Supreme Court of the United States

October Term, 1961

No. 468

In the Matter of the Application
of
STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS, and LAWRENCE ROTH,
Petitioners,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenors-Respondents.

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Special Term of the Supreme Court of the State of New York, Nassau County (R. 50-116), is reported at 18 Misc. 2d 659, 191 N. Y. S. 2d 453. The majority and concurring opinions of the Appellate Division of the Supreme Court of the State of New York, Second

Department (R. 123-40), are reported at 11 App. Div. 2d 340, 206 N. Y. S. 2d 183. The majority, concurring and dissenting opinions of the Court of Appeals of the State of New York (R. 142-55) are reported at 10 N. Y. 2d 174, 184 N. Y. S. 2d 659, 176 N. E. 2d 579.

Jurisdiction of This Court

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

The judgment of the Court of Appeals was announced on July 7, 1961 (R. 156-7), and entered on October 23, 1961 (R. 158-9). The petition for a writ of certiorari was filed on October 4, 1961, and granted on December 3, 1961 (R. 160).

Constitutional and Statutory Provisions Involved

The constitutional provisions involved in this case are the First and Fourteenth Amendments.

The pertinent part of the First Amendment reads as follows:

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

Section 1 of the Fourteenth Amendment reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Strictly speaking, there are no statutory provisions involved in this case. A critical part of the State action under consideration, however, is a resolution of respondents, as the Board of Education of Union Free School District Number 9, New Hyde Park, New York, which was adopted at an official meeting on July 8, 1958, and is recorded in the minutes of the meeting as follows (R. 40):

> "Mrs. Harte moved, seconded by Mr. Saunders, that the regents prayer be said daily in our schools. Motion carried by majority vote, Mr. Fried voted 'nay.'
>
> The Board of Education gave direction to the District Principal that this be instituted as a daily procedure to follow the Salute to the flag."

Question Presented

Does not State action requiring that a prayer to God, composed by State officials, acting in their official capacity, be said as a daily procedure, following the Pledge of Allegiance to the Flag, in all the public schools of a local school district, violate the guarantee of separation of church and state in the Establishment Clause of the First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment?

Statement of the Case

1. The Facts

Petitioners, five citizens of the State of New York and taxpayers residing in Union Free School District Number 9, New Hyde Park, New York, where their children attend the local public schools, seek to compel respondents, the five members of the local board of education, to discontinue the saying of a prayer now required to be said in those schools (R. 11-13). They are opposed by sixteen intervenors, as well as by respondents (R. 43-7).

Two of the petitioners are of the Jewish faith. One belongs to the Society for Ethical Culture. One is a member of the Unitarian Church. And one is a non-believer (R. 11-12). All are subject to the Education Law of New York, which requires parents to cause their children between the ages of seven and sixteen years to attend a course of full-time day instruction, under penalty of punishment by fine or imprisonment for failure to comply (R. 13, 61).

The prayer under consideration is required to be said pursuant to a resolution adopted by respondents at an official meeting on July 8, 1958 (R. 13). The minutes of the meeting show that, by a vote of 4-1, respondents resolved "that the regents prayer be said daily in our schools," and "gave direction to the District Principal that this be instituted as a daily procedure to follow the Salute to the flag" (R. 40).

The name of the prayer derives from the fact that it was composed by the Board of Regents, the governing body of the Department of Education of the State of New York, and recommended in a statement of belief entitled "The Regents Statement on Moral and Spiritual Training in the Schools," which was unanimously adopted at the Regents' regular meeting on November 30, 1951 (R. 13-14, 28-9, 390), The words of the prayer are as follows (R. 14):

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

Pursuant to respondents' resolution of July 8, 1958, the prayer is said aloud, daily, at the commencement of the school day, in each class of each public school within the local school district (R. 14, 66). It is said in the presence of the teacher, and is either led by the teacher or by a student selected by the teacher (R. 14, 24-7, 66). Though respondents' resolution does not so provide, respondents claim that they have always directed principals and teachers not to

force or to encourage any child to join in the prayer (R. 27, 66).

Prior to this case, respondents claim to have received only one request that a child be excused from saying the prayer, and they claim to have respected that request (R. 26-7, 66), but Special Term, the only court below which considered the question, has found, as a matter of fact, that the saying of the prayer and the manner and setting in which it is said are contrary to the religions and religious practices of those petitioners who have a religion and contrary to the beliefs held by the petitioner who professes none (R. 15, 66-7).

2. The Proceedings Below

This case began in January, 1959, when petitioners instituted a proceeding at Special Term, under Article 78 of the Civil Practice Act of New York, in which they requested an order in the nature of mandamus directing respondents to discontinue the saying of the prayer (R. 9-10, 54). Such a proceeding, under New York law, is summary and may be decided on papers, and this one was. The "facts" in this case, as stated above, have been taken from those allegations in the petition which have not been explicitly denied in the answer of respondents or the accompanying affidavit of respondent Vitale, a procedure followed by Special Term in arriving at its decision (R. 65-7).

The relief requested by petitioners was denied by Special Term, but the case was remanded to respondents, as the local board of education, for further proceedings in accordance with the opinion expressed by the court that certain features of the procedure connected with the prayer were objectionable because "compulsory" (R. 6-8, 105-9). From this interlocutory order, an appeal was taken by petitioners to the Appellate Division, where the order was unanimously affirmed (R. 123-40).

The case proceeded no further until the proceedings provided for in the interlocutory order were taken by

respondents. These consisted of adopting a set of regulations at an official meeting on September 3, 1959, transmitting them to the principals and teachers in the local school district, and sending a letter to each parent and taxpayer in the district (R. 170-3).

The regulations were as follows (R. 171-2):

> "1. Neither teachers nor any school authority shall comment on participation or non-participation in the exercise nor suggest or request that any posture or language be used or dress be worn or be not used or not worn.
>
> 2. Provision is to be made for those children who are to be excused from participating or from the room during the prayer exercise.
>
> 3. Any child may be excused on written request of the parent or legal guardian and all parents will be so advised that the request should be so made, addressed to the principal of the school which the child attends."

The critical part of the letter was intended to supplement regulation number "3" (R. 172-3):

> "Any parent or guardian who does not wish his child to say the prayer is requested to write a letter to the principal of the school his child attends, indicating whether he wants his child excused from the room or to remain silent in the room while the prayer is being said."

Thereafter, a motion was made by respondents at Special Term for a final order dismissing the petition on the basis of the proceedings taken pursuant to the interlocutory order (R. 169). In an affidavit in support of this motion, respondent Freed stated that, although respondents had received requests that children be excused from saying the prayer, they had received none requesting that children be excused from the classroom, and they had decided "to defer

any decision with respect to the exact provision to be made for any such children until such request is made * * * '' (R. 173).

The final order was granted, and an appeal taken therefrom directly to the Court of Appeals (R. 164-8). That appeal brought into question the validity of the interlocutory order and its affirmance by the Appellate Division. The interlocutory order was sustained and the final order affirmed by a vote of 5-2 (R. 142-57).

Summary of Argument

1. The State action under consideration violates the Establishment Clause of the First Amendment.

(a) The Establishment Clause has been made applicable by the Fourteenth Amendment to acts of State and local officials, and it prohibits any such acts respecting an establishment of religion, and not merely an establishment of a church or sect. ''Religion'' within the meaning of the Establishment Clause may be nothing more nor less than a single religious belief, such as belief in the existence of God.

(b) The Regents' Prayer is sectarian and denominational, since it includes a declaration of belief in the existence of God, which is a belief not shared by several faiths in this country, including the Society for Ethical Culture, to which one petitioner belongs. It also involves belief in a set form of worship and belief in the practice of asking God's blessings on behalf of the worshipper. Moreover, Special Term found, as a fact, that the prayer is contrary to the religions of petitioners who have a religion and to the beliefs of petitioner who professes none.

(c) The Regents' Prayer is not part of any national ''tradition'' or ''heritage,'' although prayer in general

may be, since the Regents' Prayer was composed by laymen who are State officials, in their official capacity, in the hope of finding a form of worship acceptable to all. Such a prayer has no tradition behind it in this country, and is not believed to be in use in the public schools of any State outside the State of New York.

(d) The significance of the Regents' Prayer should not be judged by its brevity or simplicity, but by the importance of the beliefs involved in it and the significance of a determination that prayers may be composed by State officials and recited under their direct supervision in public schools. The prayer involved in this case should be judged by the fact that it is part of a recognized drive in this country to introduce religious education and observances in public schools.

(e) The essential and primary purpose and effect of the State action under consideration is to aid religion. The form of the State action, and, specifically, the fact that it may not be "instruction", is immaterial. The statement of belief of the Board of Regents makes it clear that the purpose and intended effect of the Regents in recommending the prayer, and of respondents in instituting it as a daily procedure in the public schools of the local school district, is to promote belief in God. The means or form of achieving that purpose, if not "instruction", is a higher or more extreme form of religious activity.

(f) The factual situation in this case is basically the same as that in *McCollum*. The State action under consideration permits, even requires, religious activity in public school buildings during school hours; it requires pupils not participating in the religious activity to remain in school; and it involves the use of tax-supported buildings to aid religion.

(g) The only factual difference between the present case and *McCollum* makes this case a stronger one for applica-

tion of the doctrine of separation. Whereas in *McCollum* State officials merely cooperated with religious ministers, here they perform the functions of religious ministers. This violates the most fundamental concept in the doctrine of separation, as developed in this country, which is that civil magistrates have no competence in, or jurisdiction over, religious matters.

(h) The element of coercion in this case is stronger than in *McCollum*. The impact of the compulsory school system is, if anything, stronger here because pupils are not merely compelled to attend school; they are compelled to say the Regents' Prayer unless excused. Morever, as the record shows, because of the brevity of the prayer and its recitation in conjunction with the Pledge of Allegiance, even those pupils who are excused do not leave the classroom. Most important of all, the influence on the minds of pupils necessarily exerted by the fact that education officials, including their teachers, advocate certain religious beliefs cannot be avoided by permitting the pupils to leave their classroom, or even the school building.

(i) The State action under consideration rejects the belief on which the "Founding Fathers" built our national government, belief in the necessity for absolute separation of church and state. It threatens not merely to breach the "wall of separation", but to undermine it completely.

Argument

1. The State action in this case violates the guarantee of separation of church and state in the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment.

(a) Certain propositions are beyond the area of legitimate dispute.

Petitioners assume that certain propositions are now beyond the area of legitimate dispute in this Court.

(1) We assume that the Establishment Clause of the First Amendment, though in terms applicable only to laws enacted by Congress, has been made applicable by the Fourteenth Amendment to the laws of a State government and to the acts of State and local officials which have the force of such laws (*Cantwell* v. *State of Connecticut,* 310 U. S. 296, 303; *Everson* v. *Board of Education,* 330 U. S. 1, 5; *People of State of Illinois* ex rel. *McCollum* v. *Board of Education,* 333 U. S. 203, 210; *McGowan* v. *State of Maryland,* 366 U. S. 420, 429; *Torcaso* v. *Watkins,* 367 U. S. 488, 492).

(2) We assume that the Establishment Clause prohibits more than laws establishing a church or sect; it bars any law *respecting an establishment of religion* (*People of State of Illinois* ex rel. *McCollum* v. *Board of Education, supra; Torcaso* v. *Watkins, supra; Everson* v. *Board of Education, supra,* 330 U. S. at pages 14-15; *McGowan* v. *State of Maryland, supra,* 366 U. S. at pages 441-2).

This second proposition does not appear to have been accepted by the majority in the Court of Appeals. In the opinion of the court written by Chief Judge Desmond, the word "law" and the word "respecting", which appear in the Establishment Clause, are treated as if they were not part of the clause at all (R. 143):

> "Saving this simple prayer may be, according to the broadest possible dictionary definition, an act of 'religion', *but when the Founding Fathers prohibited an 'establishment of religion' they were referring to official adoption of, or favor to, one or more sects.*" (Emphasis added.)

(3) Lastly, petitioners assume that the word "religion", as used in the First Amendment may mean nothing more nor less than a single religious belief, such as belief in the existence of God (*Torcaso* v. *Watkins, supra*).

This, too, does not seem to have been accepted by the majority below. Running through both the opinion of Chief Judge Desmond and the concurring opinion of Judge Froessel is the notion that belief in the existence of God is so elementary or "essential" that it is outside the scope of religion, at least as that word is used in the First Amendment. The notion is stated in the opinion of Judge Froessel as follows (R. 145):

> "History and common experience teach us that the perception of a Supreme Being, commonly called God, is experienced in the lives of most human beings. Some, it is true, escape it, or think they do for a time. In any event, that perception is manifest, independent of any particular religion or church, and has become the foundation of virtually every recognized religious faith—indeed, the common denominator. *One may earnestly believe in God, without being attached to any particular religion or church. Hence a rule permitting public school children, willing to do so, to acknowledge their dependence upon Him, and to invoke His blessings, can hardly be called a 'law respecting an establishment of religion'* or 'prohibiting the free exercise thereof' in transgression of the First Amendment, which in nowise prohibits the recognition of God, or laws respecting such recognition." (Emphasis added.)

Any such notion, however, would seem to have been rejected by this Court in the recent *Torcaso* case, *supra,* where

the only "religion" under consideration was belief in the existence of God. In *Torcaso,* Maryland's refusal to issue to an individual, otherwise qualified, a commission to serve as a notary public because he would not declare his belief in God was held by this Court to be a violation of the First Amendment. The State action was characterized in the opinion of the Court written by Mr. Justice Black as follows (367 U. S. at page 490):

> "The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in 'the existence of God'."

The State action under consideration in *Torcaso* may not be comparable to that in the present case in all respects. If, however, a declaration of belief in the existence of God was a matter of religion in *Torcaso,* petitioners respectfully submit that a prayer including precisely the same declaration must be so here.

(b) The Regents' Prayer is sectarian and denominational.

The corollary assumption in the opinions of Chief Judge Desmond and Judge Froessel that the Regents' Prayer is non-sectarian and non-denominational would seem to be contrary to a fact judicially noted by this Court in the *Torcaso* case and to one of the few findings of fact made by the court of first instance in this case.

In the opinion of this Court in *Torcaso,* the observation was made that belief in the existence of God is not among the tenents of several faiths practiced in this country. Mr. Justice Black specifically noted that one such faith was "Ethical Culture," the faith of one of the petitioners in the present case (367 U. S. at page 495, note 11).

Moreover, the opinion of Special Term, the only court below which considered the question, contains the express

finding of fact that the saying of the Regents' Prayer and the manner and setting in which it is said are contrary to the religions and religious practices of all the petitioners who have a religion, as well as to the beliefs of the petitioner who professes none (R. 66-7). Special Term held that such a finding necessarily resulted from respondents' failure to challenge the good faith of petitioners' claim that the prayer was contrary to their beliefs (R. 66-7).

Despite this finding, it is true, Special Term subsequently concluded that the prayer was non-sectarian (R. 113):

> "The fact that the prayer and the manner of its saying may not conform to all of the tenets of the Jewish, Unitarian and Ethical Culture groups, or of any other group, does not mean that the prayer is sectarian."

Petitioners respectfully submit, however, that Special Term's conclusion is both unwarranted and self-contradictory. We submit that, by definition, a prayer which conforms to *all* of the tenets of one or more faiths and only to *some,* but not all, of the tenets of others, is sectarian and denominational, particularly if the tenets to which it does not conform are important. We would assume that even respondents and intervenors would agree that belief in the existence of God is important. The Regents' Prayer also involves belief in a set form of worship and belief in the practice of asking God's blessings on behalf of the worshipper.

(c) The Regents' Prayer is not part of any national "tradition" or "heritage."

The majority and concurring opinions of the Court of Appeals, the concurring opinion of the Appellate Division and the opinion of Special Term refer to the Regents' Prayer as part of a national "tradition" or "heritage"

(R. 70, 132, 144). Petitioners respectfully submit that, although *prayer in general* may be an integral part of our national tradition and heritage, a prayer such as that involved in this case, which has been composed by laymen who are State officials, acting in their official capacity, in the hope of finding a form of worship acceptable to all, is most certainly not part of any national tradition or heritage.

In this respect it is significant that, although the well-documented opinion of Special Term begins by stating that "the attempt to find a commonly acceptable prayer is not new" (R. 51), the opinion cites only two instances in which the attempt was made, one, by Benjamin Franklin, being merely an attempt to modify the Lord's Prayer.

The other attempt noted in the opinion of Special Term was recorded by James Madison in a letter to Edward Everett on March 19, 1823, and it was made by William Livingston, before he became Governor of New Jersey, at a time when he was merely a member of the Committee of Trustees for the Lottery Fund for King's College (now Columbia University). In 1753, Livingston composed a prayer which he thought might be said by all of the Protestant students at King's College, when that institution should be built. The prayer was never put in use, and it was roundly criticized in the newspaper in which it was originally published.*

This is what Madison had to say about Livingston's prayer:

> "I recollect to have seen many years ago, a project of a prayer by Governor Livingston, father of the present judge, intended to comprehend and conciliate college students of every Christian denomination, by a form composed wholly of texts and phrases of Scripture. If a trial of the expedient was

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* MAHONEY, THE RELATION OF THE STATE TO RELIGIOUS EDUCATION IN EARLY NEW YORK, 1633-1825 (1941), pp. 74-6.

> ever made, it must have failed, notwithstanding its winning aspect, from the single cause that many sects reject all set forms of worship.'' *

In 1823, it appears, Madison had to think back over a span of almost three-quarters of a century even to recall a significant attempt at composition of a commonly accepted prayer. As far as he was concerned, that isolated attempt was doomed to failure. And, in any event, it was not made by government officials acting in their official capacity.

Today, the statistics would appear to be much the same. Petitioners do not believe that there is any prayer in use in the public schools of any State in this country which, like the prayer involved in this case, has been composed by State officials for use in such schools. In 1955, a prayer virtually identical with the Regents' Prayer was presented to the Honorable Edmund G. Brown, now the Governor but then the Attorney General of California. In the only official opinion on the specific question presented in this case, other than those of the courts below, Governor Brown ruled that the prayer presented to him was a violation of the Establishment Clause of the First Amendment, citing the *Everson, McCollum* and *Zorach* decisions of this Court (25 Cal. Ops. Atty. Gen. 316, 1955). This is the ''tradition'' and ''heritage'' behind the Regents' Prayer.

(d) The true significance of the Regents' Prayer is not to be judged by its brevity or simplicity.

The opinions of the courts below sustaining the Regents' Prayer emphasize its brevity and simplicity, as if to indicate that the measure of its significance should be its size and form (R. 105, 126, 143, 145). Of course, this emphasis is more than inconsistent with the importance which the same opinions attach to the main belief expressed in the

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* BLAKELY, AMERICAN STATE PAPERS ON FREEDOM AND RELIGION (1943), p. 592.

prayer, and, as petitioners will point out below, the only real effect of the brevity of the prayer is to strengthen the element of coercion already present in the State action under consideration in this case. These "physical" characteristics of the prayer, however, have much the same type of distorting effect as an optical illusion, and, petitioners respectfully submit, they require the same degree of concentration to overcome.

If State educational officials are now held legally competent to compose and conduct the recitation of a 22-word prayer at the beginning of the school day, on the theory that the beliefs expressed in that prayer are acceptable to the vast majority of citizens, it is difficult to see why they will not be held equally competent to compose and conduct the recitation of a 220-word prayer, or a *second* brief prayer at the *end* of the school day. Moreover, if such other prayer involves beliefs other than belief in God, belief in a set form of worship, and belief in the practice of asking God's blessing on the worshipper, who will judge whether those other beliefs are acceptable to the vast majority?

Madison was faced with a similar problem in 1784 when he opposed "A Bill Establishing a Provision for Teachers of the Christian Faith," in the Virginia Assembly. After the long dark years of religious persecution in England and the Colonies, a bill levying a tax to provide support for religious teachers of their own choosing must have appeared to be a rather modest and even liberal proposal to many of the God-fearing citizens of Virginia. In his famous "Memorial and Remonstrance against Religious Assessments," however, Madison opposed the bill, among other reasons—

> "3. Because it is proper to take alarm at the first experiment on our liberties * * * Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may estab-

> lish with the same ease any particular sect of Christianity in exclusion of all other Sects? * * * " *

The Regents' Prayer may not be a "first experiment," but the State action connected with it is part of one of two great and powerful drives recognized in the minority opinion of this Court written by Mr. Justice Rutledge in the *Everson* case, *supra* (330 U. S. at page 63), and more recently recognized in the majority opinion of the Court in the *McGowan* case (366 U. S. at page 444). Those drives are described and commented upon in the opinion of Mr. Justice Rutledge as follows (330 U. S. at page 63):

> "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. *One is to introduce religious education and observances into the public schools.* The other, to obtain public funds for the aid and support of various private religious schools * * * In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court."

Petitioners respectfully submit that, although the Regents' Prayer is brief and simple, the State action under consideration in this case constitutes a gross violation of the guarantee of church and state in the Establishment Clause of the First Amendment.

(e) The essential or primary, if not the only, purpose and effect of the State action under consideration in this case is to aid religion.

Petitioners assume that the classic expression of the latitude of the Establishment Clause is to be found in the majority opinion of this Court in the *Everson* case, *supra,* 330 U. S. at pages 15-16:

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* Both the bill referred to and Madison's "Memorial and Remonstrance" are set forth in appendices to the dissenting opinion of Mr. Justice Rutledge in the *Everson* case, *supra,* 330 U. S. at pages 63-74.

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'."

In the *Everson* case, the State action consisted of the repayment of money to parents of school children for bus fares which the children had paid to attend parochial schools. Although such State action provided some indirect aid to religion, this Court held, by a vote of 5-4, that the action did not violate the Establishment Clause because it was in the nature of "public welfare legislation," and its essential purpose and effect was to aid public education (330 U. S. at page 17).

In the *McCollum* case, *supra,* which followed *Everson,* there was no real issue as to the nature of the State action. There, a local board of education permitted religious instruction during school hours in public school buildings, and required those children who chose not to attend to remain in their classrooms. Such instruction, this Court held, was "beyond all question a utilization of the tax-established public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment * * *." (330 U. S. at page 210.)

The present case, petitioners respectfully submit, falls into precisely the same category. Although it may be true that the State action under consideration in this case is not, in form, "instruction," that aspect of the case would seem to be immaterial, and the confusion which it created in the courts below would seem to have been entirely unnecessary.*

Petitioners share part of the responsibility for this confusion. Because the decision in the *McCollum* case was favorable to our position in this case, and because the religious activity involved in the prior case was in the form of instruction, we characterized the religious activity in this case as "instruction". For the same reasons, respondents and intervenors argued to the contrary. The dispute, however, was a battle over words which raised form over substance.

The interpretation of the Establishment Clause in the *Everson* case, quoted above, includes the following warning (330 U. S. at page 16):

> "No tax in any amount, large or small, can be levied to support *any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.*"

Moreover, the recent decisions of this Court in the *Sunday Closing Law Cases* (366 U. S. 420 et seq.), particularly in the *McGowan* case, *supra,* point out that the real question in a case of this type relates not to the *form* of the State action, but rather to its substance or essential *pur-*

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* The concurring opinion of Mr. Justice Beldock in the Appellate Division gives as his "sole" reason for affirming the interlocutory order of Special Term his belief that "the prayer here involved *does not constitute religious teaching* * * *. It gives no training or instruction of a religious nature whatever" (R. 129; emphasis in original). The majority opinion of the Court of Appeals also denies that the prayer is "religious education" (R. 143).

pose and effect. Thus, the Sunday Closing Laws of Maryland and other States were sustained because their essential purpose and effect was to provide the general public with a "uniform day of rest," rather than to encourage the observance of Sunday as a religious holiday (366 U. S. at page 445).

Two Justices of this Court concurred in the decisions in the *Sunday Closing Law* cases, but expressed the opinion that State action should not be held invalid under the Establishment Clause so long as it appeared to serve any legitimate and substantial secular end. Although this concurring opinion is perhaps more favorable than the majority opinion to State action which is being examined in the light of the Establishment Clause, it contains a caveat (366 U. S. at page 466):

> "* * * If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McCollum.*"

This, petitioners respectfully submit, is also the case now before this Court. Whether or not the State action under consideration here is deemed to be "instruction," "teaching" or "education," the conclusion seems inescapable that its essential or primary, if not its only, purpose and effect is to promote belief in the existence of God.

The Board of Regents have admitted as much in the statement of belief in which they first recommended the prayer that now bears their name. That statement begins as follows (R. 28):

> "BELIEF IN and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded."

After thus stating their thesis, the Regents proceed to unfold their purpose (R. 28):

> "* * * In our opinion, the securing of the peace and safety of our country and our State against such dangers points to *the essentiality of teaching our children, as set forth in the Declaration of Independence, that almighty God is their Creator,* and that by Him they have been endowed with their inalienable rights of life, liberty and the pursuit of happiness." (Emphasis added.)

Not petitioners, but the Regents themselves, it will be noted, first used the word "teaching" in connection with the saying of the Regents' Prayer. Moreover, although the Regents mention a secular goal, "the securing of the peace and safety of our country," they indicate quite clearly that it is secondary and derivative in that it is intended to follow and result from teaching children to believe in God.

Immediately after the foregoing quotation, the Regents recommend the saying of the prayer, together with "the act of allegiance to the Flag." Then they repeat and emphasize their initially stated purpose (R. 29):

> "We believe that thus *the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God,* for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare." (Emphasis added.)

By "school," of course, the Regents mean the compulsory public school system of New York. They apparently consider "intensifying" in pupils a "love for God" to be not only a function, but a "high function," of that system.

Petitioners respectfully submit that the Regents' purpose in recommending the prayer, and respondents' purpose in instituting it as a daily procedure in the public schools of their district, is to promote belief in God by daily prayer. Moreover, if the means or form of accomplish-

ing that purpose is not accurately described as "instruction," "teaching" or "education," it is nonetheless a religious activity; and, since prayer is merely putting into practice the beliefs in which the practitioner has previously been instructed, it is, if anything, a higher or more extreme form of religious activity.

(f) The factual situation in this case is basically the same as that in *McCollum*.

The opinion of this Court in the *McGowan* case, *supra,* lists the fatal defects in the State action under consideration in *McCollum* as follows (366 U. S. at page 452):

> "* * * In McCollum, state action permitted religious instruction in public school buildings during school hours and required students not attending the religious instruction to remain in their classrooms during that time. The Court found that this system had the effect of coercing the children to attend religious classes; * * * In McCollum, the only alternative available to the nonattending students was to remain in their classrooms; * * * In McCollum, there was direct cooperation between state officials and religious ministers; * * * In McCollum, tax supported buildings were used to aid religion; * * *."

(1) In the present case, the State action also "permits" religious activity in public school buildings during school hours, and requires students who do not choose to participate to remain in their classrooms.

The State action under consideration in *McCollum,* was, if anything, more truly permissive than that under consideration here. Under the program involved in *McCollum;* there was provision for religious instruction only to the extent that particular religious sects requested the privilege of giving instruction in their respective faiths, and the majority opinion in *McCollum* noted that instruction in the Jewish faith had been discontinued because there was no request for it (333 U. S. at pages 208-9). Under the

procedure involved in this case, there is provision for the saying of the Regents' Prayer, as a daily procedure in all the schools of the district, *regardless of whether a single parent requests the prayer to be said.* The resolution adopted by respondents on July 8, 1958, *requires,* rather than permits, 'that the Regents' Prayer be said daily in our schools' " (R. 40).

Moreover, under the program involved in *McCollum,* there was an element of choice; the pupils participating in that program could select the particular faith in which they desired instruction (333 U. S. at pages 208-9). Here, there is no such choice: the pupils who wish to join in prayer with their classmates may only join in the Regents' Prayer, no other.

(2) In the present case, as in *McCollum,* the only alternative available to pupils not choosing to participate is to remain "in their classrooms."

On this point, some clarification is necessary. This Court's opinion in the *McGowan* case uses the phrase "in their classrooms" (366 U. S. at page 452), but petitioners assume that the phrase is intended to convey no more than the Court's understanding that the pupils not choosing to participate in the program involved in *McCollum* were required to remain *in school.* The Court's opinion in the *McCollum* case states the actual fact as follows (333 U. S. at page 209):

> "Students who did not choose to take the religious instruction were not released from public school duties; *they were required to leave their classrooms and go to some other place in the school building for the pursuit of their secular studies.*" (Emphasis added.)

In the present case, as the affidavit of respondent Freed in support of respondents' motion for a final order shows (R. 173), the pupils not choosing to participate in the saying

of the prayer actually remain in their classrooms, in the sense that they do not leave the classrooms in which the prayer is said and go to some other place in the school building. According to respondent Freed, this situation results from the fact that no parents have requested that their child be excused from the classroom in which the prayer is being said. There is nothing in the record, however, to indicate that if parents did request that their child be excused from the classroom, the child would be free to leave the school building, or free from school discipline. On the contrary, although the prayer is required to be said at the commencement of the school day, it is definitely required to be said *after* that day has begun, and at a time when attendance at school is compulsory.

(3) Here, as in *McCollum,* tax-supported buildings are used to aid religion.

This final similarity between the factual situation in *McCollum* and the present case requires only the briefest comment. The fact is admitted that, pursuant to the resolution adopted by respondents on July 8, 1958, the Regents' Prayer is being said daily in all the schools of the local school district (R. 20).

(g) The only difference in the factual situation in *McCollum* and that in the present case makes the present case a stronger one for the application of the guarantee of separation in the Establishment Clause.

The only difference between the factual situation in the *McCollum* case and that in the present case lies in the fact that "[i]n McCollum, there was direct cooperation between state offiicals and religious ministers" (366 U. S. at page 452). In the present case, no such cooperation appears to exist, but this one difference, petitioners respectfully submit, makes this case a stronger one for the application of the guarantee of separation incorporated in the Establishment Clause of the First Amendment.

In this case, instead of merely cooperating with religious ministers, the State officials have performed the functions of ministers. Acting in their capacity as State officials, they have inquired into religious matters and expressed their beliefs on those matters; they have composed a prayer which incorporates their beliefs; they have instituted that prayer as a daily procedure in the public schools of a local school district; and they are now supervising and conducting the saying of the prayer in those schools. It is certainly the fact that a teacher is present whenever the prayer is said, thus not only making certain that it is said, but also that it is said in an orderly and proper way (R. 66). It also appears to be undisputed that if the teacher does not actually lead the saying of the prayer, he or she selects the student who does (R. 14, 24-7, 66).

Undoubtedly, to a limited extent, cooperation between State officials and religious ministers is necessary and proper (*Zorach* v. *Clauson,* 343 U. S. 306). Petitioners respectfully submit, however, that the State action under consideration in this case violates the most fundamental concept in the entire philosophy of separation of church and state, as that philosophy has been developed in this country and incorporated in the Constitution.

If there was any one belief that was shared by all of the Founding Fathers, it was the belief that the civil magistrate had no competence in, or jurisdiction over, religious matters. First expressed by the English philosopher John Locke, this belief was adopted and adapted to the American scene by Thomas Jefferson and James Madison, and it was even shared by "moderates" such as George Washington.

This Court has described "A Bill for Establishing Religious Freedom," which Jefferson wrote, Madison sponsored, and Virginia enacted into law in 1785, "as best reflecting the long and intensive struggle for religious freedom in America, as particularly relevant in the search for

the First Amendment's meaning" (*McGowan* v. *State of Maryland, supra,* 366 U. S. at page 437). In that document, Jefferson stated:

> " * * * that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to extend his powers into the field of opinion and to restrain a profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or suffer from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; * * *." *

This Court has also acknowledged the "Memorial and Remonstrance Against Religious Assessments," written by Madison, as an important original source for determining the meaning of the First Amendment (*Reynolds* v. *United States,* 98 U. S. 145; see also Mr. Justice Rutledge's dissenting opinion in *Everson* v. *Board of Education, supra,* 330 U. S. at page 68). Among other reasons, Madison opposed religious assessments—

> "2. Because if religion be exempt from the authority of Society at large, still less can it be subject to that of the Legislative Body. * * *
>
> * * *
>
> 5. Because the bill implies that the Civil Magistrate is a competent Judge of Religious truths or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretention, falsified by the contradictory opinions of rulers in all ages and throughout the world; the second, an unhallowed perversion of the means of salvation.

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* Quoted in PADOVER, THE COMPLETE JEFFERSON, p. 947.

> 6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world; it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; * * *
>
> * * *
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> 8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to civil Government * * * Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate it needs them not. Such a government will best be supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another." *

As pointed out above, even Washington, who was more moderate than Jefferson and Madison in his views on separation, shared the latter's belief concerning the civil magistrate's incompetence in, and lack of jurisdiction over, religious matters. In a letter written at the end of 1789 to Presbyterians of Massachusetts and New Hampshire who had expressed dismay over the omission in the new Constitution of any reference to the Christian religion, he said the following:

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* The "Remonstrance" is set forth in full in an appendix to Mr. Justice Rutledge's dissenting opinion in the *Everson* case, *supra*, 330 U. S. beginning at page 63.

> "And here, I am persuaded, you will permit me to observe, that *the path of true piety is so plain, as to require but little* POLITICAL *direction.*
>
> *To this consideration we ought to ascribe the absence of any regulation respecting religion from the Magna Charta of our country.* To the guidance of the Ministers of the Gospel, this important object is, perhaps, more properly committed. It will be your [the Presbyterians'] care to instruct the ignorant and to reclaim the devious; And in the progress of morality and science, to which our Government will give every furtherance, we may confidently expect the advancement of true religion, and the completion of our happiness." * (Emphasis in original.)

There is one more document, written by Jefferson, which is particularly applicable to the State action under consideration in this case. It is a letter to Reverend Samuel Miller in 1808 on the subject of Presidential proclamations of days of thanksgiving, and it contains the following general comment:

> "Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government * * * I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its disciplines or its doctrines; nor of the religious societies, that the General Government should be invested with the power of effecting any uniformity of time or matter among them. Fasting and praying are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the time for these exercises, and the subjects proper for them, according to their own particular tenets; * * * " **

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* Quoted in I STOKES, CHURCH AND STATE IN THE UNITED STATES, p. 537.

** I STOKES, *ibid.*, pp. 490-1.

In the present case, the New York officials would seem to have committed every single act condemned by the Founding Fathers in the statements quoted above. They have advocated belief in the existence of God, belief in a set form of worship and belief in the practice of asking God's blessings on behalf of the worshipper. They have composed and are now supervising and conducting, on a daily basis, a prayer incorporating those religious beliefs. They have attempted to justify their acts by stating that the promotion of those religious beliefs is in the interests of securing the peace and safety of our country, but in so doing they have merely compounded their original error by employing religion "as an engine of civil policy."

All of this, of course, is in addition to the fact that these same State officials, have, by making the saying of the Regents' Prayer a daily procedure in the schools of a local school district, utilized the compulsory school system and school buildings, facilities, supplies and personnel in the promotion of religious beliefs and the conduct of religious activities.

(h) The element of coercion present in this case is also stronger than that in *McCollum*.

The opinions of this Court in the *McCollum* case indicate that the only element of "coercion," "compulsion" or "pressure" present in that case lay in the impact of the "compulsory" public school system upon the program of religious instruction under consideration. The majority opinion, delivered by Mr. Justice Black, describes this element as follows (333 U. S. at pages 209-10):

> "The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes."

The concurring opinion of Mr. Justice Frankfurter, in which four Justices of the Court joined, is to the same effect (333 U. S. at page 227):

> "Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects."

In this concurring opinion, there is also mention of another form of pressure, but it, too, is generated by the compulsory public school system (333 U. S. at page 227):

> "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend."

In his separate concurring opinion, Mr. Justice Jackson took exception to the above-quoted comment. He saw no "legal compulsion" of any kind in the State action under consideration (333 U. S. at pages 232-3). *Yet, he, also, believed that such action was prohibited by the Establishment Clause.*

Needless to say, Mr. Justice Reed, who dissented, saw no element of coercion, compulsion or pressure (333 U. S. at pages 238-56).

The situation in the present case, petitioners respectfully submit, is little different from that in *McCollum.* If anything, the impact of the compulsory school system is stronger here, in at least three ways.

(1) In *McCollum,* the only "coercion" lay in the fact the pupils were compelled to attend school to obtain a secular education. They were not thereafter compelled to

participate in the program of religious instruction unless their parents requested that they do so. When they participated in the program of religious instruction, they were deemed to have been "released," and it was for that reason that the program was called a "released time" program (333 U. S. at page 222). In the present case, not only are the pupils compelled to attend school to obtain a secular education, but also, when they attend, they are compelled to participate in the saying of the Regents' Prayer, *unless their parents request that they be excused.* Here, the burden of taking action is on the parents of the pupils. If no action is taken, the pupils participate in the religious activity.

(2) In *McCollum,* the program of religious instruction was one of several classes which occurred during the school day, and it lasted for about 30-45 minutes (333 U. S. at pages 207-8). Those pupils who did not wish to participate in the program pursued their regular secular studies during that period (*ibid.* at page 209). In the present case, the Regents' Prayer is said in conjunction with the Pledge of Allegiance to the Flag. This is required by the resolution adopted by respondents on July 8, 1958 (R. 40), and it is recommended in the statement of belief adopted by the Regents on November 30, 1951 (R. 28). Moreover, the prayer contains only 22 words and takes less than one minute to say. Any pupil, therefore, who wishes to participate in the Pledge of Allegiance, but who does not choose to be present at the recitation of the prayer, must dash out of the classroom immediately after the Pledge of Allegiance and return in a matter of seconds. Under these circumstances, it is hardly surprising that although respondents have received requests that children be excused from saying the prayer, they have received none requesting that any child be excused from the classroom.

Both the timing and the brevity of the prayer, therefore, have the effect of encouraging some form of participation in its recitation even by those children who have been excused from saying it. They see and hear their teacher and classmates say the prayer. They have been excused from saying it, at the request of their parents, but nothing in the record indicates that they will be prohibited from saying it if they choose to do so. Petitioners respectfully submit that the "law of imitation" cited in the concurring opinion of Mr. Justice Frankfurter in the *McCollum* case (333 U. S. at page 227) is in full force and effect here.

(3) Most important of all, even more than the State action considered in *McCollum,* the State action being considered in this case necessarily exerts an influence on the minds of the children involved which cannot be avoided by any system of alternatives. Here, State educational officials charged with the duty of imparting knowledge to minor children have, in their official capacity, advocated religious beliefs. The same officials who teach children, and demand that the latter learn, that two plus two equals four and that "c-a-t" spells "cat", now say that there is a God, to Whom children should say a specified daily prayer, and from Whom children may ask, and expect to receive, blessings for themselves as well as others. Under these circumstances, petitioners respectfully submit, the effect on the children involved will be much the same whether they say the Regents' Prayer, or remain silent while it is said, or even if they leave the classroom or the school building during its recitation.

(i) The State action under consideration in this case rejects the belief concerning religion on which the "Founding Fathers" built.

The Board of Regents of the State of New York have stated that "[b]elief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded" (R. 28). Petitioners disagree.

We are aware, of course, that belief in God exerted a strong influence on the thoughts and actions of many of the "Founding Fathers" in their personal lives, but we respectfully submit that another belief concerning religion dominated their thinking and conduct in the sphere of politics and government. We submit that the true cornerstone, or rather the "wall", on which they based their hope of creating a national government under which religion would flourish was "the wall of separation of Church and State."

That wall, we submit, the State action under consideration in this case threatens not merely to breach, but to undermine completely.

Conclusion

It is respectfully submitted that the decision of the Court of Appeals of the State of New York should be reversed and this case remanded to that Court with a direction to grant the relief requested in the original petition presented to the Special Term of the Supreme Court of the State of New York, Nassau County, together with such other and further relief as may be appropriate.

Respectfully submitted,

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