

The Burger Court Opinion Writing Database

Lemon v. Kurtzman

411 U.S. 192 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: MAR 9 1973

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1470

Alton J. Lemon et al.,
Appellants,
v.
David H. Kurtzman, Etc.,
et al.

On Appeal from the United
States District Court for
the Eastern District of
Pennsylvania.

[March —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

On June 28, 1971, we held that the Pennsylvania statutory program to reimburse nonpublic sectarian schools for certain secular educational services violated the Establishment Clause of the First Amendment. The case was remanded to the Three-Judge District Court for further proceedings consistent with our opinion. *Lemon v. Kurtzman*, 403 U. S. 602 (1971) (*Lemon I*). On remand, the District Court entered summary judgment in favor of appellants and enjoined payment, under Act 109, of any state funds to nonpublic sectarian schools for educational services performed after June 28, 1971. The District Court's order permitted the State to reimburse nonpublic schools for services provided before our decision in *Lemon I*. Appellants made no claim that appellees refund all sums paid under the Pennsylvania statute¹ struck down in *Lemon I*.

Appellants, the successful plaintiffs of *Lemon I*, now challenge the limited scope of the District Court's injunction. Specifically, they assert that the District Court

¹ Non-public Elementary and Secondary Education Act, 109 (24 P. S. §§ 5601-5609).

— (3)
12, 14, 15-16
file

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-1470

Recirculated: **MAR 28 1973**

Alton J. Lemon et al., Appellants, v. David H. Kurtzman, Etc., et al.	}	On Appeal from the United States District Court for the Eastern District of Pennsylvania.
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[March —, 1973]

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To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1470

From: Douglas, J.

Circulated: 3-26-73

Alton J. Lemon et al.,
 Appellants,
 v.
 David H. Kurtzman, Etc.,
 et al.

On Appeal from the United
 States District Court for
 the Eastern District of
 Pennsylvania.

Recirculated: _____

[March —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

There is as much a violation of the Establishment Clause of the First Amendment whether the payment from public funds to sectarian schools involved last year, the current year, or next year. Madison in his Remonstrance stated "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment. . . ."¹

Whether the grant is for teaching last year or at the present time taxpayers are forced to contribute to sectarian schools a part of their tax dollars.

The ban on that practice is not new. *Lemon I*, 403 U. S. 602, did not announce a change in the law. We had announced over and again that the use of taxpayers' money to support parochial schools violates the First Amendment, made applicable to the States by virtue of the Fourteenth.

We said in unequivocal words in *Everson v. Board of Education*, 330 U. S. 1, 16, "No tax in any amount, large or small, can be levied to support any religious activities

¹ The Remonstrance is reprinted in 330 U. S., at 63 and in 397 U. S., at 719.

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1470

Alton J. Lemon et al.,
 Appellants,
 v.
 David H. Kurtzman, Etc.,
 et al.

On Appeal from the United
 States District Court for
 the Eastern District of
 Pennsylvania.

[March —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting.

There is as much a violation of the Establishment Clause of the First Amendment whether the payment from public funds to sectarian schools involved last year, the current year, or next year. Madison in his Remonstrance stated "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment. . . ."¹

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 22, 1973

RE: No. 71-1470 - Lemon v. Kurtzman

Dear Chief:

In due course I plan to circulate a
dissent in the above.

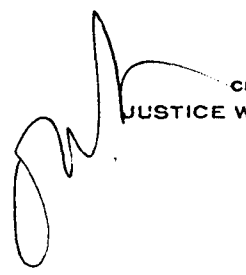
Sincerely,

B. J. White

The Chief Justice

cc: The Conference

B
Supreme Court of the United States
Washington, D. C. 20543


CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 26, 1973

RE: No. 71-1470 Lemon v. Kurtzman

Dear Bill:

Please join me.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 26, 1973

71-1470, Lemon v. Kurtzman

Dear Bill,

Please add my name to your dissenting
opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Douglas

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 12, 1973

Re: No. 71-1470 - Lemon v. Kurtzman

Dear Chief:

Please note at the foot of your opinion
in this case that Mr. Justice White concurs in
the judgment.

Sincerely,



The Chief Justice

Copies to Conference

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U.S. DEPARTMENT OF JUSTICE

2
file
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 27, 1973

Re: No. 71-1470 - Lemon v. Kurtzman

Dear Chief:

Please join me.

Sincerely,

H. A. B.

The Chief Justice

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SECTION OF ADVANCE IN

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Supreme Court of the United States
Washington, D. C. 20543

March 15, 1973

Re: No. 71-1470 Lemon v. Kurtzman

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

cc: The Conference

3
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

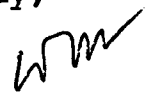
March 15, 1973

Re: No. 71-1470 - Lemon v. Kurtzman

Dear Chief:

Please join me in your opinion for the Court in
this case.

Sincerely,



The Chief Justice

Copies to the Conference

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U.S. DEPARTMENT OF JUSTICE