

The Burger Court Opinion Writing Database

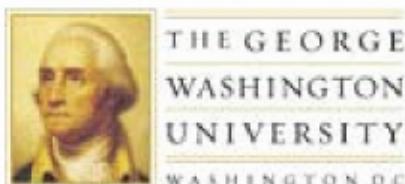
Levitt v. Committee for Public Education & Religious Liberty

413 U.S. 472 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

June 14, 1973

Re: No. 72-269 - Levitt v. Comm. for Public Education & Religious Liberty, et al
No. 72-270 - Brydges v. Comm. for Public Education & Religious Liberty, et al
No. 72-271 - Cathedral Academy, et al v. Comm. for Public Education & Religious Liberty, et al

Dear Bill:

I have your note of June 14. Allen and Everson both stand solidly for the page 11-12 statement you question. It seems to me a useful statement as is but I will add, "See e. g., Allen and Everson." That should take care of your point.

Regards,

W.B.

Mr. Justice Brennan

WS

13
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1973

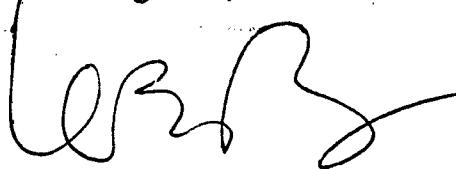
Re: No. 72-269 - Levitt v. Comm. for Public Education
& Religious Liberty, et al
No. 72-270 - Brydges v. Comm. for Public Education
& Religious Liberty, et al
No. 72-271 - Cathedral Academy, et al v. Comm. for
Public Education & Religious Liberty,
et al

MEMORANDUM TO THE CONFERENCE:

Enclosed is a truncated version of what I originally
drafted (but did not circulate) in the above cases.

The printed version will take a few days.

Regards,



To: Mr. [redacted]

SUPREME COURT OF THE UNITED STATES

Nos. 72-269, 72-270, 72-271

Levitt)
72-269 v.)
Comm. for Public Education &)
Religious Liberty, et al.)
Brydges) On Appeal from the
72-270 v.) United States District Court
Comm. for Public Education &) for the Southern District of
Religious Liberty, et al.) New York
Cathedral Academy, et al.)
72-271 v.)
Comm. for Public Education &)
Religious Liberty, et al.)

From: [redacted]

Circulated:

JUN 14 1973

Recirculated:

SD / You had me see pp 7, 9,
greatest that earlier
Explanation on line 13 of
pp 11, 12 be omitted if
line 10 of page
five is now

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

2
1st DRAFT

From: The Chief Justice

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 72-269, 72-270, AND 72-271

Recirculated: JUN 19 1973

Arthur Levitt, as Comptroller of the
State of New York, and Ewald B.
Nyquist, as Commissioner of
Education of the State of
New York, Appellants.

72-269

Committee for Public Education
and Religious Liberty et al

Warren M. Anderson, as Majority
Leader and President pro tem
of New York State Senate.
Appellant.

72-270

Committee for Public Education
and Religious Liberty et al

Cathedral Academy et al.
Appellants

72-271

Committee for Public Education
and Religious Liberty et al.

On Appeal from
the United States
District Court
for the Southern
District of New
York.

[June 19, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of
the Court

In this case we are asked to decide whether Chapter 138 of New York State's Laws of 1970, under which the State reimburses private schools throughout the State for certain costs of testing and recordkeeping, violates the Establishment Clause of the First Amendment. A

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

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1973

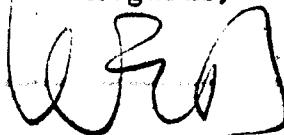
Re: Nos. 72-269, 270 & 271 - Levitt, Anderson, Cathedral
Academy v. Committee for Public Education, etc.

Dear Bill:

I have your note of June 19 and my "Hobson's Choice" is to gain your vote on the opinion at the expense of losing another.

I will therefore show you as concurring in the judgment or result, whatever is the correct formula.

Regards,



Mr. Justice Brennan

Copies to the Conference

P.S. This time of the year some cases don't even allow for a "deathbed dissent"!

7/ See 7.10

11

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

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

Nos. 72-269, 72-270, AND 72-271 Circulated:

JUN 21 1973

Recirculated:

Arthur Levitt, as Comptroller of the
 State of New York, and Ewald B.
 Nyquist, as Commissioner of
 Education of the State of
 New York, Appellants,

72-269 v.

Committee for Public Education
 and Religious Liberty et al.

Warren M. Anderson, as Majority
 Leader and President pro tem
 of New York State Senate,
 Appellant,

72-270 v.

Committee for Public Education
 and Religious Liberty et al.

Cathedral Academy et al.,
 Appellants,

72-271 v.

Committee for Public Education
 and Religious Liberty et al.

On Appeals from
 the United States
 District Court
 for the Southern
 District of New
 York.

[June —, 1973]

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

In this case we are asked to decide whether Chapter 138 of New York State's Laws of 1970, under which the State reimburses private schools throughout the State for certain costs of testing and recordkeeping, violates the Establishment Clause of the First Amendment. A

March 23, 1973

Dear Chief:

In No. 72-269 - Levitt v. Committee for Public Education and the companion cases, there were two votes to reverse, three to affirm in part and reverse in part, and four to affirm.

I took the liberty of asking Bill Brennan if he would prepare a memo stating the views of those of us who would affirm.

W. O. D.

The Chief Justice

WD

5

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 14, 1973

Dear Chief:

I join your opinion in Levitt - 72-269 and the companion cases. I would prefer, however, to strike most of the paragraph starting on page 11. The question of what service a state may "mandate" a religious school to perform might include, for purposes of health, keeping room temperatures at 72° when outside temperatures are at a certain level.

But I doubt if the state constitutionally could take on the heating and sanitary services of a religious school. I'd prefer to let the problem rest, awaiting case by case solutions.

There are bound to be cases coming up - cases of all kinds.

W. O. D.

The Chief Justice

cc: Conference

Supreme Court of the United States
Washington, D. C. 20530

72-269

June 19, 1973

72-269

Dear Chief:

In Levitt and in Norwood are statements or indications that a sectarian school may be reimbursed for its services as respects secular activities by the State.

Dear Chief: This is new ground in which I have serious doubts. We have never so held and I would prefer to keep our holdings as narrow as possible. If, however, you keep the opinions in their present form, please provide only for note at the end of each; for a certain of specified services, some secular and some potentially religious, neither this Court nor the District Court properly attach allusion to an unjust correlative right which occurred in Levitt and is incurable. See Levitt, 406 U.S. 625. The suggestion, of course, is that such "unjust correlative rights" in fact exist. I do not believe that a sectarian school may be reimbursed for any of its "services" under any circumstances. I would much prefer a change in **The Chief Justice** to indicate his desire to substitute this suggestion.

With every good will, I would be happy to file your opinion. If, cc: Conference

With every good will, I would be happy to file the Conference Report with you, even if the Conference has not yet voted for it. (Mr. Justice Douglas in his view this affirmative is compelled by constitutional rights in Committee on Public Education and Religious Liberties, 97-1000, H. R. (1973) and also by Lemon, U.S. (1973).

Sincerely,

Bev

WP

WP

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 20, 1973

Dear Chief:

In No. 72-³69 - the Levitt case -
and the two companion cases, would you
kindly add my name to Bill Brennan's
statement which I understand has been added
to the end of your opinion.

W. O. D. *WVO*

The Chief Justice

cc: Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 14, 1973

Dear Chief:
I too, hope you will omit the
explanation paragraph
on page 11-12

RE: No. 72-269 - Levitt v. Comm. for Public Education & Religious Liberty, et al.
No. 72-270 - Brydges v. Comm. for Public Education & Religious Liberty, et al.
No. 72-271 - Cathedral Academy, et al. v. Comm. for Public Education & Religious Liberty, et al.

Dear Chief:

I think your "truncated version" effectively and correctly disposes of these cases. I hope, however, that you will omit the "word of explanation" paragraph at 11-12. This is an area of such sensitivity that I would not want to vouchsafe the generality that "we do not mean to suggest that the state is constitutionally barred from reimbursing a church-sponsored school for some services it mandates." I think that is better left to concrete instances that can be evaluated on their own merits.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 19, 1973

111-1

RE: Nos. 72-269, 270 & 271 - Levitt, Anderson, Cathedral
Academy v. Committee for Public Education, etc.

Dear Chief:

Your most recent draft in Levitt is excellent, and I would be happy to join the opinion with one minor qualification. At pages 9-10, you state that "Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services." The suggestion, of course, is that such "reimbursable secular services" in fact exist. I do not believe that we have ever specifically held that a sectarian school may itself be reimbursed by a State for any of its "services" -- secular or otherwise. Thus, I would much prefer a change in the above-quoted sentence so as to eliminate this suggestion. With such an alteration, I would be happy to join your opinion. If, however, for some reason, you feel the sentence must be retained, will you please note at the foot of your opinion the following: "Mr. Justice Brennan is of the view that affirmation is compelled by our decision today in Committee for Public Education and Religious Liberty v. Nyquist, U.S. ____ (1973) and Sloan v. Lemon, U.S. ____ (1973)."

Sincerely,

Bed

The Chief Justice

cc: The Conference

9
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 14, 1973

Nos. 72-269 - Levitt v. Comm. for Pub. Educa.

Dear Chief,

I agree with the reasoning and conclusion of the "truncated version" you have circulated, except that I too would strongly prefer that the paragraph at pp. 11-12 be eliminated.

Sincerely yours,

O.S.

The Chief Justice

Copies to the Conference

5

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 21, 1973

Nos. 72-269, 72-270, and 72-271
Levitt v. Comm. for Pub. Educa.

Dear Chief,

This will confirm that I join your opinion
for the Court in this case.

Sincerely yours,

P.S.
V.

The Chief Justice

Copies to the Conference

B

file

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

~~Copy~~

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 19, 1973

Re: Nos. 72-269, 72-270 & 72-271 - Levitt v.
Committee for Public Education
and Religious Liberty

Dear Chief:

Please note at the bottom of your
opinion for the Court in this case that Mr.
Justice White dissents.

Sincerely,



The Chief Justice

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1973

Re: Nos. 72-269, 72-270, 72-271 - Levitt v.
Comm. for Public Education, etc.

Dear Chief:

I, too, hope you will omit the
explanation paragraph on pages 11-12.

Sincerely,


T.M.

The Chief Justice

cc: Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 20, 1973

Re: Nos. 72-269, 270 and 271 - Levitt,
Anderson, Cathedral Academy v. Committee
for Public Education, etc.

Dear Chief:

In light of your memorandum of June 20
responding to Bill Brennan's note of June 19,
please add my name to his statement at the end
of your opinion in these cases.

Sincerely,



T.M.

The Chief Justice

cc: Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1973

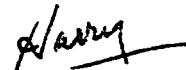
Re: No. 72-269 - Levitt v. Comm. for Public Educ.
No. 72-270 - Anderson v. Comm. for Pub. Educ.
No. 72-271 - Cathedral Academy v. Comm. for
Public Education

Dear Chief:

Please join me in your circulation of June 14.

Along with Lewis, I am in accord with the substance of the views expressed in the paragraph on pages 11-12 that has occasioned comment. I so expressed myself at conference. I would be content, however, to have the paragraph omitted and to await other cases or, if the Court prefers, to have it retained with the suggestion Lewis has offered.

Sincerely,



The Chief Justice

cc: The Conference

9
CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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

June 15, 1973

No. 72-269 Levitt v. Comm. for Public Education

Dear Chief:

Please join me in your opinion.

I have noted the comments suggesting deletion of the reference to state prepared tests on pages 11-12 of your draft of June 14, 1973. I would be quite content to see this omitted, although - certainly from my viewpoint - I agree with the substance of the view you express. If you elect to retain the paragraph, I do think it could be clarified if the third and fourth sentences were reframed along the following lines:

"Any such program would have to be tested against the standards prescribed by this Court, and we prejudge the permissibility of no particular type of service. But we note that a different case would be presented by a carefully drawn statute under which schools are reimbursed for administering and grading state prepared tests on secular subjects and which are required by law to be given to pupils in all schools, public and private. See Board of Educ. v. Allen, supra."

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

R

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 1973

Re: No. 72-269 - Levitt v. Comm. for Public Education
No. 72-270 - Anderson v. Comm. for Public Education
No. 72-371 - Cathedral Academy v. Comm. for Public
Education

Dear Chief:

Please join me. As an alternative to the part of your opinion which is presently the subject of discussion, I would be perfectly agreeable to Lewis' suggestion.

Sincerely,

W. REHNQUIST

The Chief Justice

Copies to the Conference