The Burger Court Opinion Writing Database

Committee for Public Education & Religious Liberty v. Nyquist

413 U.S. 756 (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

June 6, 1973

CONFIDENTIAL

Re: No. 72-694 - Committee for Public Education v. Nyquist
No. 72-753 - Anderson v. Committee for Public Education
No. 72-791 - Nyquist v. Committee for Public Education
No. 72-929 - Cherry v. Committee for Public Education

Dear Lewis:

I will join you in Part A and possibly in Part B of the above but I will dissent as to Part C -- assuming I have the parts correctly identified.

I regret I cannot agree with your reading of Walz or indeed of Lemon and Tilton. For me they are contrary, and Part C cuts a piece off each, particularly Walz. I suspect -- indeed I would even predict -- that the "C" holding will lay the foundation to eliminate the deductibility of private contributions to churches. Under your opinion it would be difficult to sustain tax deductions for contributions to a church school. If so, what will happen to contributions to the church that sponsors that school. We know that all church schools receive large aid from the parent church and in many instances the school budget is simply a pocket of the church itself.

I suspect this holding means you will not vote for a disposition of Levitt that allows the state to pay for examination and record keeping the state requires. This may lead me to reassign Levitt. However, on this we can "have a word."

Regards,

WEB

Mr. Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1973

Re: No. 72-694 - Committee for Public Education v. Nyquist
No. 72-753 - Anderson v. Committee for Public Education
No. 72-791 - Nyquist v. Committee for Public Education
No. 72-929 - Cherry v. Committee for Public Education

Dear Lewis:

I cannot join your opinion beyond Part A and will perhaps write a dissent on at least Part C and probably B.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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72-694 6/14/73

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

CHAMBERS OF
THE CHIEF JUSTICE

Dear Lewis

There are several cases to mine as which I would have been agreeable to reargument - Rooden was one until we found a "combination" that took care of both White + Rehnquist.

Hence I do not regard a suggestion to reargue as "subversive."

I do not suggest but

I see some good reasons for reargueing the "church school aid" cases. Levitt will now be only a plurality opinion. I would welcome a re-run next Term if all those cases went over. It has some advantages — a man can begin in October with a headstart. Then cases trouble me & they fall in that category of May-June cases not fully thought through

and even if correct, not fully articulated - I include my own Scott opinion in that, even though it is much easier than your several cases on the point.

We have all had 14-15-16 opinions + that is just too many in one year.

Regards
Warren

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

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1973

Re: 72-694) - Comm. for Pub. Edu. v. Nyquist
72-753) - Anderson v. Comm. for Public Education
72-791) - Nyquist v. Comm. for Pub. Education
72-929) - Cherry v. Comm. for Pub. Edu.

72-459) - Sloan v. Lemon
72-620) - Crouter v. Lemon

Dear Byron:

Please join me in so much of your dissent as relates to the tuition grants and tax credits.

I am also joining with Bill Rehnquist's dissent on this basis.

Regards,

Warren

Mr. Justice White

Copies to the Conference

WJB

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: JUN 19 1973

Recirculated:

No. 72-694 - Comm. for Public Education v. Nyquist
No. 72-753 - Anderson v. Comm. for Public Education
No. 72-791 - Nyquist v. Comm. for Public Education
No. 72-929 - Cherry v. Comm. for Public Education

MR. CHIEF JUSTICE BURGER concurring in part and dissenting in part.

I join in that part of the Court's opinion in Committee for Public Education and Religious Liberty v. Nyquist, supra, which holds the "maintenance and repair" provisions[1/] unconstitutional under the Establishment Clause because it is a direct aid to religion. I disagree, however, with the Court's decisions in Nyquist and in Sloan v. Lemon, supra, to strike down the New York and Pennsylvania tuition grant programs and the New York tax relief provisions.[2/] I believe the Court's decisions on those

1/ N.Y. Laws 1972, c. 414, § 1, amending New York Educ. Law, Art. 12, §§ 549-553 (McKinney 1972).

2/ Law of Pa., 1971, Act 92, 24 Pa. Stat. Ann. § 5701 et seq. (Supp. 1972); N.Y. Laws 1972, c. 414, § 2, amending N.Y. Educ. Law, Art. 12-A, §§ 559-563 (McKinney 1972); N.Y. Laws 1972, c. 414, §§ 3, 4 and 5, amending N.Y. Tax Law, §§ 612(c), 612(j) (McKinney 1972).

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B

file

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

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1973

Re: 72-694) - Comm. for Pub. Education v. Nyquist
72-753) - Anderson v. Comm. for Public Education
72-791) - Nyquist v. Comm. for Public Education
72-929) - Cherry v. Comm. for Public Education

Dear Bill:

Please join me in so much of your dissent as relates to the tuition grants and tax credits.

I am also joining with Byron's dissent on this basis.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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: _____

Recirculated: JUN 21 1973

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 72–694, 72–753, 72–791, AND 72–929

Committe for Public Education and Religious Liberty et al., Appellants,
72–694 *v.*
Ewald B. Nyquist, as Commissioner of Education of the State of New York et al.

Warren M. Anderson, as Majority Leader and President pro tem of the New York State Senate, Appellant,
72–753 *v.*
Committee for Public Education and Religious Liberty et al.

Ewald B. Nyquist, as Commissioner of Education of the State of New York et al., Appellants,
72–791 *v.*
Committee for Public Education and Religious Liberty et al.

Priscilla L. Cherry et al., Appellants,
72–929 *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 concurring in part and dissenting in part.

I join in that part of the Court's opinion in *Committee for Public Education and Religious Liberty* v. *Nyquist, supra,* which holds the "maintenance and repair" pro-

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 4, 1973

Re: Nos. 72-694, 72-753, 72-791 and 72-929,
Committee for Public Education v. Nyquist

Dear Lewis,

I think you have written a fine opinion in these cases, and I am glad to join it.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

U fill

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-19-73

Recirculated: _____

Re: Nos. 72-694, 72-753, 72-791 and 72-929, Committee for Public Education and Religious Liberty v. Nyquist

and

Nos. 72-459 and 72-620, Sloan v. Lemon

Mr. Justice White, dissenting.

Each of the States regards the education of its young to be a critical matter, so much so that it compels school attendance and provides an educational system at public expense. Any otherwise qualified child is entitled to a free elementary and secondary school education, or at least an education that costs him very little as compared with its cost to the State.

This Court has held, however, that the Due Process Clause of the Constitution entitles parents to send their children to non-public schools, secular or sectarian, if those schools are sufficiently competent to educate the child in the necessary secular subjects. Pierce v. Society of Sisters, 268 U.S. 510 (1925). About 10% of the Nation's children, approximately 5.2 million students, now take this option and are not being educated in public schools at public expense. Under state law these children have a right to a free public education and it would not appear unreasonable if the State, relieved of the expense of educating a child in the public school, contributed to the expense of his education elsewhere. The parents of such children pay taxes, including school taxes. They could receive in return

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 20, 1973

Re: Nos. 72-694, 72-753, 72-791 & 72-929,
Committee for Public Education v.
Nyquist

Nos. 72-459 & 72-620, Sloan v. Lemon

Dear Chief:

Please join me in your opinion in these cases insofar as it dissents from the invalidation of the New York and Pennsylvania tuition grant and tax relief programs.

Sincerely,

The Chief Justice

Copies to Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 20, 1973

Re: Nos. 72-694, 72-753, 72-791 and 72-929,
Committee for Public Education v.
Nyquist

Dear Bill:

Please join me in your dissenting opinion in these cases.

Sincerely,

B. R. W.

Mr. Justice Rehnquist

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S

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

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Nos. 72-694, 72-753, 72-791, AND 72-929

Recirculated: 6-21-73

Committee for Public Education and Religious Liberty et al., Appellants,
72-694 *v.*
Ewald B. Nyquist, as Commissioner of Education of the State of New York et al.

Earl W. Brydges, as Majority Leader and President pro tem of the New York State Senate, Appellant,
72-753 *v.*
Committee for Public Education and Religious Liberty et al.

Ewald B. Nyquist, as Commissioner of Education of the State of New York et al., Appellants,
72-791 *v.*
Committee for Public Education and Religious Liberty et al.

Priscilla L. Cherry et al., Appellants,
72-929 *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. JUSTICE WHITE, dissenting.

Each of the States regards the education of its young to be a critical matter, so much so that it compels school attendance and provides an educational system at public expense. Any otherwise qualified child is entitled to a

ND

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 5, 1973

Re: Nos. 72-694, 72-753, 72-791, 72-729, 72-459, 72-6
Committee for Public Education v. Nyquist; Sloan v. Lemon

Dear Lewis:

I definitely share your view that the New York statute is unconstitutional insofar as it provides direct grants to religious institutions for the maintenance of buildings utilized for religious purposes. However, I have not yet come to rest on the question of tuition aid given to the parents, either directly, or in the form of a tax credit, involved in both the New York and Pennsylvania cases.

I may write on both of these issues.

Sincerely,

T.M.

Mr. Justice Powell

cc: Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 13, 1973

Re: Nos. 72-694, 72-753, 72-791 and 72-929 -
Committee for Public Education v. Nyquist, etc.

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1973

Re: Nos. 72-694, 72-753, 72-791, 72-929 - Comm. for Public Education v. Nyquist, etc.

Dear Lewis:

You obviously have devoted much effort in the preparation of your opinion for these close and difficult cases. It is a good opinion.

I have finally reached the point where I wonder whether Allen was correctly decided. Perhaps it was, but I suspect now that it has suffered some erosion since it was handed down.

You asked me to let you know if I had any specific concern about the opinion, particularly in its relationship to Walz. I really have no suggestion. I wondered initially whether the paragraph beginning at the foot of page 34 might be omitted. I am not certain that the non-restriction factor is a significant one, but in any event you qualify it. I am content to have it in or out as you prefer.

Sincerely,

Harry

Mr. Justice Powell

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1973

Re: Nos. 72-694, 72-753, 72-791, 72-929 - Comm. for Public Education v. Nyquist, etc.

Dear Lewis:

Please join me in the opinion you have prepared for these cases.

I have one insignificant inquiry: inasmuch as Mr. Anderson has succeeded Mr. Brydges, as has been noted in the opinion, should the title in No. 72-753 be changed accordingly?

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

1st DRAFT

From: Powell, J.

Circulated: JUN 1 1973

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 72-694, 72-753, 72-791 AND 72-929

Committee for Public Education and Religious Liberty et al., Appellants.
72-694 *v.*
Ewald B. Nyquist, as Commissioner of Education of the State of New York, et al.

Earl W. Brydges, as Majority Leader and President pro tem of the New York State Senate, Appellant.
72-753 *v.*
Committee for Public Education and Religious Liberty et al.

Ewald B. Nyquist, as Commissioner of Education of the State of New York, et al., Appellants.
72-791 *v.*
Committee for Public Education and Religious Liberty et al.

Priscilla L. Cherry et al., Appellants,
72-929 *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. JUSTICE POWELL delivered the opinion of the Court.

This case raises a challenge under the Establishment Clause of the First Amendment to the constitutionality of a recently enacted New York law which provides finan-

June 6, 1973

No. 72-694 Committee for Public Education v. Nyquist
No. 72-753 Anderson v. Committee for Public Education
No. 72-791 Nyquist v. Committee for Public Education
No. 72-929 Cherry v. Committee for Public Education

Dear Chief:

Thank you for your letter of this date commenting on Nyquist and Levitt. Your remarks prompt me to state in brief form my view on the question arising in connection with Nyquist of the constitutionality of genuine tax deductions. And, for whatever assistance it may provide, I will also outline my views in Levitt.

(1) Nyquist

First, I am glad to have you aboard as to Part II A of this opinion dealing with New York's maintenance and repair statute. As to Part II C -- the tax benefit program -- I endeavored to write the opinion in such a manner as to avoid specifically any negative inference as to the validity of genuine tax deductions for charitable contributions to churches or church schools. Indeed, I intended to indicate that such deductions would fit compatibly with my reading of Walz. To those ends, I stated (page 31 n. 39) that the New York law does not constitute a traditional tax deduction program and, therefore, that we do not decide whether such a deduction would withstand Walz analysis. Additionally, my treatment of Walz was designed to suggest that a deduction would survive scrutiny for at least two reasons: (i) charitable deductions enjoy the same sort of historical approval and widespread use as do property tax exemptions, see p. 33;

(ii) such deductions are available to a large class of taxpayers, including many who make contributions to charitable, nonreligious and noneducational organizations. See pp. 34-35. See also fn 28, pp. 23-24. Taken together, I think these factors suggest that, as in Walz, bona fide income tax deductions may properly be regarded as reflective of a state attitude of "benevolent neutrality" toward religious institutions.

(2) Levitt

In view of your remark re Levitt, it may prove helpful to you if I outline the view of this case I took at Conference. As you know, the New York law in question here makes lump sum, undifferentiated payments directly to nonpublic schools to pay for a number of services. Some of those services appear to be purely secular and clearly separate from the religious mission of nonpublic, sectarian schools, and their funding would be permissible under our cases, including Everson, Allan, Lemon and Tilton. Thus, I would not disapprove of payment for state-required, state-prepared tests such as the Regents' Tests. Their function is purely secular and their content is fixed in advance to assure no sectarian influence.

The remaining services, however, cannot pass a test of secularity. The bulk of the regular, periodic, teacher-prepared tests may be as much a part of the overall religious orientation and mission of a sectarian institution as are its teachers. Indeed, testing is an essential part of teaching itself. A state might just as well pay a part of teachers' salaries. I see no way to avoid here the prohibitions of effect and entanglement. Similarly, I would not approve general student attendance record keeping or general personnel qualification record keeping. These services are performed for religious classes and for teachers of religion, and indeed I do not see how the religious and secular can be divided here. This aspect of Levitt I think is controlled by our discussion of New York's maintenance and repair provisions in Nyquist. If the state may not finance the heating and lighting of classrooms in which the religious message is transmitted, it may not pay for the attendance records for those classes or for the qualification records of the instructor.

In summary, if the New York law were severable, I would strike down aid to general testing, general attendance record keeping

and teacher qualification record keeping. I would uphold, however, aid to state-prepared and state-mandated testing. My reading of the statute, however, inclines me to think it is not severable and that, as the DC concluded, the entire statute must fall. The $27 or $45 grants are not divided among the services for which they provide aid and I do not know how the District Court could arrive at an apportionment. Instead, I think the wiser course would be to state -- with some clarity -- in dictum in the opinion that the permissible forms of aid to state-required testing could be funded under a properly redrawn statute. For these reasons, and with these limitations in mind, I voted to affirm the District Court.

Sincerely,

The Chief Justice

LFP/gg

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1973

Cases Held for No. 72-694 Committee for Public Education and Religious Liberty v. Nyquist; No. 72-753 Brydges v. Committee for Public Education and Religious Liberty; No. 72-791 Nyquist v. Committee for Public Education and Religious Liberty; and No. 72-929 Cherry v. Committee for Public Education and Religious Liberty

MEMORANDUM TO THE CONFERENCE:

The following cases are being held:

No. 72-1026 Durham v. McLeod (Appeal from South Carolina SC).

This case involves a challenge to the South Carolina Educational Assistance Act of 1971, which creates an Authority to issue bonds the proceeds of which will be available for loans to South Carolina residents to attend institutions of higher learning, both within and without the State. No restriction is placed on the type of higher educational institution attended or the courses studied, these decisions being left to the loan recipients. The loans may be guaranteed by the Authority to the extent of its resources (a revolving loan fund is created) but not by the State.

The statute was attacked on Establishment grounds because it contains no restrictions barring a student from attending a sectarian institution or pursuing a sectarian course of study. The State Supreme Court upheld the law and the appeal to this Court has been held for decision of the tuition grant issues in Nyquist and Sloan. The statute appears to be closely analogous to the G. I. Bill, which we suggested in footnote 28, pp. 23-24 of Nyquist, is analytically distinct from the

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grants in New York and Pennsylvania. Because of the breadth of the benefited class, because of the fact that this case involves higher education, and because the statutory enactment holds no genuine prospect for political divisiveness, I think this case distinguishable and will vote either to dismiss or affirm.

No. 71-1664, Essex v. Wolman (Appeal from USDC SD Ohio).

This is a petition for rehearing from the State of Ohio in this case which the Court summarily affirmed last fall. The only ground for rehearing is the claim that it would be unfair to uphold Pennsylvania's and New York's tuition grant programs after having affirmed the District Court's decision holding unconstitutional Ohio's tuition grant scheme. In view of the disposition of Sloan and Nyquist, this petition for rehearing should now be denied.

No. 72-1139, Kosydar v. Wolman (USDC SD Ohio).

This is an appeal from a decision by a three-judge federal court in Ohio holding an Ohio tax credit program to be in violation of the Establishment Clause. This case has been held for Nyquist. Appellants rely on the District Court opinion in Nyquist, which our opinion reverses. I see no significant differences between Ohio's and New York's laws and will, therefore, vote to affirm this case. (It should be noted that no response was requested and none has been received. In view of my suggested disposition I do not regard this fact as significant.)

A-1164, Marlburger v. Public Funds for Public Schools of New Jersey (USDC D NJ)

On May 29, 1973, the Court granted a stay of a preliminary injunction issued by the USDC D NJ "pending further order of this Court." It was my understanding that the stay was, in effect, a means of "holding" this matter until the several religion cases were resolved. In light of Nyquist, Sloan and Levitt, I am now of the view that the stay should be vacated and the preliminary injunction reinstated.

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The DC preliminarily enjoined State implementation of its 1971 Nonpublic Elementary and Secondary Education Act. The Act has two primary parts. Section 5 provides reimbursement to parents who send their children to nonpublic schools for "textbooks, instructional materials and supplies." The grants are $10 for each elementary school child and $20 for each secondary school child. Section 6 provides that nonpublic schools may acquire secular "supplies, instructional materials, equipment and auxiliary services" from the State. The details of each program are discussed in Mr. Ripple's memorandum circulated prior to the initial consideration of this application.

The DC balanced the traditional factors in assessing whether a preliminary injunction should be granted: likelihood of success on the merits; irreparability of harm; potentiality of harm to the interests represented by plaintiffs; and assessment of the "public interest." Central to the DC's conclusion was its judgment that both sections of the Act would probably be held in violation of the Establishment Clause. Each section, in the DC's analysis, ran afoul of (1) the "effects" test, (2) the "administrative entanglements" test, and (3) the political divisiveness aspect of the entanglements inquiry. While I have little doubt about the bulk of the DC's conclusions, I do have some question about the constitutional propriety of the provision of "auxiliary services" such as nursing care and remedial assistance. If such services were provided for all school children under a narrowly defined and limited program, I think our cases might support a finding of constitutionality. However, as merely one segment of a larger aid program, and lacking sufficient detail to assure that it can be implemented entirely on the secular side of nonpublic schools without raising entanglements problems, I do not disagree with the DC's judgment of likely unconstitutionality. The stay should, in my view, be vacated.

L. F. P., Jr.

L.F.P. Jr

ss

WP

Changes pp. 13, 23, 24-25, 29, 34 and Technical changes

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

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Nos. 72–694, 72–753, 72–791, AND 72–929

Circulated:

Recirculated: JUN 22 1973

Committee for Public Education and Religious Liberty et al., Appellants,
72–694 *v.*
Ewald B. Nyquist, as Commissioner of Education of the State of New York, et al.

Warren M. Anderson, as Majority Leader and President pro tem of the New York State Senate, Appellant,
72–753 *v.*
Committee for Public Education and Religious Liberty et al.

Ewald B. Nyquist, as Commissioner of Education of the State of New York, et al., Appellants,
72–791 *v.*
Committee for Public Education and Religious Liberty et al.

Priscilla L. Cherry et al., Appellants,
72–929 *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 25, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case raises a challenge under the Establishment Clause of the First Amendment to the constitutionality of a recently enacted New York law which provides finan-

113-1

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

WHR:DRAFT 6/4/73

From: Rehnquist, J.

Circulated: 6/4/73

Recirculated: _____

Nos. 72-694, 72-753, 72-791 and 72-929

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al., Appellants

v.

EWALD B. NYQUIST, AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, et al.

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

MR. JUSTICE REHNQUIST, dissenting.

Differences of opinion are undoubtedly to be expected when the Court turns to the task of interpreting the meaning of the religious clauses of the First Amendment, since our previous cases arising under these clauses, as the Court notes, "have presented some of the most perplexing questions to come before the Court". Ante, page 3. I address myself in this opinion only to that portion of the Court's opinion which strikes down New York's tax benefit program. I find both the Court's reasoning and its result all but impossible to reconcile with Walz v. Tax Commission, 397 U.S. 664 (1970), decided only three years ago, and with Board of Education v. Allen, 392 U.S. 236 (1968) and Everson v. Board of Education, 330 U.S. 1 (1947).

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

printed
1st DRAFT

From: Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

Nos 72-694, 72-753, 72-791, AND 72-929

Circulated:

Recirculated: 6/5/73

Committee for Public Education and Religious Liberty et al., Appellants,
72-694 *v.*
Ewald B. Nyquist, as Commissioner of Education of the State of New York et al.

Earl W. Brydges, as Majority Leader and President pro tem of the New York State Senate, Appellant,
72-753 *v.*
Committee for Public Education and Religious Liberty et al.

Ewald B. Nyquist, as Commissioner of Education of the State of New York et al., Appellants
72-791 *v.*
Committee for Public Education and Religious Liberty et al.

Priscilla L. Cherry et al., Appellants,
72-929 *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. JUSTICE REHNQUIST, dissenting.

Differences of opinion are undoubtedly to be expected when the Court turns to the task of interpreting the meaning of the Religious Clauses of the First Amendment, since our previous cases arising under these clauses,

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

2, 7, 8, 9

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

From: Rehnquist, J.

Circulated: _____

Recirculated: 6/14/73

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos 72-694, 72-753, 72-791, AND 72-929

Committee for Public Education and Religious Liberty et al., Appellants,
72-694 *v.*
Ewald B. Nyquist, as Commissioner of Education of the State of New York et al.

Earl W. Brydges, as Majority Leader and President pro tem of the New York State Senate, Appellant,
72-753 *v.*
Committee for Public Education and Religious Liberty et al.

Ewald B. Nyquist, as Commissioner of Education of the State of New York et al., Appellants,
72-791 *v.*
Committee for Public Education and Religious Liberty et al.

Priscilla L. Cherry et al., Appellants,
72-929 *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. JUSTICE REHNQUIST, dissenting.

Differences of opinion are undoubtedly to be expected when the Court turns to the task of interpreting the meaning of the Religious Clauses of the First Amendment, since our previous cases arising under these clauses,

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1973

Re: Nos. 72-694, 72-753, 72-791 & 72-929 - Committee for Public Education v. Nyquist, et al.

Nos. 72-459 & 72-620 - Sloan v. Lemon, et al.

Dear Chief:

Please join me in your circulation of June 19, in which you concur in part and dissent in part.

Sincerely,

wkj

The Chief Justice

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1973

Re: Nos. 72-694, 72-753, 72-791 & 72-929 - Committee for Public Education v. Nyquist, et al.

Nos. 72-459 & 72-620 - Sloan v. Lemon, et al.

Dear Byron:

Please join me in your dissent insofar as it relates to the tuition grants and tax credits.

Sincerely,

wlr

Mr. Justice White

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