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

than are schoolchildren. Still others will say that all this controversy is "much ado about nothing," since no power on earth—including this Court and Congress—can stop any teacher from opening the school day with a moment of silence for pupils to meditate, to plan their day—or to pray if they voluntarily elect to do so.

I make several points about today's curious holding.

(a) It makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is *one* of the authorized activities during a moment of silence," *ante*, at 12 (O'CONNOR, J., concurring in the judgment) (emphasis added). To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion. For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion. The Alabama legislature has no more "endorsed" religion than a state or the Congress does when it provides for legislative chaplains, or than this Court does when it opens each session with an invocation to God. Today's decision recalls the observations of Justice Goldberg:

> "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."
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> *School District* v. *Schempp*, 374 U. S. 203, 306 (1963) (concurring opinion).

(b) The inexplicable aspect of the foregoing opinions, however, is what they advance as support for the holding concerning the purpose of the Alabama legislature. Rather than determining legislative purpose from the face of the statute as a whole,[1] the opinions rely on three factors in concluding that the Alabama legislature had a "wholly religious" purpose for enacting the statute under review, Ala. Code § 16-1-20.1 (Supp. 1984): (i) statements of the statute's sponsor, (ii) admissions in Governor James' Answer to the Second Amended Complaint, and (iii) the difference between § 16-1-20.1 and its predecessor statute.

Curiously, the opinions do not mention that *all* of the sponsor's statements relied upon—including the statement "inserted" into the Senate Journal—were made *after* the legislature had passed the statute; indeed, the testimony that the Court finds critical was given well over a year after the statute was enacted. As even the appellees concede, see Brief for Appellees 18, there is not a shred of evidence that the legislature as a whole shared the sponsor's motive or that a majority in either house was even aware of the sponsor's view of the bill when it was passed. The sole relevance of the sponsor's statements, therefore, is that they reflect the personal, subjective motives of a single legislator. No case in the 195-year history of this Court supports the disconcerting idea that post-enactment statements by individual legislators are relevant in determining the constitutionality of legislation.

Even if an individual legislator's after-the-fact statements could rationally be considered relevant, all of the opinions fail to mention that the sponsor also testified that one of his purposes in drafting and sponsoring the moment-of-silence bill

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[1] The foregoing opinions likewise completely ignore the statement of purpose that accompanied the moment-of-silence bill throughout the legislative process: "To permit a period of silence to be observed *for the purpose* of meditation or voluntary prayer at the commencement of the first class of each day in all public schools." 1981 Ala. Senate J. 14 (emphasis added). See also id., at 150, 307, 410, 535, 855, 967.

was to clear up a widespread misunderstanding that a schoolchild is legally *prohibited* from engaging in silent, individual prayer once he steps inside a public school building. See App. 53–54. That testimony is at least as important as the statements the Court relies upon, and surely that testimony manifests a permissible purpose.

The Court also relies on the admissions of Governor James' Answer to the Second Amended Complaint. Strangely, however, the Court neglects to mention that there was no trial bearing on the constitutionality of the Alabama statutes; trial became unnecessary when the District Court held that the Establishment Clause does not apply to the states.* The absence of a trial on the issue of the constitutionality of §16–1–20.1 is significant because the Answer filed by the State Board and Superintendent of Education did not make the same admissions that the Governor's Answer made. See 1 Record 187. The Court cannot know whether, if this case had been tried, those state officials would have offered evidence to contravene appellees' allegations concerning legislative purpose. Thus, it is completely inappropriate to accord any relevance to the admissions in the Governor's Answer.

The several preceding opinions conclude that the principal difference between §16–1–20.1 and its predecessor statute proves that the sole purpose behind the inclusion of the phrase "or voluntary prayer" in §16–1–20.1 was to endorse and promote prayer. This reasoning is simply a subtle way of focusing exclusively on the religious component of the statute rather than examining the statute as a whole. Such logic—if it can be called that—would lead the Court to hold, for example, that a state may enact a statute that provides reimbursement for bus transportation to the parents of all schoolchildren, but may not *add* parents of parochial school students to an existing program providing reimbursement for parents of public school students. Congress amended the

*The four days of trial to which the Court refers concerned only the alleged practices of vocal, group prayer in the classroom.

statutory Pledge of Allegiance 31 years ago to add the words "under God." Act of June 14, 1954, Pub. L. 396, 68 Stat. 249. Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method of focusing on the difference between § 16-1-20.1 and its predecessor statute rather than examining § 16-1-20.1 as a whole.[3] Any such holding would of course make a mockery of our decisionmaking in Establishment Clause cases. And even were the Court's method correct, the inclusion of the words "or voluntary prayer" in § 16-1-20.1 is wholly consistent with the clearly permissible purpose of clarifying that silent, voluntary prayer is not *forbidden* in the public school building.[4]

(c) The Court's extended treatment of the "test" of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts." "In each [Establishment Clause] case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch* v. *Donnelly*, 465 U. S. ——, —— (1984). In any event, our responsibility is not to apply tidy formulas

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[3] The House Report on the legislation amending the Pledge states that the purpose of the amendment was to affirm the principle that "our people and our Government [are dependent] upon the moral directions of the Creator." H. R. Rep. No. 1693, 83d Cong., 2d Sess. 2, reprinted in 1954 U. S. Code Cong. & Admin. News 2339, 2340. If this is simply "acknowledgement," not "endorsement," of religion, *see ante*, at 12, n. 5 (O'CONNOR, J., concurring in the judgment), the distinction is far too infinitesimal for me to grasp.

[4] The several opinions suggest that other similar statutes may survive today's decision. *See ante*, at 20, *ante*, at 1–2 (POWELL, J., concurring), *ante*, at 12, n. 5 (O'CONNOR, J., concurring in the judgment). If this is true, these opinions become even less comprehensible, given that the Court holds this statute invalid when there is no legitimate evidence of "impermissible" purpose; there could hardly be less evidence of "impermissible" purpose than was shown in this case.

by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion. Given today's decision, however, perhaps it is understandable that the opinions in support of the judgment all but ignore the Establishment Clause itself and the concerns that underlie it.

(d) The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes—as Congress does by providing chaplains and chapels. It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray. The statute also provides a meaningful opportunity for schoolchildren to appreciate the absolute constitutional right of each individual to worship and believe as the individual wishes. The statute "endorses" only the view that the religious observances of others should be tolerated and, where possible, accommodated. If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.

The Court today has ignored the wise admonition of Justice Goldberg that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *School District* v. *Schempp*, 374 U. S. 203, 308 (1963) (concurring opinion). The innocuous statute that the Court strikes down does not even rise to the level of

"mere shadow." JUSTICE O'CONNOR paradoxically acknowledges, "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." *Ante*, at 7.[5] I would add to that, "even if they choose to pray."

The mountains have labored and brought forth a mouse.[6]

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[5]The principal plaintiff in this action has stated: "I probably wouldn't have brought the suit just on the silent meditation or prayer statute . . . . If that's all that existed, that wouldn't have caused me much concern, unless it was implemented in a way that suggested prayer was the preferred activity." Malone, Prayers for Relief, 71 A.B.A. J. 61, 62, col. 1 (Apr. 1985) (quoting Ishmael Jaffree).

[6]Horace, Epistles, bk. III (Ars Poetica), line 139.