Nos. 81-1 and 81-3

In the Supreme Court of the United States

OCTOBER TERM, 1982

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The United States believes resolutely that Congress ought to deny tax-exempt status to any educational institution that pursues a racially discriminatory policy.[1] The overriding national commitment to the eradication from American society of differences in the treatment of individuals based solely on race or color is especially strong in the field of education, where racial discrimina-

[1] The President early this year sent to both Houses of Congress legislation that would require such a result. See Senate Bill, S. 2024, 97th Cong., 2d Sess. (1982); House Bill, H.R. 5313, 97th Cong., 2d Sess. (1982).

tion has long been condemned by this Court, by the Congress, and by all elements of the Executive Branch.

The Government's position in this case signals no compromise of this fundamental principle of nondiscrimination in matters of race. Rather, it rests on the equally fundamental tenet that Congress—not the courts or the Executive Branch—has exclusive authority, and responsibility, under Article I of the United States Constitution to legislate. While we think Congress *should* by law authorize the IRS to deny tax exemptions to racially segregated schools, nowhere in the Internal Revenue Code (or elsewhere) has it done so. And, in the absence of such a legislative mandate, the result desired—no matter how much desired—cannot constitutionally be accomplished by either judicial or administrative action.

At the center of the present controversy is § 501(c)(3) of the Code, which *amicus curiae* William T. Coleman, Jr. ("Amicus") argues can be construed to permit IRS denials of tax exemptions to petitioners and other *bona fide* educational institutions that engage in racially discriminatory practices. We argued in our main brief ("Br.") that such a construction of § 501(c)(3) is contrary to both its language and its legislative history, and flies in the face of many years of administrative interpretation by those charged with implementing the Code. This reply will be limited to supplementing those earlier remarks only to the extent necessary to respond to specific points relied upon by Amicus.

A. Understandably, Amicus does not argue that Congress intended specifically to deny tax-exempt status to racially discriminatory private schools. Such an argument is foreclosed by American history; the statutory exemption for educational institutions was initially enacted at the turn of the century,[2] a time when—as Amicus

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[2] Tariff Act of 1913, ch. 16, § II, 38 Stat. 114, 166. The intent of the 1913 Congress, of course, forms the core of the question of statutory interpretation at issue in this case. See *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472 (1979) (construing § 501(c)(6)).

readily acknowledges (A. Br. 43-44)—racial segregation in education and other pursuits was widespread and in many places legally required.[3]

Rather, Amicus maintains that Congress intended to accord tax-exempt status only to organizations satisfying the requirements of a "charity" at common law. Thus, notwithstanding the carefully disjunctive statutory enumeration in § 501(c)(3) of eight discrete purposes qualifying for exemption, it is Amicus' thesis that Congress intended *any* organization devoted to "purposes beneficial to the community" (A. Br. 19-20, quoting *Commissioners* v. *Pemsel*, [1891] A.C. 531, 583) to be exempt, provided that—in the common-law sense of "charitable"—the organization engages in no practices that are illegal or inconsistent with public policy. On this reasoning, the other seven separately enumerated exempt purposes—five of which were specifically added by different amendments to the statute—are said to be subsumed within the operative term "charitable," and, in Amicus' view, are merely intended as "illustrative examples" of purposes beneficial to the community (A. Br. 18-24, 35-40).

Amicus' theory thus attributes to Congress the highly improbable intention of "vesting in the Commissioner virtually plenipotentiary power over philanthropic organizations" (*Commissioner* v. *"Americans United," Inc.*, 416 U.S. 752, 773 (1974) (Blackmun, J., dissenting)), by authorizing him not only to determine which purposes are "beneficial to the community," but also to divine "public policy" and to police exemptions accordingly. Moreover, it drains all independent legal significance from seven of the eight separately enumerated exempt pur-

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[3] The exemption for educational institutions now contained in § 501(c)(3) first appeared in 1894, two years before the Court's decision in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). See Tariff Act of 1894, ch. 349, 28 Stat. 509, 556. The 1894 Act was invalidated in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), but the income tax, as well as the statutory exemption for educational institutions, was reinstated in 1913, after ratification of the Sixteenth Amendment. See note 2, *supra*.

poses in § 501(c)(3) and reduces to a meaningless exercise Congress' repeated amendments of the statute to include additional exempt purposes. The fulcrum for this extravagant authority that Congress allegedly reposed in the Commissioner—the word "charitable"—simply cannot support the weight of Amicus' tortured statutory construction.[4]

The starting point of Amicus' analysis is Congress' initial enactment in 1894 of an exemption for "charitable, religious or educational purposes," which, according to Amicus (A. Br. 19), "closely tracked" Lord Macnaghten's classic enumeration of the four principal divisions of English common-law charitable trusts: "[T]rusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community * * *." *Commissioners* v. *Pemsel, supra,* [1891] A.C. at 583.[5] Conspicuously absent from Congress' formulation, however, is the very division on which Amicus' entire argu-

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[4] Amicus' argument that the seemingly carefully chosen words of § 501(c)(3) are tautologous must overcome not only logic, but the well-established presumption giving effect to "every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). Contrary to Amicus' claim (A. Br. 35), here the context of § 501(c)(3) also compels a disjunctive reading, as we demonstrate below.

[5] Amicus places heavy emphasis upon Lord Macnaghten's opinion in *Pemsel* (A. Br. 20-22). There, the question was whether rental income devoted to the missionary work of the Protestant Episcopal Church in "heathen nations" was exempt from taxation under a statute exempting "rents and profits of lands * * * belonging to any hospital, public school, or alms-house, or vested in trustees for charitable purposes." In determining that the term "charitable purposes" was used in its broad legal sense rather than its narrow "relief of the poor" sense, Lord Macnaghten pointed to, among other things, a sister provision of England's Income Tax Act of 1842, which required a person "acting for such school, hospital, or alms-house, or *other trust for charitable purposes*" ([1891] A.C. at 584) to prove that the exempt income was being put to charitable uses. This language satisfied Lord Macnaghten that "the Legislature considered the purposes of a public school to be charitable, and a public school to be a trust for charitable purposes, just as much

ment rests—*i.e.*, purposes beneficial to the community. Nonetheless, Amicus contends that the word "charitable" was at the time used and understood by Congress in its broad, English common-law sense,[6] rather than its narrower, traditional sense of "relief of the poor." All available evidence of legislative intent argues otherwise.

B. Had Congress intended the term "charitable" in § 501(c)(3) to be understood as applying to all organizations devoted to purposes beneficial to the community, it surely would have been consistent in its selection of language for sister Code provisions. Analysis of language elsewhere in the Code, however, fails to support Amicus' thesis, and, indeed, plainly contradicts it.

In § 501(c)(4) Congress used the phrase "operated exclusively for the promotion of social welfare" in describing the exemption available to "[c]ivic leagues or organizations not organized for profit * * *." The exemption in § 501(c)(4) for "social welfare" purposes, like the exemption for "charitable" purposes in § 501(c)(3), was initially enacted in Section II(G)(a) of the Tariff Act of 1913, ch. 16, 38 Stat. 114, 172. It was included in the 1913 Act "as a result of a belief that the provision then exempting religious, charitable or educational organizations [*i.e.*, the predecessor to § 501(c)(3)] *was not broad enough* to cover many non-profit organizations whose activities benefited the general public." *People's Educational Camp Society, Inc. v. Commissioner*, 331 F.2d 923, 930 (2d Cir. 1964; emphasis added); see *Tariff Schedules: Briefs and Statements on H.R. 3321 filed with the Senate Comm. on Finance*, 63d

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as an almshouse or a hospital" (*id.* at 587-588), a fact which he found sufficient "to displace the narrow view" of "charitable" taken by the lower court. *Ibid.* Here, in contrast, sister Code provisions of § 501(c)(3) (see pages 5-8), as well as all other available evidence of the meaning Congress assigned to the term "charitable," lead to the opposite conclusion.

[6] Amicus notes that the legislative history of the Tariff Act of 1894 refers frequently to the English income tax (A. Br. 20 n.16). These references, however, only discuss generally the experiences of

Cong., 1st Sess. 2001 (1913) (statement of U.S. Chamber of Commerce) (hereinafter *"1913 Briefs and Statements"*).[7]

The juxtaposition in § 501 of the phrase "for the promotion of social welfare" in subsection (c)(4) and the term "charitable," which appears as but one of several enumerated exempt purposes in subsection (c)(3), manifests a clear congressional understanding of the latter term as embracing a narrower range of conduct than the former. The Commissioner so ruled in 1923[8] and the following year formally promulgated an interpretive regulation expressly providing that civic organizations "engaged in promoting the welfare of mankind, other than organizations comprehended within [§ 501(c)(3)], are included within [§ 501(c)(4)]." Treas. Reg. 65, Art. 519 (1924).

Indeed, with respect to another type of organization exempted under § 501(c)(4)—"local associations of employees, * * * the net earnings of which are devoted ex-

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England, as well as other countries, with an income tax. See H.R. Rep. No. 276, 53d Cong., 2d Sess. 5 (1894) (discussing income tax laws of England, Prussia, Austria, and Italy); 26 Cong. Rec. 584-588, 1609-1610, 1612-1614, 3781, 6612-6615 (1894). The exemption of certain organizations from England's income tax is nowhere discussed in the 1894 legislative history cited by Amicus.

[7] See *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 478 n.8 (1979).

[8] See I.T. 1800, II-2 Cum. Bull. 152 (1923) (interpreting "charitable" in its "popular and ordinary sense" as pertaining only to "relief of the poor"). The IRS continues to hold that some civic organizations devoted to the social welfare—though they would certainly qualify as common-law charities—are not "charitable" organizations qualified to receive deductions under § 170. See, *e.g.*, Rev. Rul. 70-4, 1970-1 Cum. Bull. 126; Rev. Rul. 57-297, 1957-2 Cum. Bull. 307.

Amicus (A. Br. 20, 30, 33) attaches great significance to an opinion by then Solicitor of Internal Revenue Hartson holding that the term "charitable" in the *estate tax* provisions was to be consrtued in its broad, common-law sense. Sol. Op. 159, III-1 Cum. Bull. 480 (1924). In light of Solicitor Hartson's subsequent opinion recognizing the continued validity of the Service's interpreta-

clusively to charitable, educational, or recreational purposes"—the 1924 IRS regulation defined the term "charitable" as "relief of the poor," as did the portion of the regulation pertaining specifically to § 501(c)(3) organizations. *Id.* at Arts. 517, 519; see Br. 20-22. This regulation was reissued a total of eight times before being substantially modified in 1959. See Br. 21-22.

Other related Code provisions further refute Amicus' contention that the term "charitable" in § 501(c)(3) was intended by Congress to encompass all of the other enumerated purposes. For example, § 507(g)(2) provides that the tax normally assessed on termination of a private foundation may be abated if prescribed action is taken "to insure that the assets of such private foundation are preserved for such *charitable or other purposes* specified in § 501(c)(3) * * *." Section 512(a)(3)(B)(i) excludes from the calculation of "unrelated business taxable income" all income set aside "for a purpose specified in § 170(c)(4)."[9] Identical language is also found in § 512(a)(4). Section 513(a), as discussed in our principal brief (Br. 15-16), defines "unrelated trade or business"

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tion of "charitable" in I.T. 1800 (see S.M. 2160, III-2 Cum. Bull. 151 (1924)), and in light of the Service's promulgation, in the very same year, of a *formal regulation* interpreting charitable as "relief of the poor" (Treas. Reg. 65, Art. 517 (1924)), Sol. Op. 159 lends no weight to Amicus' argument.

[9] Section 170(c)(4) permits the deduction of contributions "for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals." Amicus finds support for a broad interpretation of "charitable" in Congress' generic use of the term "charitable contribution" in § 170. The point collapses, however, in light of the numerous related Code sections that define or otherwise qualify certain statutory terms by reference to "one or more of the purposes described in § 170(c)(2)(B)." See Code sections cited in note 11, *infra*. Indeed, § 170 itself confirms Congress' intent to accord the term "charitable" a meaning separate and distinct from that of any other exempt "purpose or function" enumerated in § 501. Section 170(b)(1)(A)(iv) places percentage limitations on the allowable deduction for contributions to "an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or perform-

as any business "not substantially related * * * to the * * * performance by such organization of its *charitable, educational, or other purpose or function* constituting the basis for its exemption under § 501 (or, in the case of [certain specified organizations], to the * * * performance of *any purpose or function* described in § 501(c)(3))." Identical language appears in § 514 with respect to the definition of "debt-financed property." See *id.* at § 514(b)(1)(A)(i).[10] Finally, in the Code provisions dealing with certain taxes imposed on private foundations, the phrase "*one or more of the purposes* described in § 170(c)(2)(B)" is repeated frequently.[11]

These references to related Code provisions emphatically confirm what is plain on the face of § 501(c)(3): each term describing an exempt purpose has a separate, distinct, and finite meaning, and each of the enumerated purposes constitutes a sufficient and independent basis for exemption under § 501(a).[12]

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ance by such organization of its *charitable, educational, or other purpose or function* constituting the basis for its exemption under § 501(a)) from the United States * * *." Identical language is found in § 170(b)(1)(A)(vi). See also § 170(e)(1)(B)(i).

[10] In the Code provisions relating to employment taxes, Congress defined "employment" to exclude "service performed in the employ of a *religious, charitable, educational, or other organization* described in § 501(c)(3)." 26 U.S.C. 3121(b)(8)(B) and 3306(c)(8). Section 4911(e)(1)(A), which imposes a tax on excess lobbying expenditures by certain exempt organizations, defines "exempt purpose expenditures" to mean the "amounts paid * * * to accomplish *purposes described in § 170(c)(2)(B) (relating to religious, charitable, educational, etc., purposes).*"

[11] See 26 U.S.C. 4942(g)(1), 4944(c), 4945(d)(5), 4947(a)(1), 4947(a)(2) and 4947(b)(3)(A).

[12] Amicus invokes (A. Br. 37) the doctrine of *noscitur a sociis*, as enunciated in *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303 (1961). *Jarecki*, however, compels a disjunctive reading of the purposes listed in § 501(c)(3). As in *Jarecki*, the words of the provision "strongly suggest that a precise and narrow application was intended * * *" and to hold otherwise would be to "adopt a strained reading which renders one part a mere redundancy." *Id.* at 307. Indeed, Amicus' reading is particularly strained since Congress has

C. Amicus' contention that Congress used the term "charitable" in its sweeping common-law sense is further contradicted by the statute's legislative history. Amicus attaches great significance to a few errant remarks by some individual legislators concerning "charitable organizations" or "charitable purposes" generally (A. Br. 24-28). While casual review of the context of the cited remarks robs them of their proffered significance,[13] our response does not depend on a parsing of these passages.

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amended the sentence several times, adding one "redundancy" after another. Further, the common-law meaning of "charitable" is so broad and elastic as to have no precise boundaries, the classic circumstance for invoking the narrowing doctrine of *noscitur a sociis*. *Ibid.*; see *National Muffler Dealers Ass'n* v. *United States*, *supra*. Nor can support for Amicus' construction of § 501(c)(3) be found in decisions (A. Br. 36) in which this Court has "look[ed] beyond the mere words to the *obvious intent* [and] cannot help seeing that the word 'or' must be taken conjunctively." *Union Insurance Co.* v. *United States*, 73 U.S. (6 Wall.) 759, 764 (1867); see *De Sylva* v. *Ballentine*, 351 U.S. 570, 573-576 (1956); *United States* v. *Fisk*, 70 U.S. (3 Wall.) 445, 447 (1865). Unlike the cited cases, reading the word "and" into § 501(c)(3) in place of "or" would not remove an absurdity, but rather would create one—we doubt that any organization in the country is devoted to *all* of the enumerated purposes. See note 4, *supra*.

[13] Amicus relies (A. Br. 25-26) largely on a single reference from the 1902 House Ways and Means Committee report that mentions "the whole domain" of charities; in context, that phrase refers to a specific listing of "charitable" organizations, all of which comfortably fit the narrow "relief of the poor" concept. H.R. Rep. No. 1702, 57th Cong., 1st Sess. 3 (1902). Representative McCall's remarks in 1902 similarly were made in the narrow context of a like listing of charities he referenced. 35 Cong. Rec. 5564-5565 (1902). Senator Bacon's statement in 1909 referred not to § 501(c)(3), but to a separate amendment exempting a broader class of religious, educational, charitable and "benevolent" institutions from a tax on corporate income. 44 Cong. Rec. 4149-4150 (1909). Senator Hollis' statement in 1917 is misquoted; he actually explained his amendment as concerning "donations to charity." 55 Cong. Rec. 6728 (1917). Moreover, shortly thereafter Senator Robbins argued forcefully that a tax deduction for contributions to "charitable organizations" should be enacted "in the interest of the poor people." 56 Cong. Rec. 10426 (1918). Indeed, "relief to the poor" was a concept

Our point is simply this: After investigating § 501(c)(3)'s legislative history, which spans over 80 years and includes nine additions to its language, Amicus has not cited, and we have not found, a single passage stating or implying that Congress intended to exempt all organizations devoted to any purpose "beneficial to the community," that it intended the Commissioner to regulate eligibility for § 501(c)(3) exemptions in accordance with his perceptions of "public policy," that it intended *bona fide* "educational" or "religious" organizations to qualify also as common-law charities, or that it used the term "charitable" in its common-law sense rather than its commonly understood "relief of poverty" sense. Had Congress intended so unusual and sweeping a construction of the seemingly simple, straightforward language of § 501(c)(3), the statute's legislative history would surely contain clear evidence to that effect. The legislative history, however, is rich with evidence precisely to the contrary.

Section 501(c)(3) can be traced back to § II(G)(a) of the 1913 Tariff Act, which was enacted on the heels of ratification of the Sixteenth Amendment. The bill initially introduced in the House exempted only religious, charitable, and educational organizations, as had the Tariff Act of 1894. 50 Cong. Rec. 1306 (1913). On the House floor, Representative Rogers offered an amendment adding "benevolent" and "scientific" to the list of exempt purposes. Citing a Massachusetts state court decision,[14] Rogers counseled that the terms "charitable" and

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equated with the term "charitable" throughout the debates in 1917. See *id.* at 10418-10428. And in 1935 Representative McCormack (79 Cong. Rec. 12423) and the House minority report (H.R. Rep. No. 1681, 74th Cong., 1st Sess. 20), both referred to by Amicus, explained that charitable deductions are for the benefit of corporations contributing to "community chests and other charities" that help assume "the burden of caring for unemployables." See also remarks of Rep. Kramer, 79 Cong. Rec. 12423 (1935).

[14] Representative Rogers was apparently referring to *New England Theosophical Corp.* v. *Boston*, 172 Mass. 60, 63 (1898), which held that "[t]he word 'charitable' refers to hospitals and other

"benevolent" are not synonymous and that benevolent organizations are equally deserving of exemption. *Ibid.*

Rogers' Amendment was defeated (*ibid.*),[15] but in the Senate the bill was amended to accord tax-exempt status to "scientific" organizations. Moreover, the same Senate amendment added § 501(c)(4)'s predecessor, exempting "any civic league or organization * * * operated exclusively for the promotion of social welfare" (50 Cong. Rec. 3856 (1913)), based specifically on the view that such "civic * * * organizations could not be held to be 'organized and operated exclusively for religious, charitable, or educational purposes.'" *1913 Briefs and Statements*, *supra*, at 2002. Thus, Congress refused to include a sweeping term ("benevolent") designed to exempt any philanthropic purpose, yet at the same time enlarged the scope of § 501(c)(3) by adding another specific, limited purpose ("scientific") to the list—a purpose that clearly would have been embraced within the exemption for "charitable" purposes had Congress intended that term to be construed in its common-law sense. And, with the same stroke of the pen, Congress elsewhere exempted, in plain and straightforward language, all civic organizations devoted to promoting the general welfare. See text, *supra*, at 5-6. In light of this legislative history, Amicus' proffered interpretation of § 501(c)(3) is untenable.

Organizations devoted to "prevention of cruelty to children or animals" and "literary" purposes were ex-

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charitable institutions for the relief of the poor or the sick." The Massachusetts court interpreted "benevolent" more broadly, to include "charitable" purposes as well as activities inspired by "kindness, good will, or a disposition to do good * * *." *Id.* at 62.

[15] Representative Hull opposed the amendment, arguing that all nonprofit corporations were exempt, and that accordingly, there was "no occasion whatever for undertaking to particularize." 50 Cong. Rec. 1306 (1913). Congress as a whole, however, did find a need to particularize, adding only "scientific" to the list of exempt purposes.

empted in 1918 and 1921, respectively.[16] The Revenue Act of 1924, ch. 234, Section 231(6), 43 Stat. 282, reenacted the provisions of § 501(c)(3) without change, notwithstanding an enthusiastic effort on the Senate floor to reverse the Commissioner's 1923 interpretation of "charitable" as "relief of poverty." Senator Willis, explaining that the "Commissioner * * * has decided that under the existing law an allowance can not be made for gifts to a community chest unless those gifts shall be for the relief of the poor" (65 Cong. Rec. 8171 (1924)), sought to amend the section by adding the following parenthetical after the word "charitable": "(including preventive and constructive service for relief, rehabilitation, health, character building, and citizenship)" (*ibid.*). While acknowledging that this amendment had been criticized "in private conversation because it is thought that language is too broad," Senator Willis nonetheless stated (*ibid.*) that his purpose was to bring "general welfare work" within the meaning of "charitable." Senators Smoot and Walsh responded that the terms of the amendment were too sweeping and indefinite. See *id.* at 8172. Arguing that the statute as written goes "just as far

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[16] Revenue Act of 1918, ch. 18, § 231(6), 40 Stat. 1076; Revenue Act of 1921, ch. 136, § 231(6), 42 Stat. 253. Neither amendment sparked lengthy discussion. During the Senate hearings concerning a series of amendments to § 501's predecessor, the Treasury Department's Tax Adviser testified that bona fide nonprofit Masonic, Odd Fellows, and similar organizations had been exempted by the IRS, but that the IRS "had the hardest kind of task to prove that they were educational institutions." *Internal Revenue: Hearings on H.R. 8245 Before the Senate Comm. on Finance,* 67th Cong., 1st Sess. 76 (1921) (*"1921 Hearings"*). Proving that these oragnizations qualified under Amicus' construction of "charitable" would have been no task at all.

Quoting a remark made by Senator Smoot during the 1921 hearings, Amicus states (A. Br. 40 n.38): "Congress noted that the law [regarding the "charitable" nature of gifts for governmental purposes] had 'always been construed that way anyhow.'" Senator Smoot's remark, however, had nothing to do with gifts for governmental purposes, but rather concerned the IRS' practices with respect to calculating the maximum allowable deduction under § 170's

as it is safe to go," Senator Smoot stated (*ibid.*): "It seems to me * * * that we have properly limited the exemptions that ought to be allowed to gifts for religious, charitable, scientific, literary, or educational purposes. Now, if we are going virtually to use the word 'welfare' —and that is what the Senator says his amendment means—* * * no human being can tell where it is going to end." [17] The amendment was rejected.

As noted in our principal brief (Br. 20-22), over the next three decades Congress repeatedly *reenacted* § 501(c)(3), amending its language on three occasions to include provisions wholly redundant under Amicus' interpretation.[18] Similarly, the IRS regularly reissued its regulations interpreting "charitable" as relief of poverty. See Br. 21-22. Thus, contrary to Amicus' contention (A. Br. 33-34), when Congress reenacted the Code in 1954, the formal administrative interpretation of § 501(c)(3) had for 30 years been uniformly and directly contrary to Amicus' proffered construction.[19] Moreover, had Con-

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predecessor. See *1921 Hearings*, *supra*, at 54 (remarks of Sen. Smoot and Dr. Adams).

[17] Senator Walsh expressed a similar concern. 65 Cong. Rec. 8172 (1924).

[18] Amicus also relies (A. Br. 26) on a 1938 House Ways and Means Committee Report, H.R. Rep. No. 1860, 75th Cong., 3d Sess. (1938), for his argument (Br. 26-28) that Congress must have intended to require all § 501(c)(3) organizations to qualify as common-law charities. We deal with this point in our principal brief (Br. 22 n.19) and add only that the very House Report on which Amicus relies refutes his construction of "charitable." In no less than four places, the Report discusses deductions and exemptions for "*charitable and other purposes*" and in one telling passage acknowledges the deductibility of funds "used * * * for charitable and *other purposes (such as missionary and educational purposes)*." H.R. Rep. No. 1860, *supra*, at 19-20.

[19] Amicus' contention (Br. 23-33) that the IRS and the lower federal courts have consistently applied common-law standards under § 501(c)(3) is not well-taken. His reliance on Sol. Op. 159 is discussed at note 8, *supra*. A number of IRS rulings before and after 1959 have shown clearly that providing relief for the poor is a cen-

gress "incorporated" the common-law concept of charity into § 501(c)(3) in 1954, as Amicus maintains (A. Br. 33-34), certainly some hint of its intention would be reflected in the record of legislative deliberations accompanying passage of the Act. Instead, the record reflects only that Congress *amended* § 501(c)(3) to "incorporate" another specific and limited exempt purpose [20]—a purpose ("testing for public safety") clearly within the existing exemption for "charitable" purposes under Amicus' interpretation.

This extended record of legislative activities and regulatory interpretations overwhelmingly refutes Amicus' claim that Congress at all times between 1894 and 1954 used the term "charitable" in § 501(c)(3) and its prede-

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tral element of "charitability" under § 501(c)(3). See, e.g., Rev. Rul. 64-231, 1964-2 Cum. Bull. 139; Rev. Rul. 61-72, 1961-1 Cum. Bull, 188; Rev. Rul. 57-467, 1957-2 Cum. Bull. 313; Rev. Rul. 56-185, 1956-1 Cum. Bull. 202 (hospital and other organizations exempt only if indigents receive free or reduced-cost care).

Amicus' citation of judicial authority is also unpersuasive. In *Slee* v. *Commissioner*, 15 B.T.A. 710, 715 (1929), aff'd, 42 F.2d 184 (2d Cir. 1930), the Board of Tax Appeals specifically rejected a broad definition of the purposes qualifying for deduction. Judge Learned Hand affirmed, noting that, while a clinic providing free health care to those who cannot afford to pay is a charitable venture, the organization's lobbying activities in that case kept it from being *exclusively charitable*. 42 F.2d at 185-186. Although several courts have discussed common-law as well as statutory standards in cases dealing with §§ 501(c)(3) and 170, and related provisions, their holdings generally have been on narrow statutory grounds. See, *e.g.*, *Underwriters' Laboratories, Inc.* v. *Commissioner*, 135 F.2d 371, 373 (7th Cir. 1943) (denying exemption due to private inurement); *Girard Trust Co.* v. *Commissioner*, 122 F.2d 108, 110-111 (3d Cir. 1941) (granting exemption to "religious" organization despite its attempts to influence legislation in the absence of a statute barring such activity); *Hazen* v. *National Rifle Association*, 101 F.2d 432, 436 (D.C. Cir. 1938) (denying exemption because educational activities were "incidental and collateral"); *St. Louis Union Trust Co.* v. *Burnet*, 59 F.2d 922, 928 (8th Cir. 1932) (granting charitable deduction where testator "intended to provide for relief of the poor" but used the broader term "benevolent").

[20] Internal Revenue Code of 1954, ch. 736, 68A Stat. 163.

cessor provisions in the broad common-law sense. Nonetheless, in 1959 the IRS issued regulations under § 501 (c) (3) assigning to the term "charitable" its expansive common-law meaning. See 26 C.F.R. 1.501(c) (3)-1(d) (2). As noted in our main brief (Br. 23 n.21), a regulation so "out of harmony with the statute, is a mere nullity." *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936); *Iselin* v. *United States*, 270 U.S. 245, 250-251 (1926); *Morrill* v. *Jones*, 106 U.S. 466, 467 (1882).

D. Amicus contends (A. Br. 33-34, 48-56) that Congress has since 1959 "ratified and approved the construction placed on § 501(c) (3)" by the IRS in its 1959 regulations and Rev. Rul. 71-447—and by the district court in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971). We have dealt with this contention in our principal brief (Br. 26-38), but a further comment is needed.

The statutory construction purportedly accepted and ratified by Congress assigns to the term "charitable" its all-encompassing common-law meaning. Thus, neither the IRS regulations, the *Green* court, nor Amicus suggests that Congress had a specific intent to deny exempt status to racially discriminatory schools. As previously noted (note 2, *supra*), such an interpretation is foreclosed by the history of racial segregation surrounding the statute's enactment in 1913.

The inquiry into congressional ratification here is thus not governed by the narrow question whether Congress approves or disapproves of the result yielded by the questioned regulations, the *Green* decision and Amicus' similar analysis (*i.e.*, that racially discriminatory educational institutions are denied tax benefits). It is, instead, concerned solely with the separate question whether the statutory interpretation relied upon to reach that result (*i.e.*, use of the expansive common-law meaning of "charitable" to define the contours of § 501(c) (3)) has been approved by subsequent Congresses as reflective of the original legislative intent. In short, as in all cases of statutory construction, the issue is not whether a *result* yielded by

an administrative interpretation appears to be consistent with a subsequent analogous enactment, but rather whether "that *interpretation* is the one intended by Congress." *CBS, Inc.* v. *FCC*, 453 U.S. 367, 385 (1981), quoting *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); see, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran, Inc.*, No. 80-203 (May 3, 1982), slip op. 23; *Haig* v. *Agee*, 453 U.S. 280, 301 (1981); *United States* v. *Rutherford*, 442 U.S. 544 (1979).[21]

Amicus argues (A. Br. 51) that by enacting § 501(i) in 1976, Congress "approved the IRS interpretation of § 501(c)(3) with positive legislation."[22] But passage of

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[21] Each of the cases relied upon by Amicus—*CBS*, *Haig*, and *Rutherford*, *supra*,—involved an administrative statutory construction that was (1) longstanding and consistent, (2) supported by or consistent with the statute's plain language, (3) supported by persuasive legislative history, and (4) not overturned by Congress. Here, the IRS' regulatory construction of the term "charitable" was "substantially contemporaneous" (see, *e.g.*, *National Muffler Dealers Ass'n* v. *United States*, *supra*), longstanding and consistent until 1959, when the regulatory construction was broadened to incorporate common-law concepts. As the Court noted in *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 9-10 n.12, a change in an administrative construction "undercut[s] the argument that the regulations are entitled to deference * * *." See, *e.g.*, *Haig* v. *Agee*, *supra*, 453 U.S. at 303. Moreover, Amicus' interpretation of the statute requires a contortion of its language. See, *e.g.*, *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978). Finally, Amicus' interpretation of "charitable" is contradicted by the statute's legislative history and is inconsistent with every pertinent congressional action taken since 1913. That Congress has not taken formal action to overturn the IRS' 1959 regulation cannot, under these circumstances, be accorded weight. Indeed, we point out that a failure by Congress formally to overturn an agency's statutory construction will be a feature of *every* case in which the administrative construction is contested—else there would be no case.

[22] Amicus also contends that Congress "acquiesced" in the agency's 1959 intepretation of "charitable" when it passed the Tax Reform Act of 1969. In reality, however, Congress in 1969 added to the Code no less than eight separate provisions containing language wholly at odds with Amicus' all-encompassing construction of the term

that provision cannot be considered legislative approval of a reading of § 501(c)(3) that would lodge with the Commissioner "unfettered power" to grant or deny exempt status on the basis of "the particular brand of social policy [he] happens to be advocating at the time." *Commissioner* v. *"Americans United," Inc., supra*, 416 U.S. at 774-775 (Blackmun, J., dissenting).[23] To the contrary, Congress framed § 501(i) in precise terms, directing the IRS to deny tax-exempt status only to § 501(c)(7) social clubs that have a written policy of racial discrimination.

As Amicus points out (A. Br. 51), in light of *Green* Congress had no occasion in 1976 to consider the question of exemptions to racially discriminatory schools. If it had—for example, if *Green* had recently been decided the other way—passage of § 501(i) strongly suggests that Congress would likely have sought to achieve the same *result* with respect to exempt educational organizations. By no means, however, does enactment of § 501(i) sug-

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"charitable." See 26 U.S.C. 170(e)(1)(B)(i); 507(g)(2); 4942(g)(1); 4944(c); 4947(a)(1); 4947(a)(2); 4947(b)(3)(A); 4945(d)(5). Moreover, while the House Report cited by Amicus (A. Br. 34) does indeed recognize that the term "charitable" had been "used in the law of trusts for hundreds of years," it also recognizes that "internal revenue agents" determined the existence of a "charitable" purpose under "a concept of service to the poor and not merely useful nonprofit service to those who can afford it." H.R. Rep. No. 91-413 (Pt. I), 91st Cong., 1st Sess. 35, 43 (1969).

[23] Notwithstanding Amicus' effort to gainsay the importance of the public policy against sex discrimination (A. Br. 47 n.48), the theory relied upon by Amicus simply cannot be confined to racial discrimination. See note 25, *infra*. Indeed, the "public policy" determinations made by the Commissioner since 1970 demonstrate the difficulties inherent in the exercise of such broad discretion. See Rev. Rul. 77-272, 1977-2 Cum. Bull. 191 (exempting program discriminating against non-Indians); Rev. Rul. 75-384, 1975-2 Cum. Bull. 204 (denying exemption to "disrup[tive]" antiwar protest group); Rev. Rul. 78-305, 1978-2 Cum. Bull. 172 (exempting group fostering tolerance of homosexuality). See also *McCoy* v. *Schultz*, 1973-1 U.S.T.C. ¶ 9233 (1973) (exempting sexually discriminatory group).

gest congressional approval, much less ratification, of the contrived statutory *interpretation* yielding the result in *Green*. The term "charitable" was in no way involved in the amendment, and nothing in the legislative history of § 501(i) suggests an intent to give an expansive reading to that term in § 501(c)(3).

Indeed, it clearly appears that the 1976 Congress had precisely the contrary understanding of § 501(c)(3). For, in the same year that it added § 501(i), Congress also amended the language of § 501(c)(3), adding to the list of exempt organizations, those institutions "foster[ing] national or international amateur sports competition." Pub. L. No. 94-455, § 1313(a), 90 Stat. 1730. Such organizations, while clearly "charitable" in the common-law sense (see 122 Cong. Rec. 25960 (1976)), were expressly exempted because of congressional uncertainty as to whether they qualified as *educational* organizations. See 122 Cong. Rec. 25961 (1976) (remarks of Sens. Long and Culver). No one suggested that amateur sports organizations would qualify as "charitable."

Nor do the 1978 congressional debates concerning the Ashbrook and Dornan Amendments support the expansive interpretation of § 501(c)(3) urged by Amicus. As recounted in detail in our main brief (Br. 26-31, 33), Congress' reaction to the Kurtz regulations leaves no room to argue that the common-law definition of "charitable" received legislative ratification.[24]

E. It is thus clear that Congress did not authorize the IRS in § 501(c)(3) to deny tax-exempt status to *bona fide* educational institutions on the ground that they are

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[24] Amicus' sweeping assertion (A. Br. 54) to the contrary is erroneous. While numerous legislators expressed agreement with the result of denying tax-exempt status for racially discriminatory schools, many also indicated their belief that the IRS had acted without authority in 1970. *See Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 586-587 (1979) (remarks of Sen. Thurmond); 125 Cong. Rec. H5884 (daily ed., July 13, 1979) (Rep. Grassley).

not also "charitable" in the common-law sense.[25] For all of the reasons stated here and in our principal brief,[26] the judgments of the courts of appeals should be reversed.

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[25] Amicus' separate reliance on *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U.S. 30 (1958), is equally misplaced. To our previous discussion of that argument (Br. 24-26), we add only that the extension of *Tank Truck* beyond deductions under § 162(a) of the Code contradicts language in Justice Clark's opinion in that case (356 U.S. at 33) and other decisions of this Court. See *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326, 338 (1941); *Lilly* v. *Commissioner*, 343 U.S. 90, 94-95 (1951); *Speiser* v. *Randall*, 357 U.S. 513, 543 (1957) (Clark, J., dissenting on other grounds). See also *Commissioner* v. *Sullivan*, 356 U.S. 27, 29 (1958); *Commissioner* v. *Heininger*, 320 U.S. 467, 473-74 (1943). Moreover, that the breadth of Amicus' proffered interpretation of *Tank Truck* is without discernible limits is amply illustrated by Amicus' effort to show (A. Br. 47 n.48) that gender-based discrimination is insufficient to warrant denial of tax-exempt status. Surely the national policy against sex discrimination is no less clear and compelling than the policy underlying the vehicle weight statutes in *Tank Truck*. 356 U.S. at 34. If, as Amicus claims, the aim is to make exception only in cases involving policies that "occupy a unique place" (A. Br. 47), it is best accomplished through specific legislation, as in the past, rather than requiring Congress to "correct any perceived errors" in the wide-ranging "public policy" determinations that the IRS would be called upon to make under Amicus' theory.

[26] Amicus' Fifth Amendment argument, based largely on *Norwood* v. *Harrison*, 413 U.S. 455 (1973), is without merit (A. Br. 57-62). In *Norwood*, the State of Mississippi, by virtue of judicial findings of *de jure* segregation in its public schools, was under an affirmative duty "not to take any action that would impede the process of disestablishing the dual system and its effects." *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 538 (1979); see *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 488 (1972). The State's purpose in violating that duty by providing textbooks to students attending racially discriminatory private schools was irrelevant. *Dayton Bd. of Educ.* v. *Brinkman, supra*, 443 U.S. at 538. Here, the United States is not subject to any similar judicial determination and is thus under no such affirmative duty. Accordingly, the Fifth Amendment imposes no bar to the granting of tax exemptions to petitioners absent proof that the United States acted with a racially discriminatory purpose. See our main brief at 38-39.

Respectfully submitted.

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* The Solicitor General is disqualified in these cases. See also note *, page (I) of our principal brief.

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