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# Court of Appeals

STATE OF NEW YORK

*File*  
*5/10/01*

In the Matter of the Application  
of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNEB,  
LENORE LYONS and LAWRENCE ROTH,  
*Petitioners-Appellants,*  
*against*

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE,  
ANNE BIRCH and RICHARD SAUNDERS, constituting the Board  
of Education of Union Free School District Number Nine,  
New Hyde Park, New York,

*Respondents-Respondents,*

directing them to discontinue a certain  
school practice,  
and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN  
SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB,  
VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX,  
EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ,  
DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MAC-  
FARLANE,

*Intervenor-Respondents-Respondents.*

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## BRIEF OF AMERICAN JEWISH COMMITTEE and ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH *Amici Curiae*

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**BRIEF OF  
AMERICAN JEWISH COMMITTEE  
and  
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B'NAI B'RITH  
*Amici Curiae***

### Interest of the Amici

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto \* \* \*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

It has been among the fundamental tenets of the organizations which appear as *amici curiae* herein that the welfare and the security of members of minority religious groups in the United States depend upon the preservation of constitutional guarantees for all; that an invasion of the rights of any religious group is ultimately a threat to the religious freedom of all groups and to the individual members thereof.

This case places in issue the constitutionality under the First Amendment of prayer as part of the opening exercise in the public schools of the State of New York. We deem it appropriate, at this point, to state that the constituency of both of the *amici* includes vast numbers of people who not only believe in the existence of God, but devoutly worship Him. But the constituency of the *amici* believe that prayer, in our democratic society, is a matter for the home, synagogue and church, and not for the public schools. They wholeheartedly support the First Amendment to the United States Constitution and its underlying public policy which requires separation of church and state in the interest of both. Hence, they are concerned with the decision of Mr. Justice Meyer in the Supreme Court, Nassau County, upholding the constitutionality of the recitation of the Regents' prayer in the public schools of New Hyde Park.

The New York State Board of Regents by sponsoring prayer in the public schools and recommending its specific form, sought to satisfy the demands of certain segments in our society which insist on the introduction of religious practices in the public schools, concededly out of good motives. The Board of Regents hoped that a prayer could be devised which would be unobjectionable to all three major religious faiths and still meaningful in terms of teaching a reverence for the Creator. The danger inherent in this process is that a state agency undertook to evaluate the spiritual needs of the student population of the public schools and to establish the means to satisfy such needs. This tends to belittle creedal differences and to establish a form of "public school religion" or "least common denominator

religion.” Freedom of religious belief, observance and worship can remain inviolate only so long as there is no intrusion of religious authority in secular affairs or secular authority in religious affairs. Each breach in this separation of role and function tends to beget additional breaches and, hence, the American Jewish Committee and the Anti-Defamation League of B’nai B’rith are opposed to any and all forms of establishment of religion by which a state agency undertakes to provide for the religious needs of children.

For these reasons, the two organizations join in filing this brief *amici curiae* with the permission of this Court.

### **Statement of the Case**

On November 30, 1951, the New York State Board of Regents, the agency charged by the Education Law with supervision of the school system of the State, adopted a Statement on Moral and Spiritual Training in the Schools. That Statement recommended that the Pledge of Allegiance at the commencement of each school day “might well be joined with this act of reverence to God: Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”

At a meeting of the Board of Education, Union Free School District Number Nine, New Hyde Park, New York, held on July 8, 1958, a motion was duly made and carried that the Board of Education direct the district principal to institute

the Regents' prayer as a daily procedure to follow the Pledge of Allegiance.

A proceeding under Article 78 of the Civil Practice Act was instituted by five taxpayers whose children attended the public schools in District Number Nine, for an order directing the members of the Board of Education to discontinue the recitation of the Regents' prayer in the local public schools. Sixteen taxpayer parents who opposed the petition were granted permission to intervene to argue the issues arising under the United States and New York State Constitutions. The State Board of Regents filed a brief *amicus curiae*.

Mr. Justice Bernard S. Meyer, at Supreme Court, Special Term, Nassau County, decided on August 24, 1959, that the Establishment Clause of the First Amendment does not bar the Regents' prayer from the public schools, but that the Free Exercise Clauses of the Federal and State Constitutions require that children whose parents object to their participation be excused. To achieve this objective, Mr. Justice Meyer required that notice to the parents specify the wording of the prayer and the procedure to be followed when the prayer is recited, to enable the parents to make a conscious choice whether or not their children shall be permitted to participate in the religious exercise. Regulations to be adopted by the School Board were also to make it clear that neither teachers nor other school authorities might comment on participation or non-participation of the students, nor suggest the assumption of any posture in connection with the prayer. The Board was required to provide facilities for those children whose parents requested that they be excused from the room during the recitation of the Regents' prayer. Mr. Justice Meyer, in the

exercise of his equitable discretion, denied the petition but remanded the matter to the School Board for further proceedings not inconsistent with his opinion.

Petitioners appealed to the Appellate Division, Second Department, which, on October 17, 1960, affirmed the order of Mr. Justice Meyer in a *per curiam* opinion. In a separate opinion Mr. Justice Beldock concurred in part and dissented in part.

The Supreme Court, Nassau County, after receiving an affidavit from the President of the Board of Education of Union Free School District Number Nine, advising the Court that the Board's resolution and regulations had been amended in accordance with the Court's opinion, on March 17, 1961 entered a final order dismissing the proceeding on the merits. An appeal therefrom was taken to this Court pursuant to the provision of Sections 588 and 590 of the Civil Practice Act.

### **Summary of Argument**

The action of a local Board of Education, directing the inclusion of the Regents' prayer in the opening exercise in the public schools constitutes an establishment of religion in violation of the First Amendment of the United States Constitution. This Amendment, as interpreted by the United States Supreme Court, prohibits State as well as Federal agencies from aiding one or all religions, from using the public schools for religious exercises, or from blending secular and religious instruction.

The doctrine that public schools may adjust their program to accommodate to the needs of

sectarian groups to schedule their programs of religious education off school premises, does not apply to this case. Provision for the excuse of pupils whose parents object to their participation in the school-sponsored religious exercise, does not make this practice any less an establishment of religion.

The contention that prayer in public schools could be upheld because it has been traditional in some public school systems, is not dealt with in this brief. It is our view that such a contention can no more justify practices which are in violation of the clear meaning of the First Amendment than the tradition of racial segregation in the South can save those practices from attack under the Equal Protection Clause of the Fourteenth Amendment.

## ARGUMENT

**I. The resolution of a public school board directing the recitation of a prayer as a daily procedure in the public schools violates the constitutional prohibition against an establishment of religion.**

**A. *The Establishment of Religion Clause of the First Amendment***

The First Amendment to the United States Constitution provides, in part, as follows:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof \* \* \*

This provision against action by Congress has been held equally applicable to action by the states

or any of their political subdivisions. *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

The Establishment of Religion Clause has been defined by the United States Supreme Court in three recent decisions: *Everson v. Board of Education*, 330 U. S. 1 (1947); *McCullum v. Board of Education*, 333 U. S. 203 (1948) and *Zorach v. Clauson*, 343 U. S. 306 (1952). There was no disagreement between the majority and minority opinions in *Everson* on the following definition:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. 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" 330 U. S. at 15-16; see also 41, 52, 53, 59, 60.

**B. *The McCollum decision controls this case***

*McCollum* made the definition of the Establishment Clause as spelled out in *Everson* the basis for a determination that a released time program in the public schools of Champaign, Illinois, violated the First Amendment.<sup>1</sup> Under that program, children attending public schools, whose parents so requested, were released for a thirty or forty-five minute period each week, during the regular school time, to receive religious instruction by sectarian teachers. Such classes were conducted in the regular classrooms of the school building. Students whose parents did not wish them to participate in the religious instruction were not required or permitted to remain in the classroom where such instruction took place. Instead, they were assigned another place in the public school building for the pursuit of their secular studies. *McCollum v. Board of Education, supra*, at 207-209.

The program in the public schools of Champaign, involved in the *McCollum* case, may be characterized by these elements:

1. Use of public school classrooms;
2. Use of regular public school time; and
3. Participation limited to children whose parents consent.

The United States Supreme Court, in an eight-to-one decision, held this Champaign program unconstitutional under the Establishment Clause

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1. While the definition of the Establishment Clause may have been *obiter dictum* in *Everson* in light of the disposition of that case, it clearly became the *ratio decidendi* of the decision in *McCollum*.

of the First Amendment. The Court concluded that "the foregoing facts \* \* \* show the use of tax-supported property for religious instruction \* \* \*" at 209. Such use of "tax-supported property" was a violation of the prohibition against laws "which aid one religion, aid all religions, or prefer one religion over another."

The public school program in issue in this case was described by Mr. Justice Meyer as "said aloud at the commencement of the school day, by each class, in the classroom in the presence of a teacher." Record on Appeal,<sup>2</sup> 66, f. 197. The prayer followed the salute to the flag. R. 66, f. 196. Children who did not wish to participate, were not required to do so. R. 66, f. 197.<sup>3</sup>

Thus, it is clear that the significant features of the Champaign program struck down in *McColum*, and listed above, are also present in this case:

1. The use of public school classroom;
2. The use of regular public school time; and
3. Participation limited to children whose parents consent.

Mr. Justice Meyer based his opinion in the Supreme Court on the premise that the recital of the Regents' prayer "cannot be deemed religious instruction." R. 104, f. 312. He conceded that were it "instruction," it would violate either the

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2. Hereinafter referred to as R.

3. Since this feature was not specifically incorporated in the Board's resolution directing the recital of the prayer, Mr. Justice Meyer required the Board to amend its resolution expressly providing for such excuse. R. 106-109, ff. 316-326.

Establishment Clause or the Free Exercise Clause of the First Amendment. R. 70, ff. 208-209.

We submit that the clear intent, purpose and effect of requiring recital of a prayer as part of the public school's opening exercises, are instruction of the children that Almighty God is their Creator, that they must acknowledge their dependence upon Him and beg His blessings upon them, their parents, their teachers and the United States. Just as the Pledge of Allegiance and the singing of the National Anthem—also part of the opening exercises—are intended to inculcate in the children a deep sense of loyalty and patriotism and to instruct them in their duties and obligations to our country, so, too, the recital of the prayer is intended to instruct the children in that love for God, for parents and for home which is the mark of "true character training." Regents' Statement, R. 70, f. 210.

There can be no doubt that the purpose of commencing the school day with the Regents' prayer is to teach the children committed to the care of the public school that one of the principal sanctions for good conduct as taught by the school, is fear of God. If such were not its purpose, there would be no point to the exercise. If, as Mr. Justice Meyer believes, prayer in our public schools is traditional, then it is no less instructional albeit traditional.

It is now generally accepted that the pupil is being and should be subjected to a learning experience during the entire period that he is entrusted to the public school—from the assembly in the school yard to final dismissal. This learning experience is not limited to the substantive content of classroom instruction in specific subjects, but embraces as well the total program of

of the First Amendment. The Court concluded that "the foregoing facts \* \* \* show the use of tax-supported property for religious instruction \* \* \*" at 209. Such use of "tax-supported property" was a violation of the prohibition against laws "which aid one religion, aid all religions, or prefer one religion over another."

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the school day, in all its varied aspects, including opening exercises, teacher attitudes, behavior in the classrooms, assemblies and at lunch, interrelationships with teachers and classmates, special drills such as air raid and fire drills, and even appropriate attire. Educational Policies Commission, National Educational Association of the United States and American Association of School Administrators, *Moral and Spiritual Values in Public Schools*, Washington, D. C., 1951, pp. 58-59.<sup>4</sup> How, then, can the recital of the Regents' prayer in the classroom be isolated from the total learning experience and regarded as something non-instructional in character?

Apart from the instructional nature of the Regents' prayer, clearly it is a religious rite and hence devotional in nature. Prayer is communication with and appeal to the Creator; it is the most fundamental expression of religious faith.

Whether the Regents' prayer is deemed instructional or devotional or, as we believe, both, it is clearly a religious act and, if carried on in the public school building during regular school hours, constitutes aid to one or all religions and violates the Establishment Clause as interpreted by the United States Supreme Court in *McCollum*. In fact, the involvement of the public school in

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4. See also, Caswell, Hollis L., & Campbell, Doak S., *Curriculum Development*, American Book Co., New York, 1935, p. 69; Counts, George S., "Education," III *Encyclopaedia of the Social Sciences* (re-issued ed.) 1937, p. 413; Goslin, William E., "Responsibilities of American Education," *Freedom and Public Education*, Praeger, New York, 1953, p. 47; Quillen, I. James, "The Curriculum and the Attacks on the Public Schools," *Public Education in America*, Harper & Bros., New York, 1958, p. 119; Stratemeyer, Florence, & others, *Developing a Curriculum for Modern Living*, Columbia University, 2nd ed., 1957, pp. 661-2.

religion is even more apparent and pervasive in the case of the Regents' prayer than in the Campaign program. The practice here in issue is an official school activity over which the classroom teacher presides. The prayer and Pledge of Allegiance are parts of the opening exercise, which blend religious and secular concerns and commingles God and Caesar. In contrast, the practice struck down in *McCullum* involved religious instruction by non-public school teachers in separate rooms with the public school teacher not in control of the class. *McCullum v. Board of Education, supra*, at 208.

Prayer and Bible reading, in conjunction with the Pledge of Allegiance, as an opening public school exercise, were recently held to be "devotional and religious" and hence in violation of the Establishment Clause of the First Amendment. *Schempp v. School District of Abington Township*, 177 F. Supp. 398 (1959), judgment vacated and case remanded for appropriate further proceedings in light of subsequent amendment of enabling statute, *School District of Abington Township v. Schempp*, 364 U. S. 298 (1960).

The three-judge statutory court said that:

The addition of the Flag Salute to the ceremony cannot be deemed to detract from the devotional quality of the morning exercises. Our backgrounds are colored by our own experiences and many of us have participated in such exercises as those required in the Abington Township schools in our childhood. We deemed them then and we deem them now to be devotional in nature, intended to inculcate religious principles and religious beliefs. 177 F. Supp. at 406.

We are aware that the prayer involved in *Schempp* was the Lord's Prayer and not the Regents' prayer. But just as the Lord's Prayer is acceptable to some and objectionable to others, so, too, the Regents' prayer is acceptable to some and objectionable to others.<sup>5</sup>

In the whole history of mankind, no one has thus far been able to formulate any single means or expression of communicating with God in a manner acceptable to all men, which would be required to render it truly "non-sectarian." It was this impossibility of securing agreement on matters of religious faith that led the framers of the First Amendment to insist upon the separation of the institutions of the State from those of the various religions.

A school-sponsored "simple prayer to a Supreme Being," as part of an opening school exercise, was held to violate the First Amendment "even though no student or teacher [was] required to participate" in the opinion of Attorney General Edmund G. Brown of California. Op. Att. Gen. No. 53/266, June 10, 1955. The opinion relied heavily on the *McCullum* decision.

### **C. *The Zorach* decision is not controlling**

The Supreme Court's interpretation of the meaning of "establishment of religion," as set forth in *McCullum, supra*, was in no way weakened by its subsequent decision in *Zorach v. Clauson*, 343 U. S. 306 (1952). In upholding the New York released time program in that case, the Court distinguished the facts from those in the *McCullum* case, since the New York program

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5. For discussion of specific religious objection to the Regents' prayer, see pp. 20-21 *infra*.

did not involve use of public school buildings for religious instruction. The Court expressly reaffirmed the principle enunciated in *Everson* and *McCullum*—"We follow the *McCullum* case." 343 U. S. at 315.

That the New York released time program was upheld in *Zorach* while the Champaign program was invalidated in *McCullum* is explained by the Court (in *Zorach*) as a result of the factual differences between the two released time programs; *Zorach* is not a "retreat" from *McCullum*. 343 U. S. at 312, 315.

In his opinion in *Zorach*, Mr. Justice Douglas reiterated "that the First Amendment reflects the philosophy that Church and State should be separated." Insofar as both the free exercise of religion and the establishment of religion are concerned, "the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute." 343 U. S. at 312. The Court held the New York released time program not violative of the First Amendment because such program did not involve any use of the public schools to promote religious worship or instruction. The only role played by the school was to "close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction." at 314. Or, as the Court expressed it elsewhere, all that was done by the public schools in New York was to make "adjustments of their schedules to accommodate the religious needs of the people." at 315.

This reasoning, supporting the *Zorach* holding, is inapplicable to the case at bar. First, the Regents' prayer is conducted within the public school building. Second, far from merely "closing its

doors'' to accommodate those wishing to participate in outside religious activities, the school authorities themselves sponsor the Regents' prayer, which becomes an integral part of the daily public school program under the guidance and control of the teacher. Finally, the opening exercise blends secular (Pledge of Allegiance) and religious (Regents' prayer) programs, a combination condemned in *Zorach*. at 314. Furthermore, the Regents' prayer constitutes "religious instruction" undertaken by the government, also condemned in *Zorach. ibid.*

Mr. Justice Meyer in his opinion below uses the concept of "accommodation" (R. 104, f. 312) to justify upholding the Regents' prayer. In doing so, he expands the concept far beyond the meaning given it by the United States Supreme Court. This term is not an open sesame to introduce all kinds of religious practices into the public schools; its meaning must be understood in light of the factual situation discussed in *Zorach*, or the constitutional prohibition on establishment will lose all its substance.

**D. *The program is unconstitutional even though not compulsory***

It is basic to an understanding of the constitutional issues involved in religious practices in the public schools to distinguish between the Establishment Clause and the Free Exercise Clause of the First Amendment. This difference is particularly striking when we consider the effect on constitutionality of a provision for the non-participation of objecting pupils. It may be conceded that permission for non-participation makes a religious program innocuous from the point of

view of the free exercise of religion. However, the presence or absence of compulsory attendance is irrelevant in any discussion of constitutionality of a program under the Establishment Clause. This clause of the First Amendment prohibits any agency of the state from undertaking or sponsoring religious programs, and it is of no moment that all or some of the citizens participate in such programs. Clearly, the holding of a Mass in a public school during the regular day would violate the Establishment Clause even though all non-Catholic pupils were permitted or required to absent themselves.

This point is illustrated in the *McCollum* case. There, the Champaign released time program was invalidated under the Establishment Clause although there was no question of compelling any child to participate in the religious indoctrination. On the contrary, only children whose parents signed consent cards were released from their secular studies to receive religious instruction. The Court expressly ruled out any consideration of the presence or absence of compulsion in view of the limitation of its consideration of the issues to the Establishment Clause. *McCollum v. Board of Education*, 333 U. S. 203, 207, footnote 1.

Mr. Justice Meyer in his opinion below, ignored this vital distinction between the Establishment and the Free Exercise Clauses. He objected to the mandatory terms of the Board's resolution setting up the Regents' prayer program, and required the Board to provide expressly for the choice of non-participation by those children whose parents disapproved on religious grounds. While this requirement might save the program from a constitutional attack under the Free Exercise Clause, it cannot save it under the Estab-

lishment Clause. Once it is conceded that the program deliberately brings religion into the public schools it is a violation of the Establishment Clause and remains so notwithstanding provision for non-participation.

One of the vices of the Regents' program for the inclusion of a prayer in the opening school exercises, notwithstanding provision for non-participation, is the fact that the program places the "stamp of approval" of the state on the religious ceremony. *Tudor v. Board of Education of Rutherford*, 14 N. J. 31, 51 (1953); *McCollum, supra*, Mr. Justice Frankfurter's concurring opinion, at 230. The non-participating children are inevitably set apart as non-conformists and subjected to social and psychological pressure to modify their beliefs and conduct. The choices open to the non-participating child are all bad: he may ask to be excused and hence label himself as a non-conformist to his classmates; he may yield to the pressure and participate in the exercise despite the conflict with his beliefs. The dilemma in which the child is thus placed is not of his own creation; it is created for him by the resolution of the Board to conduct religious prayer as part of the public school program. To consider the "subtle pressure" thus exerted upon public school children as beyond the Court's cognizance, is to draw a thread from a fabric. It fails to accept the fact that the public school authorities, by deliberately introducing a religious exercise, impose the dilemma upon the child committed to their care for secular education.

Several state courts, when called upon to consider various religious practices in the public schools, have held that provision for non-partici-

pation does not save a school-sponsored religious program from invalidity under state constitutional provisions which had the same objectives as the First Amendment.

The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the Constitution. *People ex rel Ring v. Board of Education*, 245 Ill. 334, 351 (1910).

It is said, if reading the Protestant version of the Bible in school is offensive to the parents of some of the scholars, and antagonistic to their own religious views, *their children can retire*. They ought not to be compelled to go out of the school for such a reason, for one moment. The suggestion itself concedes the whole argument. *State ex rel Weiss v. District Board*, 76 Wis. 177, 219, 220 (1890) (Emphasis in original).

And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The ex-

clusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. *Herold v. Parish Board of School Directors*, 136 La. 1034, 1050 (1915).

The same point is made by Mr. Justice Frankfurter in his concurring opinion in *McCollum*, *supra* at 227-228.

It is submitted that the case at bar cannot be distinguished from the cases cited above, on the theory that they involved sectarian practices, whereas the Regents' prayer has been characterized by Mr. Justice Meyer to be non-sectarian. R. 113, f. 337. Quite apart from the position of agnostics and atheists, to whom all appeals to Divine Providence are obviously sectarian,<sup>6</sup> prayer, as a central institution of each of the major Western religions, has a separate and distinct meaning for the adherents of each sect and denomination of such religions. This is true with respect to the forms and content of prayer.<sup>7</sup> It is

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6. That non-believers are entitled to the protection of the First Amendment, is beyond dispute. *Everson v. Board of Education*, 330 U. S. 1, 15, 18; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642 (1943); *McCollum v. Board of Education*, 333 U. S. 203, 210.

7. "Change not the form in which the sages cast the prayers." *Jerusalem Talmud*, "Berakhot," 5.2.

"The significance of the prayers consists not alone in their content but also in their traditional forms, in the verbiage in which they have been bequeathed to us, hence, also in the Hebrew language. This must remain, therefore, with few exceptions, the language of prayer." Geiger, Abraham, *Israelitisches Gebetbuch*, (Jewish Prayerbook), quoted by Philipson, David, *Centenary Papers & Others*, Cincinnati, 1919, p. 124.

also true with respect to the demeanor required of the supplicant while he is praying. To a deeply religious person, these differences may go to the root and essence of his religion. It may be that the Regents' prayer, in its form and content, is not objectionable to a number of sects and denominations, perhaps even to a majority; but it is a form of prayer not known or accepted in the homes, synagogues and churches of many children attending the public schools of New York. A confusion is thus created in the minds of many children who are subjected to different forms of religious experience at home, synagogue or church, on the one hand, and at public school, on the other. This is particularly true of the adherents of orthodoxy in all religions.<sup>8</sup>

The strict maintenance of old established forms of worship is characteristic of orthodoxy in all faiths. Hence, in the view of adherents of orthodox religions, any prayer which deviates from accepted forms is objectionable. There is no prayer which has been universally accepted by all Western religions as to form and content.

**E. *Various religious practices not involving public schools are not legal precedents for this case***

In public debates on separation of church and state in the United States, reference is frequently made to various practices carried on under the

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8. The problems which the public school authorities have to tackle in a futile effort to regulate the saying of the Regents' prayer while at the same time protecting the constitutional rights of all children, is illustrated by the disagreement between Mr. Justice Meyer and Mr. Justice Beldock in their respective opinions as to the conduct that should be required of the non-participants. It was to eliminate conflicts of this type that the First Amendment was adopted. II Madison, 186-191, para. 11; *McColum v. Board of Education, supra*, at 212, 216-17.

authority of government, such as chaplains in the Congress, presidential proclamations of a day of Thanksgiving, and invocation of God at court openings. These practices are cited to support the proposition that religious practices may be included in the public schools.<sup>9</sup> In fact Mr. Justice Meyer in his opinion below mentions some of these traditional practices to buttress his conclusion that the First Amendment does not exclude "the routine of prayer from the schools." R. 80-82, ff. 240-245. In this connection, the dictum of Mr. Justice Douglas in *Zorach v. Claiborn*, 343 U. S. 306, 312-13, is often cited. But an examination of the specific language used in that case, reveals that Mr. Justice Douglas mentioned several traditional practices with religious overtones, for the purpose of illustrating his point, with which the *amici* herein fully agree, that state and religion in the United States are not "hostile, suspicious [or] even unfriendly \* \* \*"

It should be noted that none of the traditional practices, cited by Mr. Justice Douglas in *Zorach*, relate to the sensitive area of public school education. Extreme care must be exercised not to extend beyond their original scope practices which still await judicial endorsement. We believe that Mr. Justice Douglas would be among the last to suggest that the employment of chaplains by the Congress is authority for the employment of chaplains by the public schools.

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9. Costanzo, Joseph F., "Religious Heritage of American Democracy," *Thought*, Winter, 1955-56, pp. 485-506; *New York Journal American*, February 25, 1959, Editorial; *Brooklyn Tablet*, August 1, 1959; *Religious News Service*, September 28, 1959; *New York Herald-Tribune*, May 16, 1960, "Letters to the Editor." *The New York Times*, March 9, 1961, p. 17; March 12, 1961, p. E. 9; March 13, 1961, p. 25; March 15, 1961 (Catholic Statement on School Loan Bill) p. 26.

Some of the traditional religious practices cited in public discussions of church-state issues spring from colonial days before disestablishment and the adoption of the First Amendment. One of the reasons that they continue to this day is that it is most difficult to secure authoritative adjudication of their constitutional validity. See, *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

### Conclusion

The order of Mr. Justice Meyer in the Supreme Court, Special Term dismissing the proceeding herein should be reversed and the Board of Education of Union Free School District Number Nine, New Hyde Park, should be directed to discontinue the practice of including the Regents' prayer in opening school exercises.

Respectfully submitted,

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