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Nos. 89, 153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ALTON J. LEMON, ET AL., *Appellants*

v.

DAVID H. KURTZMAN, ET AL., *Appellees*

ELEANOR TAFT TILTON, ET AL., *Appellants*

v.

ELLIOT L. RICHARDSON, ET AL., *Appellees*

On Appeal From the United States District Courts for the Eastern District of Pennsylvania and for the District of Connecticut

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 2

QUESTION PRESENTED 8

ARGUMENT 8

Introduction 8

I. Disqualification of Religiously Affiliated Institutions From Benefits Generally Available to Nonpublic Schools Would Raise Serious Questions Under the Free Exercise Clause 9

II. The Means Chosen by the Congress and by the Pennsylvania Legislature in "Charting a Course" Between Establishment and Interference With Free Exercise of Religion Are Permissible 12

CONCLUSION 16

TABLE OF AUTHORITIES

CASES:

Board of Education v. *Allen*, 392 U.S. 236 (1968) ... 10
Brown v. *Board of Education*, 347 U.S. 483 (1954) ..15, 16
Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) 14
Bush v. *Orleans Parish School Board*, 365 U.S. 569 (1961) 15
Everson v. *Board of Education*, 330 U.S. 1 (1947) 17
Green v. *Kennedy*, D.D.C. Civ. No. 1355-69 16
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 13
Lochner v. *New York*, 195 U.S. 45 (1905) 17
Poindexter v. *Louisiana Financial Assistance Commission*, 389 U.S. 571 (1968) 15
Sherbert v. *Verner*, 374 U.S. 398 (1963) 11
Simkins v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963) 14
South Carolina State Board v. *Brown*, 393 U.S. 222 (1968) 15, 16
Speiser v. *Randall*, 357 U.S. 513 (1958) 11, 15
Torcaso v. *Watkins*, 367 U.S. 488 (1961) 11
Walz v. *Tax Commission*, 397 U.S. 664 (1970) ..9, 12, 13, 17

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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1. The National Jewish Commission on Law and Public Affairs, a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox

Jewish Community in matters of public concern, here by applies for itself and on behalf of the following National Orthodox Jewish organizations, for leave to submit the attached brief:

Agudath Harabonim, Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

2. Pursuant to Rule 42(3) of the Rules of this Court, consent to the filing of this brief was requested of the parties to both of these cases by letter of July 8, 1970. All the parties to both cases have consented to the filing of this *amicus* brief except the State of Connecticut, one of the appellees in No. 153.

3. The constitutional contentions asserted in these cases directly affect the Orthodox Jewish community of the United States, whose members have established almost 400 privately operated all-day schools throughout the country wherein approximately 70,000 youngsters are presently receiving a full secular education as part of a daily program which also includes training in Jewish religious subjects, Bible, Jewish History and the Hebrew language. The future well-being of these schools, in an age of spiraling educational costs requires some financial assistance from tax revenues for their secular programs.

4. The *amici* strongly believe that American children should not be accorded second-class secular educations because their parents' religious beliefs commit them to in-depth religious training. The all-day schools described above have consistently provided superior secular educations to their enrollees, but this task has become exceedingly difficult with mounting costs. We believe that it is equitable and appropriate for State and federal tax revenues to share the costs of this nonreligious education so that American children of all faiths will be afforded similar educational opportunities and will be equally able to contribute to the development and growth of the United States.

5. The specific constitutional argument made in this brief—*i.e.*, that in view of the difficulties of balancing rights guaranteed by the Establishment and Free Exercise Clauses, this Court should defer (as it does in enforcement of the Equal Protection Clause) to the legislative judgment—has not, to our knowledge, been made in any of the briefs of the parties.

CONCLUSION

For the foregoing reasons, the motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

This brief is submitted on behalf of the National Jewish Commission on Law and Public Affairs and is joined in by the following organizations:

Agudath Harabonim,
Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

INTEREST OF THE AMICI CURIAE

The National Jewish Commission on Law and Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The organizations named above, which have joined in this brief, are the major national rabbinic and lay Orthodox Jewish representative bodies in the United States. The *amici* are firmly committed to the protection of the constitutional rights of all Americans, and particularly to the preservation of the safeguards of the First Amendment, which are of paramount concern to the adherents of minority faiths in this country. While we staunchly support the principle of governmental noninvolvement in religious affairs mandated by the Establishment Clause of the First Amendment, we view the "absolutist" application of this Clause as a substantial threat to the freedoms guaranteed by the Free Exercise Clause.

The cases now before the Court concern the constitutionality of various forms of financial assistance

from tax revenues provided under federal and State laws to private educational institutions, including those which offer religious instruction or which are operated under sectarian or church-related auspices. In each instance, the funds granted or loaned must be used only for non-religious purposes, and they are available to all private institutions meeting defined criteria—whether the institutions be religious or totally secular.

Such financial assistance is of critical importance to the almost 400 Jewish day schools in the United States which, in an age of soaring educational costs, can no longer realistically rely solely on the voluntary contributions of their supporters. The *amici* firmly believe that a program such as those involved here —under which tax revenues subsidize all or a part of the nonreligious curriculum of such schools—equitably distributes the financial burden of the mandatory secular education of *all* students within a State or district among *all* its taxpayers. And to ban such assistance under the guise of maintaining the wall between Church and State is simply to discriminate, in violation of the Free Exercise Clause, against those whose religious convictions require them to provide a rigorous program of religious training for their children.

The interest of the *amici,* therefore, is in highlighting the Free Exercise principles which support legislation of the kind challenged here. We are troubled that those who are actively erecting the Wall Between Church and State seem to be burying under and in it the religious minorities it was designed to protect.

QUESTION PRESENTED

The only issue to which this *amicus* brief is directed is the following:

Whether a State or federal statute providing assistance from tax revenues for the nonreligious facilities or curriculum of private educational institutions violates the First and Fourteenth Amendments because it includes, among those eligible, institutions which also provide sectarian religious education or which are conducted under religious or church-related auspices?

ARGUMENT

Introduction

The Pennsylvania Legislature enacted a statute under which it reimburses certified nonpublic schools for certain actual costs incurred in providing courses in mathematics, modern foreign languages, physical science and physical education. The United States Congress has also enacted a statute under which grants are made to accredited institutions of higher education for the construction of academic facilities other than those to be used for religious services or as any part of a program of religious instruction. The central issue in these cases is whether these legislative measures exceed the limits set by the First and Fourteenth Amendments.

Our argument that they are plainly permissible exercises of the governmental authority over the distribution of tax revenues proceeds from four propositions:

First, neither statute grants any special preference to religious institutions. *All* nonpublic schools, whether denominational or not, are equally eligible.

Second, neither statute provides any direct financial assistance to religious activity of any kind. Both draw a clear and precise line between the financed secular purposes and instruction and the nonsubsidized religious curricula and objectives.

Third, a State or federal statutory scheme which would *exclude* certain nonpublic institutions from eligibility for State aid for secular instruction on account of their church affiliation or the fact that they also provide religious instruction would raise serious questions under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth.

Fourth, both statutes represent a permissible "neutral course" steered by legislative bodies seeking to reconcile the two Religion Clauses of the First Amendment. In this area, the constitutional principle that there be "play in the joints productive of a benevolent neutrality" (*Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970)) requires that this Court defer to reasonable exercises of the legislative judgment.

I

DISQUALIFICATION OF RELIGIOUSLY AFFILIATED INSTITUTIONS FROM BENEFITS GENERALLY AVAILABLE TO NONPUBLIC SCHOOLS WOULD RAISE SERIOUS QUESTIONS UNDER THE FREE EXERCISE CLAUSE

Just last Term this Court defined the "basic purpose" of the Religion Clauses of the First Amendment—"to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970). These cases concern statutory provisions which accomplish precisely that objective—they grant to religiously

affiliated educational institutions the same access to public funds for their nonreligious activities as is enjoyed by nonpublic institutions which serve no religious purpose whatever.

The issue in these cases, starkly put, is whether educational institutions which provide religious instruction or services *in addition* to instruction in secular subjects are constitutionally disqualified by reason of their religious curriculum from enjoying the benefits of a State program which would be freely available to them if they were totally secular in nature. In neither of these cases do the appellants challenge the expenditure of public money for privately operated schools as such; they apparently would approve a statutory scheme under which only private institutions having no religious affiliation would be eligible for assistance from the public treasury. Such a system would, in our view, be fraught with serious constitutional doubts.

This Court recognized in *Board of Education* v. *Allen,* 392 U.S. 236, 247, 248 (1968), "that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," and that the private schools—"including parochial systems"—are performing "in addition to their sectarian function, the task of secular education." These plainly true and valid propositions apply to the higher educational institutions involved in *Tilton* v. *Richardson* (No. 153) as well as to the elementary and secondary schools in *Allen* and in *Lemon* v. *Kurtzman* (No. 89).

Would it be constitutionally permissible to deny public assistance to private institutions which carry

out "the task of secular education" because they also have a disparate "sectarian function" if others identically situated are eligible for such assistance because they have no "sectarian function"? Such a disqualification would, we submit, be constitutionally invalid under the principles of this Court's decisions in *Speiser* v. *Randall*, 357 U.S. 513 (1958), and *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

1. In the *Speiser* case the Court struck down a State statute to the extent that it conditioned the granting of a tax exemption on the suppression of constitutionally protected speech. By denying assistance from the public treasury to institutions which provide secular education solely because they *also* offer religious training, a State would be penalizing religion in the same way as California sought to penalize speech in *Speiser*.

2. The effect of such an exclusion of religiously affiliated institutions would be the converse of *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). It would disqualify from public benefits those institutions or individuals who, by reason of religious belief, deem it essential to provide a comprehensive religious education for their children (or, in the case of the colleges and universities involved in *Tilton*, for themselves) in the same institution and as part of the same school day as is given over to secular training. Obviously, a State statute which explicitly conditioned State aid on an individual's disbelief in thorough and rigorous religious training would be invalid under *Speiser* and *Torcaso;* the statute which appellants in these cases view as constitutionally mandatory is identical in its impact. See also *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

By contrast, the actual statutes challenged here are neutral and nondiscriminatory. They offer no advantage to religious schools or students on account of their religion, and they leave with such institutions and individuals the total financial burden of providing for their religious educations. All they achieve is an equality which is consistent with this Nation's great tradition of voluntarism, and which realistically makes the public purse share in the spiraling costs of secular education.

II

THE MEANS CHOSEN BY THE CONGRESS AND BY THE PENNSYLVANIA LEGISLATURE IN "CHARTING A COURSE" BETWEEN ESTABLISHMENT AND INTERFERENCE WITH FREE EXERCISE OF RELIGION ARE PERMISSIBLE

This Court need not, of course, decide in this case whether it would be constitutionally permissible for the Pennsylvania Legislature or the United States Congress to enact a statute granting benefits to private educational institutions and excluding those which are religiously affiliated. No such questionable line has been drawn in either of the two statutes challenged here. Instead, the responsible legislative bodies have taken precautions to keep tax revenues from assisting religious activities as such, and have made the funds available to institutions without regard to religious affiliation.

In an area where no "absolutely straight line" can be drawn and where, by the very nature of the constitutional principles, there must be "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*Walz* v. *Tax Com-*

mission, 397 U.S. 664, 669 (1970)), the legislative judgment as to how to "traverse the 'tight rope' " (397 U.S. at 672) should be accorded great deference. For, as this Court noted recently in its *Walz* decision, the Establishment and Free Exercise Clauses require an "accommodation" because "either . . ., if expanded to a logical extreme, would tend to clash with the other." 397 U.S. at 668, 669. In this field, as in the enforcement of the Equal Protection Clause of the Fourteenth Amendment, it suffices, therefore, for this Court "to perceive a basis upon which the Congress [or the State legislature] might resolve the conflict as it did." *Katzenbach* v. *Morgan,* 384 U.S. 641, 653 (1966).

The analogy to enforcement of the Equal Protection Clause is, we submit, borne out by the nature of the danger against which the Establishment Clause protects. For, as the Court observed in *Walz,* the ultimate goal is to avoid "excessive government entanglement with religion" (397 U.S. at 674) while preserving "the autonomy and freedom of religious bodies" (*id.* at 672). The many factors which enter into this accommodation are similar in kind and degree to the "various conflicting considerations" enumerated in *Katzenbach* v. *Morgan,* 384 U.S. 641, 653 (1966). Weighing the degree to which government agencies will become involved in religious affairs under one or another scheme of State financing of secular education is a function for which a court is ill-suited. A legislature, on the other hand, may consider what alternatives are available for the improvement of educational standards and can devise techniques for avoiding the entanglement which the Constitution forbids. It is also in a far better position to weigh the

public need for financial assistance of the kind provided by the challenged statutes and the effect on the welfare of the State and the Nation if it is withheld from religiously affiliated institutions.

There can be no serious doubt, we submit, that there is a basis in fact and reason for choosing the legislative remedies which are challenged in *Lemon* (No. 89) and *Tilton* (No. 153). Each of the statutes achieves the objective of this Court's past decisions dealing with "relationships between public education bodies and church-sponsored schools"—*i.e.*, "to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." 397 U.S. at 669. Hence both statutes are constitutional.

There remains only the claim that the bare allegation in this Court that the statutes have been administered—in violation of their own provisions—to subsidize religious instruction warrants a restraining order or injunction against their future application. That contention is patently unsound. If, in fact, religious instruction is being subsidized and such conduct violates the Constitution or the applicable statutes, the proper remedy is for an aggrieved party to sue to prevent the specific misapplication of federal or State funds. Compare, *e.g.*, *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). The burden of proving misuse of the funds in the specific case would then be squarely where it belongs—with the party challenging the expenditure. In the present instance, appellants are seeking to have the courts ban public

expenditures in wholesale fashion on the basis of generalized assertions—vigorously controverted by the appellees—regarding the nature of secular education in religiously affiliated institutions. Such an attempt to shift the burden of proof is as invidious and harmful to constitutionally secured rights as the attempt to shift the burden in *Speiser* v. *Randall,* 357 U.S. 513, 521-526 (1958).

A final word must be said on the pernicious and deplorable assertion made by certain appellants and *amici* that the statutes are constitutionally invalid because they authorize payment from the public treasury to racially segregated schools, and the attendant claim that decisions concerning Southern "tuition-grant" statutes such as *Bush* v. *Orleans Parish School Board,* 365 U.S. 569 (1961); *Poindexter* v. *Louisiana Financial Assistance Commission,* 389 U.S. 571 (1968); and *South Carolina State Board* v. *Brown,* 393 U.S. 222 (1968), control the present case. To even suggest an analogy between the establishment and financing in the South of private "academies" designed for no purpose other than the preservation of racial segregation and the operation and support of Jewish religious schools—which are part of a glorious tradition of learning dating back more than 3,000 years—is highly offensive to these *amici* and to the many American citizens of the Jewish faith whom they represent. The Biblical command incumbent upon each adult male of the Jewish faith "to teach [the religious precepts] diligently unto thy children" (*Deuteronomy,* VI, 7) neither awaited nor depended upon the outcome of *Brown* v. *Board of Education,* 347 U.S. 483 (1954). And the eligibility of the almost 400 Jewish day schools

—established in this country to enable the parents of the approximately 70,000 children now attending them to fulfill this Biblical obligation while affording them a complete secular education—should not, by the same token, turn on the racial distribution of students at the schools. It is plain that neither as to the schools affected here, nor as to the legislative programs which are challenged, can it be said that their "purpose, motive and effect . . . is to unconstitutionally circumvent the requirement first enunciated in *Brown* v. *Board of Education* . . . ." *Brown* v. *South Carolina State Board,* 296 F. Supp. 199 (D.S.C. 1968) *affirmed,* 393 U.S. 222 (1968).[1]

CONCLUSION

In these cases this Court must pass on the validity of legislative measures enacted by responsible representative bodies concerned with the need for improved educational programs and facilities in the United States and in the State of Pennsylvania. The steps taken in the challenged statutes are rational means of improving the quality of education while preserving the separation between government and religion which the Constitution commands. If this Court finds either of these programs impermissible under the First and Fourteenth Amendments, it will be foreclosing not only the specific form of assistance directly affected,

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[1] The plain distinction between the racially-motivated establishment of private academies in the South and the religious motivation underlying the creation of the Jewish day schools was spelled out in the brief *amicus curiae* filed by the National Jewish Commission on Law and Public Affairs *in support of the plaintiffs* in *Green* v. *Kennedy,* D.D.C. Civ. No. 1355-69, in which the tax exemption for the Southern private academies was successfully challenged.

but also other experimental efforts to upgrade the level of education in this country.[2]

In another context, Mr. Justice Holmes made the widely quoted observation that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics." *Lochner* v. *New York,* 195 U.S. 45, 75 (1905). Nor, we submit, did the Establishment Clause of the First Amendment enact James Garfield's views of nearly a century ago on the use of tax revenues for religiously affiliated schools.[3]

The touchstone of constitutionality must be, as this Court held in *Walz,* whether the measure is a "reasonable and balanced attempt to guard against [the] dangers" sought to be prevented by the Religion Clauses of the First Amendment. 397 U.S. at 673. The measures here challenged plainly qualify by that standard.

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[2] In March 1970, for example, under a grant from the United States Office of Economic Opportunity, a report was issued by the Center for the Study of Public Policy at Harvard University recommending a system of "Education Vouchers" for public and private institutions as "a new era of innovation and reform in American schools." Such a program would be impermissible under any of the rationales urged here by the appellants.

[3] Rutledge, J., dissenting in *Everson* v. *Board of Education,* 330 U. S. 1, 61, note 56 (1947), quoted Garfield's 1880 letter accepting the nomination for the presidency:

> "* * * it would be unjust to our people, and dangerous to our institutions, to apply any portion of the revenues of the nation, or of the States, to the support of sectarian schools. The separation of the Church and the State in everything relating to taxation should be absolute."

Accordingly, the judgments in both cases should be affirmed.

Respectfully submitted,

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