The Burger Court Opinion Writing Database

Aguilar v. Felton

473 U.S. 402 (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

June 24, 1985

Re: No. 84-237 - Aguilar v. Felton
No. 84-238 - Secretary, United States Department of Education v. Felton
No. 84-239 - Chancellor of the Board of Education v. Felton

Dear Bill:

Enclosed is a typed copy of my separate opinion in this case.

Regards,

WEB

Justice Brennan

Copies to the Conference

No. 84-237) Aguilar v. Felton
84-238) Secretary, United States Department of Education v. Felton
84-239) Chancellor of the Board of Education v. Felton

CHIEF JUSTICE BURGER, dissenting.

Under the guise of protecting Americans from the evils of an Established Church such as those of the Eighteenth Century and earlier times, today's decision will deny countless schoolchildren desperately needed remedial teaching services funded under Title I. The program at issue covers remedial reading, reading skills, remedial mathematics, English as a second language, and assistance for children needing special help in the learning process. The "remedial reading" portion of this program, for example, reaches children who suffer from dyslexia, a disease known to be difficult to diagnose and treat. Many of these children now will not receive the special training they need, simply because their parents desire that they attend religiously affiliated schools.

What is disconcerting about the result reached today is that, in the face of the human cost entailed by this decision, the Court does not even attempt to identify any threat to religious liberty posed by the operation of Title I. I share JUSTICE WHITE's concern that the Court's obsession with the criteria identified in Lemon v. Kurtzman, 403 U.S. 602 (1971), has led to results that are "contrary to the long-range interests of the country," post, at 2. As I wrote in Wallace v. Jaffree, ___ U.S. ___, ___ (1985) (dissenting opinion), "our responsibility is not to apply tidy formulas by rote; our duty is to determine whether

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

From: **The Chief Justice**

Circulated: JUN 25 1985

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–237, 84–238 AND 84–239

YOLANDA AGUILAR, ET AL., APPELLANTS
84–237 *v.*
BETTY-LOUISE FELTON ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT
84–238 *v.*
BETTY-LOUISE FELTON ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT
84–239 *v.*
BETTY-LOUISE FELTON ET AL.

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

[June ——, 1985]

CHIEF JUSTICE BURGER, dissenting.

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 10, 1984

No. 83-990

School District of City of Grand Rapids
v. Ball

No. 84-237) Aguilar v. Felton
)
) Secretary, U.S. Dept.
No. 84-238) of Education v. Felton
)
) Chancellor of Bd. of
) Education of City of
No. 84-239) New York v. Felton

Dear Chief,

I'll try my hand at opinions for the Court in these cases.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

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

From: **Justice Brennan**

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WJB
Please join me

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-237, 84-238 AND 84-239

YOLANDA AGUILAR, ET AL., APPELLANTS
84-237 *v.*
BETTY-LOUISE FELTON ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT
84-238 *v.*
BETTY-LOUISE FELTON ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT
84-239 *v.*
BETTY-LOUISE FELTON ET AL.

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

[April ——, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

The City of New York uses federal funds to pay the salaries of public employees who teach in parochial schools. In this companion case to *School District of Grand Rapids* v. *Ball*, —— U. S. —— (1985), we determine whether this practice violates the Establishment Clause of the First Amendment.

I

A

The program at issue in this case, originally enacted as Title I of the Elementary and Secondary Education Act of

P.C

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

From: **Justice Brennan**

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Recirculated: APR 15

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–237, 84–238 AND 84–239

YOLANDA AGUILAR, ET AL., APPELLANTS
84–237 *v.*
BETTY-LOUISE FELTON ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT
84–238 *v.*
BETTY-LOUISE FELTON ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT
84–239 *v.*
BETTY-LOUISE FELTON ET AL.

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

[April ——, 1985]

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The City of New York uses federal funds to pay the salaries of public employees who teach in parochial schools. In this companion case to *School District of Grand Rapids* v. *Ball*, *ante*, p. ——, we determine whether this practice violates the Establishment Clause of the First Amendment.

I

A

The program at issue in this case, originally enacted as Title I of the Elementary and Secondary Education Act of 1965,[1] authorizes the Secretary of Education to distribute

[1] Title I, 92 Stat. 2153, was codified at 20 U. S. C. § 2701 *et seq.* Section 2701 provided:

HAB

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 26, 1985

MEMORANDUM TO THE CONFERENCE

Cases Heretofore Held for Decision in No. 84-237,
Aguilar v. Felton

No. 84-1343) Ferguson, et al. v. Wamble, et al.
)
) Bennett, etc., et al. v. Wamble,
No. 84-1355) et al.
)
No. 84-1528) Wamble, et al. v. Bennett, et al.

The District Court held the local implementation of Title I, in which a private corporation was hired to provide educational services on the premises of religious schools, to violate the Establishment Clause. A group of parents (intervenors below) and the Secretary of Education have taken appeals directly to this Court. The plaintiffs below have taken a cross-appeal, in which they argue, inter alia, that they were entitled to greater relief than was provided by the District Court and that the challenged program had legal deficiencies in addition to those relied upon by the District Court.

The Solicitor General states in his jurisdictional statement that "[t]he question of jurisdiction under 28 U.S.C. 1252 in this case is identical to that in Aguilar v. Felton." Juris. St. in No. 84-1355, at 1, n. 1. The parent-appellants similarly argue that this Court has appellate jurisdiction for reasons that appear to be identical to those supporting appellate jurisdiction in Aguilar. Juris. St. in No. 84-1343, at 3, n. 3. In Aguilar, we hold that the case is not properly an appeal, because the ruling appealed from does not hold an Act of Congress unconstitutional. See Aguilar, at 6, n. 7. This case seems to be identical to Aguilar for jurisdictional purposes. I therefore recommend that the appeal here be dismissed for want of jurisdiction. The cross-appeal advances no independent basis for

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 8, 1985

84-237 - Aguilar v. Felton

84-238 - Secretary, U.S. Department of Education v. Felton

84-239 - Chancellor of the Board of Education of the City of New York v. Felton

Dear Bill,

I shall await other writing in these cases.

Sincerely yours,

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 2, 1985

Re: No. 84-237 - Aguilar v. Felton
No. 84-238 - Sec. of Education v. Felton
No. 84-239 - Chancellor of Bd. of Education of N.Y. v. Felton

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

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

May 13, 1985

'84 MAY 13 P1:20

Re: No. 84-237) Aguilar v. Felton
No. 84-238) Secretary, U.S. Dept. of Ed. v. Felton
No. 84-239) Chancellor of Board of Education
of City of New York v. Felton

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Brennan

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 1985

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-237, 84-238 AND 84-239

YOLANDA AGUILAR, ET AL., APPELLANTS
84-237 *v.*
BETTY-LOUISE FELTON ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT
84-238 *v.*
BETTY-LOUISE FELTON ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT
84-239 *v.*
BETTY-LOUISE FELTON ET AL.

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

[May ——, 1985]

JUSTICE POWELL, concurring.

I concur in the Court's opinions and judgments today in this case and in *Grand Rapids School District* v. *Ball*, *ante*, p. ——, holding that the aid to parochial schools involved in those cases violates the Establishment Clause of the First Amendment. I write to emphasize additional reasons why precedents of this Court require us to invalidate these two educational programs that concededly have "done so much good and little, if any, detectable harm." *Felton* v. *Secretary, United States Department of Education*, 739 F. 2d 48, 72 (CA2 1984). The Court has previously recognized the important role of parochial schools:

> "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for mil-

Moved from Wallace

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

From: **Justice Rehnquist**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-237, 84-238 AND 84-239

YOLANDA AGUILAR, ET AL., APPELLANTS
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84-238 *v.*
BETTY-LOUISE FELTON ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT
84-239 *v.*
BETTY-LOUISE FELTON ET AL.

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

[May ——, 1985]

JUSTICE REHNQUIST, dissenting.

I dissent for the reasons stated in my dissenting opinion in *Wallace* v. *Jaffree*, Nos. 83-812, 83-929. In *Aguilar* v. *Felton* the Court takes advantage of the "Catch-22" paradox of its own creation, see *Wallace*, *ante*, at 19 (REHNQUIST, J., dissenting), whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement. The Court in *Aguilar* strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed travelled far afield from the concerns which prompted the adoption of the First Amendment when we

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 14, 1985

Re: No. 84-237) Aguilar v. Felton
84-238) Secretary, United States Department
) Of Education v. Felton
84-239) Chancellor of the Board of Education
Of the City of New York v. Felton

Dear Sandra,

Please join me in Parts II and III of your dissent in this case.

Sincerely,

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 2, 1985

Re: 84-237, 84-238, 84-239 - Aguilar v. Felton

Dear Bill:

Please join me.

Respectfully,

John

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 2, 1985

Re: 84-237, Aguilar, et al. v. Felton, et al.
84-238, Secty. U.S. Dept of Education v. Felton
84-239, Chancellor, Board of Education of the City of New York v. Felton, et al.

Dear Bill,

I have a different view in these cases and will await the dissent or write separately.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

pp. 6, 7

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

From: **Justice O'Connor**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–237, 84–238 AND 84–239

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CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT
84–239 *v.*
BETTY-LOUISE FELTON ET AL.

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

[June ——, 1985]

JUSTICE O'CONNOR, dissenting.

Today the Court affirms the holding of the Court of Appeals that public schoolteachers can offer remedial instruction to disadvantaged students who attend religious schools "only if such instruction . . . [is] afforded at a neutral site off the premises of the religious school." 739 F. 2d 48, 64 (CA2 1984). This holding rests on the theory, enunciated in Part V of the Court's opinion in *Meek* v. *Pittenger*, 421 U. S. 349, 367–373 (1975), that public schoolteachers who set foot on parochial school premises are likely to bring religion into their classes, and that the supervision necessary to prevent religious teaching would unduly entangle church and state. Even if this theory were valid in the abstract, it cannot validly be applied to New York City's 19 year old Title I pro-

Stylistic Changes Throughout

pp. 1, 4

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

From: **Justice O'Connor**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–237, 84–238 AND 84–239

YOLANDA AGUILAR, ET AL., APPELLANTS
84–237 *v.*
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CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT
84–239 *v.*
BETTY-LOUISE FELTON ET AL.

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

[June ——, 1985]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins as to Parts II and III, dissenting.

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