The Burger Court Opinion Writing Database

Wallace v. Jaffree

472 U.S. 38 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

February 28, 1985

Re: No. 83-812 - Wallace v. Jaffree
83-929 - Smith v. Jaffree

Dear John,

In due course, assuming you get a Court, I will be adding a few dissenting observations.

Regards,

WEB

Justice Stevens

Copies to the Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: MAY 20 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

CHIEF JUSTICE BURGER, dissenting.

Some who trouble to read the opinions in this case will find it ironic—perhaps even bizarre—that on the very day we heard arguments in this case, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, at noon, the House of Representatives and the Senate each opened with a prayer. These legislative prayers were not just one minute in duration, but were extended, thoughtful invocations and prayers for Divine guidance. They were given, as they have been since 1789, by clergy appointed as official Chaplains and paid from the Treasury of the United States. Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditation, or a moment of silence.

Inevitably some wag is bound to say that the Court's holding today reflects a belief that members of the Judiciary and Congress are more in need of Divine guidance than our schoolchildren are. Still others will say that all this contro-

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: MAY 28 1985

STYLISTIC CHANGES THROUGHOUT

CHANGES AS MARKED: pp. 2-4, 6

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
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ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

CHIEF JUSTICE BURGER, dissenting.

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Inevitably some wag is bound to say that the Court's holding today reflects a belief that the historic practice of the Congress and this Court is justified because members of the Judiciary and Congress are more in need of Divine guidance

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

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1985

Re: No. 83-812 - Wallace v. Jaffree
No. 83-929 - Smith v. Jaffree

MEMORANDUM TO THE CONFERENCE:

The final draft of my dissent is enclosed with minor changes as marked and footnotes 3 and 4 added.

If anyone wants to delay announcement, I have no objections.

Regards,

WEB

STYLISTIC CHANGES THROUGHOUT

CHANGES AS MARKED: pp. 2, 5, 7

MAY 31 1985

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

CHIEF JUSTICE BURGER, dissenting.

Some who trouble to read the opinions in this case will find it ironic—perhaps even bizarre—that on the very day we heard arguments in this case, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official Chaplains and paid from the Treasury of the United States. Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditation—or a moment of silence.

Inevitably some wag is bound to say that the Court's holding today reflects a belief that the historic practice of the Congress and this Court is justified because members of the Judiciary and Congress are more in need of Divine guidance

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 7, 1984

Dear Chief,

John has agreed to try his hand at an opinion for the Court in No. 83-812, Wallace v. Jaffree, and No. 83-929, Smith v. Jaffree. I'll undertake to do so in No. 83-5954, Lindahl v. OPM.

Sincerely,

The Chief Justice

Copies to the Conference

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

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

February 1, 1985

No. 83-812) Wallace, et al.
) v. Jaffree,
) et al.
)
) Smith, et al.
No. 83-929) v. Jaffree, et al.

Dear John,

I agree.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 8, 1985

No. 83-812

Wallace v. Jaffree

Dear John,

I agree with Lewis's proposed sentence at the middle of page 17, as indicated in your note to Thurgood, Harry and me of May 8.

Sincerely,

Bill

Justice Stevens

cc: Justice Marshall
Justice Blackmun
Justice Powell

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAY 29 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 v.
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 v.
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1985]

JUSTICE WHITE, dissenting.

For the most part agreeing with the opinion of the Chief Justice, I dissent from the Court's judgment invalidating Alabama Code § 16-1-20.1. Because I do, it is apparent that in my view the First Amendment does not proscribe either (1) statutes authorizing or requiring in so many words a moment of silence before classes begin or (2) a statute that provides, when it is initially passed, for a moment of silence for meditation or prayer. As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer. But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question "May I pray?" This is so even if the Alabama statute is infirm, which I do not believe it is, because of its peculiar legislative history.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 4, 1985

Re: Nos. 83-812 and 929-Wallace and Smith v. Jaffree

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 9, 1985

Re: No. 83-812-Wallace v. Jaffree

Dear John:

I go along with Lewis's suggestions.

Sincerely,

T.M.
T.M.

Justice Stevens
Justice Brennan
Justice Blackmun

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

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

February 11, 1985

Re: No. 83-812) Wallace v. Jaffree
No. 83-929) Smith v. Jaffree

Dear John:

Please join me.

Sincerely,

HAB.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 8, 1985

Re: No. 83-812, Wallace v. Jaffree
No. 83-929, Smith v. Jaffree

Dear John:

I would go along with the change suggested by Lewis.

Sincerely,

Harry

Justice Stevens

cc: Justice Brennan
Justice Marshall

May 7, 1985

83-812 Wallace v. Jaffree

Dear John:

My vote, as you will recall, was to reverse in these cases. I still am inclined to think that whatever the purpose, the Alabama statute will have little or no effect on religion. School age children are going to do as they please in the minute for meditation or prayer.

But the case is here. While our Establishment Clauses cases have not been entirely consistent, the three-part Lemon test has not been abandoned and - despite criticism - has been rather consistently applied. This case involves only the "purpose" prong, and you conclude in a persuasive opinion that in the absence of any secular purpose the statute flunks the test. Thus you do not reach the other two components. Despite my vote to the contrary, I am giving serious consideration to joining your opinion or at least the judgment in a separate concurring opinion.

I write to inquire whether you would strengthen one aspect of your opinion. After emphasizing the absence of any evidence of a secular purpose, on page 17 you say, "[at] the very least, the First Amendment requires that a statute be invalidated if it is entirely motivated by a purpose to advance religion". This implies that if there were both a religious and a secular purpose, this would be sufficient to satisfy the first prong of the Lemon test. This has been my understanding of that test.

Would you be willing to clarify your page 17 sentence as follows: (i) omit the phrase "at the very least", and (ii) add a sentence along the following lines:

> "A statute does not violate the Establishment Clause simply because it may be motivated in part by a religious purpose. The First Amendment, however, requires that a statute be invalidated if - as in this case - it is entirely motivated by a purpose to advance religion."

A willingness to make such a change would help me a good deal in deciding whether to join your opinion.

Sincerely,

Justice Stevens

lfp/ss

May 9, 1985

83-812 and 83-929 Wallace Case

Dear Chief:

Following our telephone discussion of this case, I spent most of a week on this case and reluctantly have concluded that under Lemon and its progeny, the Alabama Statute is invalid. I therefore am joining John, and circulating a concurring opinion.

We have three religion cases pending (in addition to your Connecticut case of Thornton v. Caldor). At Conference, my vote was to affirm in both Ball and Aguilar as I thought then - and still do - that Henry Friendly was correct in his careful review of our decisions, and conclusion that the type of aid to parochial schools in these cases is invalid. Bill Brennan has applied the Lemon three part test affirming both cases. I am joining Bill with a concurring opinion.

In the Alabama cases (Wallace), I voted to reverse because - as you do - I think a straight forward "moment of silence" statute would be perfectly valid. But I am now persuaded, having gone back over the record before us with some care, that §16-1-20.1 was enacted solely for religious purposes. There is no showing of any secular purpose. Both the DC and CAll agreed as to its religious purpose and the absence of a secular purpose. I find no basis for disagreeing with these findings.

As I indicated in my letter to you of April 22 in Thornton v. Caldor, Inc., I think it would be a mistake for the Court to weaken or fail to follow Lemon. The three part test that you articulated in that case has provided the only analytical framework for the deciding of religious cases since Lemon was decided in 1972. If a majority of the Court wishes to overrule Lemon, of course it can be done.

In any event, so long as Lemon - that I followed specifically in my decision in Nyquist - remains the law, I feel obligated to follow it. The Alabama Legislature, in the enactment of the three statutes dealing with school prayer, was motivated solely by a religious purpose (as the

DC found in its first opinion) and therefore this statute flunked the "purpose prong" of your test.

I have made clear in my concurring opinion, however, that Alabama can make a fresh start and adopt a simple "moment of silence for meditation" type statute that many states have adopted. In doing so, it can articulate secular purposes, and the statute would be valid.

I know my decision will disappoint you. We are usually together, but in the end each of us has to make his own decisions.

Sincerely,

LFP/vde

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 9, 1985

83-812 Wallace v. Jaffree

Dear John:

Please join me in your opinion for the Court circulated today.

I am circulating a concurring opinion that expresses additional views.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: MAY 9 '85

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

JUSTICE POWELL, concurring.

I concur in the Court's opinion and judgment that Ala. Code § 16-1—20.1 violates the Establishment Clause of the First Amendment. My concurrence is prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools by enacting three successive statutes.[1] I agree fully with JUSTICE O'CONNOR's assertion that some moment-of-silence statutes may be constitutional,[2] a

[1]The three statutes are Ala. Code § 16-1-20 (Supp. 1984) (moment of silent meditation); Ala. Code § 16-1-20.1 (Supp. 1984) (moment of silence for meditation or prayer); and Ala. Code § 16-1-20.2 (Supp. 1984) (teachers authorized to lead students in vocal prayer). These statutes were enacted over a span of four years. There is some question whether § 16-1-20 was repealed by implication. The Court already has summarily affirmed the Court of Appeals' holding that § 16-1-20.2 is invalid. *Wallace* v. *Jaffree*, —— U. S. —— (1984). Thus, our opinions today address only the validity of § 16-1-20.1. See *ante*, at 3.

[2]JUSTICE O'CONNOR is correct in stating that moment-of-silence statutes cannot be treated in the same manner as those providing for vocal prayer:

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAY 17 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

p. 2

From: Justice Powell

Circulated: MAY 31 1985

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE POWELL, concurring.

I concur in the Court's opinion and judgment that Ala. Code § 16-1—20.1 violates the Establishment Clause of the First Amendment. My concurrence is prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools by enacting three successive statutes.[1] I agree fully with JUSTICE O'CONNOR's assertion that some moment-of-silence statutes may be constitutional,[2] a

[1] The three statutes are Ala. Code § 16-1-20 (Supp. 1984) (moment of silent meditation); Ala. Code § 16-1-20.1 (Supp. 1984) (moment of silence for meditation or prayer); and Ala. Code § 16-1-20.2 (Supp. 1984) (teachers authorized to lead students in vocal prayer). These statutes were enacted over a span of four years. There is some question whether § 16-1-20 was repealed by implication. The Court already has summarily affirmed the Court of Appeals' holding that § 16-1-20.2 is invalid. *Wallace* v. *Jaffree*, —— U. S. —— (1984). Thus, our opinions today address only the validity of § 16-1-20.1. See *ante*, at 3.

[2] JUSTICE O'CONNOR is correct in stating that moment-of-silence statutes cannot be treated in the same manner as those providing for vocal prayer:

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 29, 1985

Re: No. 83-812) Wallace v. Jaffree
83-929) Smith v. Jaffree

Dear John,

I will shortly circulate a combined dissent covering this case, the Grand Rapids case and the New York case.

Sincerely,

WHR

Justice Stevens

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: JAN 30 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

25-33 (8/58)

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January ——, 1985]

JUSTICE REHNQUIST, dissenting.

Thirty-eight years ago this Court, in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947) summarized its exegesis of Establishment Clause doctrine thus:

> "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.' *Reynolds* v. *United States*, [98 U. S., at] 164."

This language from *Reynolds*, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation be-

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: FEB 4 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[February ——, 1985]

JUSTICE REHNQUIST, dissenting in Nos. 83-812; 83-929, 83-990; 84-237; 84-238; 84-239.

Thirty-eight years ago this Court, in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947) summarized its exegesis of Establishment Clause doctrine thus:

> "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.' *Reynolds* v. *United States*, [98 U. S. 145, 164 (1879)]."

This language from *Reynolds*, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation be-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: 2/25/85

pp 16, 17, 22

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[February ——, 1985]

JUSTICE REHNQUIST, dissenting in Nos. 83–812; 83–929, 83–990; 84–237; 84–238; 84–239.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: 4/4/85

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April ——, 1985]

JUSTICE REHNQUIST, dissenting in Nos. 83-812; 83-929, 83-990; 84-237; 84-238; 84-239.

Thirty-eight years ago this Court, in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947) summarized its exegesis of Establishment Clause doctrine thus:

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

p. 24
deletions - 2 paragraphs

Circulated: MAY 15 1985

Recirculated: _____

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
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ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

JUSTICE REHNQUIST, dissenting in Nos. 83–812; 83–929, 83–990; 84–237; 84–238; 84–239.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: 5/30/85

Pp. 1, 12-14, 19, 22

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June —, 1985]

JUSTICE REHNQUIST, dissenting.

Thirty-eight years ago this Court, in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947) summarized its exegesis of Establishment Clause doctrine thus:

> "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.' *Reynolds* v. *United States*, [98 U. S. 145, 164 (1879)]."

This language from *Reynolds*, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation be-

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 6, 1984

MEMORANDUM TO THE CONFERENCE

Re: 83-812 - Wallace v. Jaffree

At oral argument the question whether the appeal is, or is almost, moot arose. In trying to answer that question, I have dipped into the record and found the following chronology which may be of interest to you:

1. On April 29, 1981, the statute that is at issue now (§16-1-20.1) became effective. (SG's Brief p.3, n.1).

2. On January 30, 1982, plaintiffs filed their second amended complaint, containing the following allegation:

> "32. (f) Pursuant to the grant of authority contained in Section 16-1-20.1, Defendants GREEN, BOYD and PIXIE ALEXANDER, have led their classes in religiously based prayer activities." Joint App. 21, 25.

3. The District Court's findings of fact state, in part:

> "Defendant Boyd, as early as September 16, 1981, led her class at E.R. Dickson in singing the following phrase:
>
> "'God is great, God is good,
> Let us thank him for our food,
> bow our heads we all are fed,
> Give us Lord our daily bread.
> Amen!'

"The recitation of this phrase continued on a daily basis throughout the 1981-82 school year." App. to Juris. Statement 4d.

4. On July 8, 1982, the statute which prescribes a form of spoken prayer (§16-1-20.2) became effective. (SG's Brief p.3, n.1).

It seems rather clear from the foregoing that the District Court's findings of fact concerning the 1981-1982 school year explain how §16-1-20.1 was applied before the 1982 statute was passed, and that those findings establish the accuracy of the allegation in paragraph 32(f) of the second amended complaint.

Respectfully,

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JAN 29 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January ——, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16–1–20, enacted in 1978, which authorized a one-minute period of silence in all public schools "for meditation;"[1] (2) § 16–1–20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer;"[2] and (3) § 16–1–20.2, enacted in

[1] Alabama Code § 16–1–20 reads as follows:

"At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."

Appellees have abandoned any claim that § 16–1–20 is unconstitutional. See Brief of Appellees 2.

[2] Alabama Code § 16–1–20.1 provides:

"At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 15

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[February ——, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16–1–20, enacted in 1978, which authorized a one-minute period of silence in all public schools "for meditation";[1] (2) § 16–1–20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer";[2] and (3) § 16–1–20.2, enacted in

[1] Alabama Code § 16–1–20 (Supp. 1984) reads as follows:
"At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."
Appellees have abandoned any claim that § 16–1–20 is unconstitutional. See Brief for Appellees 2.

[2] Alabama Code § 16–1–20.1 (Supp. 1984) provides:
"At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 7, 1985

Re: 83-812 - Wallace v. Jaffree

Dear Lewis:

Instead of the statement that you propose in your letter, I wonder if this modification would be sufficient. Rewrite the "At the very least" sentence to read this way:

> "Even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, see e.g., Abington School Dist. v. Schempp, 374 U.S. 203, 296-303 (BRENNAN, J., concurring), the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."

Respectfully,

John

Justice Powell

This is satisfactory. I have advised JPS

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 8, 1985

Re: 83-812 - Wallace v. Jaffree

Dear Bill, Thurgood, and Harry:

Lewis has suggested that I consider making the following change in the circulating opinion which each of you has joined. He proposes that the sentence in the middle of page 17 that begins with the words "At the very least" be revised to read as follows:

> "For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, see e.g., Abington School Dist. v. Schempp, 374 U.S. 203, 296-303 (BRENNAN, J., concurring), the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."

It seems to me that the specific discussion in the pages of Bill's opinion that are cited would make this proposal acceptable, but I of course will not do it unless all three of you agree. Although there is nothing definite at this point, I think there is a strong possibility that this change would enable Lewis to change his vote and to join our opinion.

I would be grateful to have your reactions as promptly as possible so that I can report back to Lewis.

Respectfully,

Justice Brennan
Justice Marshall
Justice Blackmun

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: MAY 9 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16–1–20, enacted in 1978, which authorized a one-minute period of silence in all public schools "for meditation";[1] (2) § 16–1–20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer";[2] and (3) § 16–1–20.2, enacted in

[1] Alabama Code § 16–1–20 (Supp. 1984) reads as follows:

"At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."

Appellees have abandoned any claim that § 16–1–20 is unconstitutional. See Brief for Appellees 2.

[2] Alabama Code § 16–1–20.1 (Supp. 1984) provides:

"At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April ——, 1985]

JUSTICE O'CONNOR, concurring in the judgment.

I agree with the judgment of the Court that Alabama Code § 16–1–20.1 violates the Establishment Clause of the First Amendment. In my view, there can be little doubt that the purpose and the likely effect of the Alabama moment of silence law is to endorse voluntary prayer in the public schools. I write separately to identify the peculiar features of the Alabama law that render it invalid, and to explain why moment of silence laws in other States do not necessarily manifest the same infirmity. I also write to explain why in my view neither history nor the Free Exercise Clause of the First Amendment validates the Alabama law struck down by the Court today.

I

The religion clauses of the First Amendment, coupled with the Fourteenth Amendment's guaranty of ordered liberty, preclude both the Nation and the States from making any law respecting an establishment of religion or prohibiting the free exercise thereof. *Cantwell* v. *Connecticut*, 310 U. S. 296,

langes Throughout

11-1, 18

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–812 AND 83–929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83–812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83–929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

JUSTICE O'CONNOR, concurring in the judgment.

Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily offering silent prayers at any time before, during, or after the school day. Alabama has facilitated voluntary silent prayers of students who are so inclined by enacting Ala. Code § 16–1–20, which provides a moment of silence in appellees' schools each day. The parties to these proceedings concede the validity of this enactment. At issue in these appeals is the constitutional validity of an additional and subsequent Alabama statute, Ala. Code § 16–1–20.1, which both the District Court and the Court of Appeals concluded was enacted solely to officially encourage prayer during the moment of silence. I agree with the judgment of the Court that, in light of the findings of the Courts below and the history of its enactment, § 16–1–20.1 of the Alabama Code violates the Establishment Clause of the First Amendment. In my view, there can be little doubt that the purpose and likely effect of this subse-

, 12, 15, 18

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: MAY 29

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS
83-812 *v.*
ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS
83-929 *v.*
ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1985]

JUSTICE O'CONNOR, concurring in the judgment.

Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day. Alabama has facilitated voluntary silent prayers of students who are so inclined by enacting Ala. Code § 16-1-20, which provides a moment of silence in appellees' schools each day. The parties to these proceedings concede the validity of this enactment. At issue in these appeals is the constitutional validity of an additional and subsequent Alabama statute, Ala. Code § 16-1-20.1, which both the District Court and the Court of Appeals concluded was enacted solely to officially encourage prayer during the moment of silence. I agree with the judgment of the Court that, in light of the findings of the Courts below and the history of its enactment, § 16-1-20.1 of the Alabama Code violates the Establishment Clause of the First Amendment. In my view, there can be little doubt that the purpose and likely effect of this subsequent enactment is to endorse and