 396 F. Supp. at 607-08 and n.30.

So far as we are aware, the result reached in the previous *Bob Jones* case is in accordance with that in all other cases which have addressed the issue and is widely supported by the commentators. We submit that the same result should be reached here. Given the undeniable strength of the public policy against lending government support to racially discriminatory schools—a policy we urge the Court to find is a constitutionally compelled one; given further the facts that petitioners' religious practice threatens the welfare of others, and that the granting of their exemption threatens to create a loophole undermining the policy; and, finally, given the fact that the burden on petitioners' Free Exercise has not been shown to be significant, we submit that the balance tips decidedly against petitioners and any others similarly situated.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should affirm the decisions below, and, in so doing, declare that the conferral of tax benefits on any private racially discriminatory institution is unconstitutional and that the refusal to confer such benefits on any such school, even one whose discrimination is religiously based, does not violate the First Amendment.

Respectfully submitted,

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