STATEMENT OF

DEAN NORMAN REDLICH

ON

S.J.R. 2 and S.J.R. 3

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

UNITED STATES

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

June 19, 1985

PREPARED STATEMENT OF NORMAN REDLICH

My name is Norman Redlich. I am Dean and Judge Edward Weinfeld Professor of Law at the New York University School of Law where I have taught constitutional law for twenty-seven years. I have been a member of the New York City Board of Education, and was Corporation Counsel of the City of New York from 1972 to 1974. I am the co-author of a constitutional law casebook. From 1979 to 1981 I was co-Chair of the Lawyers' Committee for Civil Rights Under Law.

Presently, I serve as co-Chair of the Commission on Law and Social Action of the American Jewish Congress* and am a member of the Board of Overseers of the Jewish Theological Seminary. I also served on that Seminary's special commission to study the question of the ordination of women in the Conservative Rabbinate.

I mention the latter affiliations because, while I appear here as a student of constitutional law, and in that capacity oppose the enactment of S.J.R. 2 and 3, my views on the subject are motivated in large part by a firm religious commitment. I consider myself a civil libertarian, and have been active in civil liberties and civil rights causes for many years. My opposition to this amendment, however, stems not only from my concern for civil liberties, but my abiding concern for the survival of religious freedom as we have known it in this country.

* The American Jewish Congress joins in these comments.

This Committee is considering two different amendments.

S.J.R.2, introduced by Senators Hatch and De Concini, provides:

> Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of prayer or reflection.

S.J.R. 3, introduced by Senator Thurmond, provides:

> Nothing in this Constitution shall be construed to prohibit individudal or group prayer in public schools or other public institutions. No person shall be required by the United States or by an State to participate in prayer. Neither the United States nor any State shall compose the words of any prayer to be said in public schools.

I.

By definition, a constitutional amendment is a change in the rules of the game. When Congress considers ordinary legislation, and a constitutional lawyer is asked for his or her opinions about its constitutionality, the answer will focus on judicial decisions and their application to the proposal at hand. But when a student of the Constitution is asked to comment on a proposed constitutional amendment, he or she has a different task: to define what the law is now, and to identify how the proposed constitutional amendment would work on change in the law.

One additional task falls to the student of the Constitution called upon to express a view on a proposed constitutional amendment: to identify those principles embodied in the relevant portions of the Constitution as it exists, and to express a view on how the proposal would alter those principles. The first set of tasks calls for a relatively narrow legalistic focus; the latter for a broader, long range, almost philosphical, perspective.

To put the matter in the terms of the amendments we are discussing today: The first task requires me to discuss whether the Supreme Court's decision in Wallace v. Jaffree would permit the courts to uphold a statute calling for a moment of silence, or a moment of silence for prayer, reflection or meditation when the record does not demonstrate a legislative intent to further religion. The second requires me to focus on whether the proposed change in the Constitution would substantially alter the existing relationships between government and religion across a broad spectrum of issues, not only prayer in the public schools.

My comments today will address both of these issues. In addition, I include in the course of my remarks some general comments about the wisdom of the Amendments before the Subcommittee, for ultimately this Committee is charged with determining a question of policy, not law.

II.

Almost twenty years ago, Professor Paul Kauper (who, in addition to being a fine Constitutional lawyer, was a devout Christian) appeared before this Subcommittee to testify against an earlier proposal

to amend the Constitution to overturn the Supreme Court's landmark decision in Engel v. Vitale, 370 U.S. 421 (1962) and School District of Abington Township, 374 U.S. 203 (1963), banning school sponsored prayers in the public schools. In his testimony, Professor Kauper laid out a standard for evaluating constitutional amendments which I believe should guide this Committee:

> Any proposal to amend the Constitution should... be subject to very careful scrutiny. My thinking about the constitutional amendment process is that any proposed amendment should deal with fundamental matters of constitutional concern and that the necessity and desirability of the amendment should be clearly demonstrated.

Kauper, Statement Relating to School Prayer, Hearings on S.J.Res. 148 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 601, 605 (1966). This is a sound standard, and one which finds justification in the constitutional text in the ways in which the Founding Fathers made it difficult to amend the Constitution.

The Constitution has been amended only 16 times after the adoption of the Bill of Rights. Only four of those sixteen amendments were adopted to overrule a specific decision of the Supreme Court. The Bill of Rights itself has never been amended, either to overrule the

Supreme Court or otherwise. That is, no doubt, because the Bill of Rights occupies a special niche in American political life.

Congress has always recognized that amending the Constitution is a matter of the gravest moment. It has always acted with restraint in this area, not invoking the Amendment process to challenge every questionable constitutional ruling. That political restraint has served the nation well, lending our political system - and our rights - a stability and permanence which are widely envied.

Neither S.J.R.2 or S.J.R.3 meets Professor Kauper's standard of strict necessity and desirability.

III.

S.J.R.3 is similar to numerous other proposals Congress has considered over the years to permit vocal school prayer, but never adopted. It is, of course, "necessary" if there is to be vocal prayer in the schools, but it is not desirable. S.J.R. 3 is almost identical to S.J.R. 199 (97th Cong. 2d Sess.) about which I testified at length several years ago. Nothing that has happened since that time has led me to reconsider what I wrote then:

> The proposal you have before you does not deal with a fringe interpretation of the Establishment Clause. It deals not with questions of remedial reading taught to parochial school students, nor to the issue whether the singing of Christmas carols is or is not a religious exercise. It does not concern textbooks or methematics courses taught in religious schools. Nor does it even purport to establish a religious exercise which is non-denominational, perhaps because sponsors of the school prayer

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amendment realize that there is no such thing as a non-denominational prayer. No, this proposed amendment does not deal with peripheral questions under the Establishment Clause. This proposed amendment strikes at the very core of constitutional values that underlie our most precious guarantee of religious and political freedom. This amendment permits an avowedly religious exercise - a prayer - of whatever nature may be approved by the majority of any school district in the country. Whether it be Mormon prayers in Utah, Jewish prayers in Brooklyn, Catholic prayers in Boston, Baptist prayers in Georgia, Congregationalist prayers in parts of New England, religious prayers are to be permitted by this proposed amendment, subject only to the limitations that a person shall not be required to participate in prayer.

Scholars may disagree over the motivation of the Founders in prohibiting religious establishments. I happen to believe that the Supreme Court's interpretation of that history is correct. But even those who may disagree with the Court's view that all aid to religion is prohibited concede that government is not permitted to discriminate among religious sects. Even Justice Stewart, the sole dissenter in Schempp, agreed that school officials could not favor one religion over another. Most Americans conceive it as settled doctrine that religion is a private affair and that government may not favor one faith or the other. In my view, then, this proposal is not a conservative one, but rather a profoundly radical alteration of a basic precept of American life, the required neutrality of government among religious faiths. It will undo one of the proudest achievements of this republic.

> It is too often assumed that the free exercise clause is the prime guarantee of religious liberty, that the Establishment Clause is, somehow, hostile to religion, designed to keep religion fromn becoming too powerful. This represents a profound misreading of history and a lack of appreciation of the Establishment Clause as itself a prime guarantor of religious liberty. There cannot be true religious liberty - the right of a person freely to choose those forms of religious belief and expression which represent that individual's innermost expression of faith - if the government is permitted to display favoritism to one faith or the other. It is our constitutional theory that the government, which represents all the people, has no business generating the pressure of any religious belief on any individual citizen. The First Amendment command that government make no law respecting an establishment of religion, which this proposed amendment would alter in a most fundamental sense, is an essential feature of a constitutional structure which guarantees that persons can conduct their religious practices, and express their religious beliefs, free from pressure of government conformity.

A constitutional amendment presupposes a societal consensus that a certain policy is so fundamental, so certain, so essential a principle as to merit inclusion in the community's fundamental charter. While unanimity is not the test, a proposal which has been debated by the Congress on at least five occasions over twenty years - as has vocal school prayer - and been rejected each time, surely cannot be said to embody a consensus of the political community.

Neither can it be said that a badly divided Supreme Court is clinging to dubious precedent, solely for history's sake, so that it might be argued that an Amendment was needed to break the constitutional logjam. While three justices dissented from the invalidation of the Alabama silent prayer statute, none voted to uphold Alabama's vocal prayer statute. Wallace v. Jaffree, 466 U.S.____ (1984) or Louisiana's voluntary vocal prayer scheme, Karen B. v. Treen, 653 F.2d 897 (11th Cir.), aff'd, 455 U.S. 913 (1981). Even Justice Rehnquist who expressed a minimalist view of the Establishment Clause, Wallace v. Jaffree, supra, 53 U.S.L.W. 4665, 4679, did not dissent from the conclusion that Alabama's vocal prayer statute was unconstitutional.

Scholars such as M. Malbin, Religion and Politics; The Intentions of the Authors of the First Amendment (Preface at 2), and R. Cord, Separation of Church and State; Historical Fact and Current Fiction, (p.165), who generally fault the Supreme Court handling of Establishment Clause cases, agree that Engel and Schempp were correctly decided. There is as close to a scholarly consensus as one comes in constitutional law that government sanctioned prayers in the public schools run counter to the relationship between church and state contemplated by the Founding Fathers.

Of course, the Constitution is not immutable. But where is the clamor to allow prayer in the schools? Not, surely, from educators, who oppose prayer in the schools. They do so not because the Constitution requires that result but because they have discovered that prayer is disruptive and divisive in their schools. It is an educationally unsound practice.

While the religious community is divided, many, if not most, religious organizations oppose vocal school prayer. Only recently, the Baptist Joint Committee on Public Affairs, the National Counsel of

Churches, the Presbyterian Church (U.S.A.) and the National Association of Evangelicals, noted their rejection of state supported efforts to sponsor or control religious services. In an amicus brief filed with the United States Supreme Court in Bender v. Williamsport Area School District they wrote: "Amici firmly oppose establishment of religion in schools by government mandating, sponsoring, initiating, promoting or organizing religious activity."

S.J.R. 3 has not become more desirable over the years. It is a proposal fundamentally and inescapably inconsistent with the well functioning constitutional scheme for protecting religious liberty. S.J.R. 3 would destroy that scheme. It should be rejected.

IV. S.J.R. 2

S.J.R. 2 is not, strictly speaking, a reaction to the Supreme Court's decision two weeks ago in Wallace v. Jaffree, since it was introduced before that case was decided. It is nevertheless that decision which is the most relevant authority on the constitutionality of "moments of silence" statutes.

Without here attempting a detailed analysis of the various opinions in Wallace v. Jaffree, let me point out certain salient points:

1) Many, if not nearly all, statutes calling just for a moment of silence, will be found constitutional. It is, however, unclear how the Court would treat a "pure" moment of silence statute when the legislative history unmistakably suggested a religious purpose;

2) Justices O'Connor and Powell's opinion are unclear as to whether a moment of silence statute could ever pass constitutional

muster if it contains the word prayer. (In more formal terms, the question is whether the mere mention of prayer is a departure from the principle of official neutrality?

3) How does one assess the constitutionality of state moment of silence laws enacted years ago, where there is no equivalent in the Congressional record?

Based on the various opinions of the Court there is room for substantial disagreement over these questions, based on the various opinions of the Court. Some of these issues are already sub judice at the federal appellate level. In May v. Cooperman, 572 F.Supp.1561 (D.N.J. 1983), the Third Circuit will consider a "pure" moment of silence law but where the legislative history indicates a religious purpose. And in Walter v. W. Va. Bd. of Educ., ____F.Supp.____, (S.D.W. Va. 1985), app. pending (4th Cir. 1985) the Fourth Circuit will consider a moment of silence for prayer or meditation law adopted by popular referendum. These cases should be decided within the year, or far earlier than a constitutional amendment could be adopted.

If, then, the purpose of this proposal is to legitimize moments of silence as such, it fails Professor Kauper's test of strict necessity for, as noted, it is likely that many "moment of silence" laws - including many of those already on the books of the several states - are constitutional. At least as a matter of constitutional theory, other states may, if they wish, adopt such laws. There is thus, as yet, no need for a constitutional amendment to legitimize such statutes.

But even if the purpose is to legitimize moment of silence statutes which mention prayer as one of several permissible uses of the

period, the proposal fails Professor Kauper's 'necessity' tests. It is not at all clear at this point that such statues are inevitably unconstitutional, at least if they have a legislative history somewhat less unusual (blatant) than that of the invalidated Alabama statute. Whatever I may think of the constitutionality or wisdom of such statues, it cannot be said that only a constitutional amendment could insure their constitutionality.

It certainly cannot be said that SJR-2 is necessary to preserve the right of students to pray on their own intitative. The Establishment Clause does not forbid such exercises; on the contrary the Free Exercise Clause protects them. Occassionally, over-zealous, but ill-informed, school officials interfere with such activities. Such action is based on a misinterpretation of the Supreme Court's decisions. Surely, though, that an occassional public official violates the Constitution is not a sufficent showing of necessity to justify a constitutional amendment.

Only if the purpose of SJR.2 is to allow the states to explicity encourage students to engage in a religious exercise[*] -- to generate, in other words, a religious response during the moment of silence by students--is S.J.R.2 necessary. A statute which seeks such a religious purpose is unconstitutional under Jaffree. Although, this purpose meets the necessity test, it fails Professor Kauper's desirability test. It would make a radical departure from the constitutional policy which has given rise to a nation whose religiosity is unmatched anywhere else in the world.

At present, over half of the states have no moment of silence laws. If those states do not believe it necessary to encourage religion in this fashion, even though there is no clear restraint on their ability to do so, can it be said that encouraging religion in this fashion constitutes a "fundamental" constitutional policy which now must be made explicit in our most basic governmental charter.?

V.

So much for the evaluation of S.J.R.2 as it would affect the public schools. What impact would adoption of SJR-2 have on church-state jurisprudence generally? How much would it reshape the current understanding

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[*] While SJR-2 prohibits a state from encouraging any particular form of prayer or requiring participation in prayer (how could a state do so?) it pointedly does not bar states from encouraging studens to ultilize the moment of silence for prayer.

of the First Amendment.

One can answer these questions only hesitantly. It is possible that the Court would view this amendment narrowly, as overruling one specific decision, and as having no impact on any other issue. However, I do not think this is very likely. The Court in Jaffree v. Wallace of necessity canvassed a broad range of Establishment Clause issues. Necessary to its holding were the following principles:

1) the Establishment Clause is binding on the states (53 U.S.L.W. at 4668)

2) that clause prohibits more than just the preference of one Christian sect over another (53 U.S.L.W. at 4669)

3) that historical argument advanced by Justice Rehnquist, which is a radical departure from Court prior reading of the ~~ambiguity~~ was not adopted by a majority of the Court;

4) religion may not be preferred over non-religion (53 U.S.L.W. at 4669)

5) the so-called three part test remains valid, and should not be altered (53 U.S.L.W. at 4670)

6) the purpose test means not only what the legislature intended to accomplish, but it reasons for acting. The inquiry here is essentially historical and hence factual (53 U.S.L.W. at 4690)

7) the accommodation doctrine does not justify a majority using the machinery of state to encourage or require practice of its beliefs (53 U.S.L.W. at 4670 n. 45)

As anyone familiar with the literature on the Establishment Clauses knows this list encompasses many of the most important issues raised in Establishment Clause jurisprudence. If SJR 2 is adopted, would not the courts reasonably conclude that these principles have been rejected by the people, the ultimate

sovereigns in our democratic system? If I am correct in this analysis, this amendment, as modest as it appears, would have a monumental impact on the entire jurisprudence of the Establishment Clause.

The question which must be asked is whether whatever little impact the amendment would have on what happens in the public schools is sufficient to justify revamping church-state jurisprudence. The question takes on added urgency because religious groups have not rushed to support this proposal. The Jewish community is all but unanimous in its opposition to SJR-2. A broad spectrum of Protestant groups, including the National Council of Churchs, also oppose it. The so-called Fundamentalist community is not enthusiastic about a silent prayer amendment. Indeed, many on the so-called religious' right object to the amendment because they view silent prayer as too inconsequential to justify the effort of amending the constitution. Education groups, too, see no necessity for this proposal. Why then, and for whose benefit, open this Pandora's box?

VI Some Policy Questions.

Adoption of a constitutional amendment would send a signal not only to the courts, but to school officials, parents, religious leaders and the public at large, that the public schools are charged with insuring the spiritual and religious development of their students. It is true that SJR-2 by its terms authorizes only silent prayers. It may be doubted whether that restriction would be observed in practices. Morever, a realistic evaluation of this society is sufficient to indicate that the battle over prayer in the schools - silent or vocal - is symbolic of a larger battle between those who would increase the role of government in promoting religion and those who oppose such a role.

Adoption of SJR-2 would do more than permit silent prayer in the schools. It would reinforce the already unfortunate tendency towards government involvement in religious activity. Is that wise? Is it desirable? Is is healthy for our society? Would it breed disrespect for law because many would take SJR-2 as a signal to ignore Engel and Schepp? Will it just whet the appetite of those who regard the separation of church and state as an idea born of the devil?

Finally, is it fair to subject school children to silent prayer? Consider the following incident described by a student in Walter v. W. Va. Bd of Educ., ___ F Supp _____, _____ (S.D.W. Va 1985) in which a moment of silence for contemplation, meditation or prayer statute was invalidated:

> . . . Well, basically they said, they told us how long it was supposed to be and quite a few minutes they kept saying, 'contemplation, meditation, and prayer' and then towards the end they told us that if we had any religious questions, we would be referred to our parents or to, I think the phrase was 'a leader of our faith,' but I am not exactly sure about the phrasing. . . Well, in second period, which was science, our teacher left the room to go find something and one of the people who was in my home turned around and asked me why I had been reading a book during the moment of silence. And, I told him that I didn't have to pray then and I didn't want to and then he told me that I should be praying all the time and then he said something to the effect that if I prayed all the time, maybe I could tgo to heaven with all the Christians when Jesus came for the second time instead of, as he put it, going down with all the other Jews.

Judicial review does not fit neatly with democracy. The jurisprudence literature, of course, deals with this problem at length. Whatever the theory, judicial review, as the federal courts practices it, has not destoryed democracy. On the contrary, in this country, at least, it has strengthed it. We are all freer because we do not let transiet majorities intrude into the freedom of conscience. As Justice Jackson wrote in another case arising in West Virginia:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversary, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election."

West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)

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Conclusion

It is the peculiar genius of the American constitutional system is that it balances majority rule against individual liberties. No where is that balance clearer than in the Bill of Rights. The Congress has until now respected that balance by refusing to amend the Bill of Rights, despite periodic popular criticm of judicial decisions. In the case of school prayer I believe that even for criticism unfounded and short sighted. But those who disagree, the wisdom of leaving the Bill of Rights unamended as is or should be, clear. I urge rejection of S.J.R.-2 and S.J.R.-3.

American Jewish Congress
CLSA
COMMISSION ON LAW AND SOCIAL ACTION

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CLSA REPORT ON THE DECISION OF THE UNITED STATES SUPREME COURT IN ESTATE OF THORNTON V. CALDOR, INC.

June 26, 1985
(53 U.S.L.W. 4853)

For some time now, the Supreme Court has been hinting that the Establishment Clause limits how far a state may go in accommodating religion by way of exemption from obligations imposed generally on similarly situated persons. Although the lower courts have on a few occasions invoked these cautions to invalidate statutes accommodating religion (e.g., certain statutes exempting all activities of church groups from anti-discrimination statutes), the Supreme Court never had—until now. The case in which the Court, by an 8-1 vote[1], chose to do so, Thornton v. Caldor, Inc., involved accommodation of Sabbath observance--and hence involved a real cost to at least a substantial part of the Jewish community. Thus, while the Court's willingness to invoke the Establishment Clause even in such a sympathetic case was welcome news, the actual application of the Clause is not an unmixed blessing. Fortunately, the decision does not appear to invalidate less rigid accommodation statutes.

I. THE FACTS

A. THE BLUE LAWS IN CONNECTICUT

In 1976, the Connecticut legislature revised the state's Sunday Blue Law in reaction to a state Supreme Court decision invalidating the existing Blue Law on the ground of vagueness. As part of its revision, the legislature widened the scope of permissible business activity. At the same time, it decided to provide additional protection for those employees for whom Sunday work was religiously impermissible: (Conn. Gen. Stat. §53-303e(b))

> No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's

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1 Only Justice Rehnquist dissented, but without opinion. Justices O'Connor and Marshall joined in both the opinion of the Court, written by Chief Justice Burger, and a separate concurrence written by Justice O'Connor.

refusal to work on his Sabbath shall not constitute grounds for his dismissal.

An administrative remedy was created to enforce this right. Although Connecticut's anti-discrimination law proscribed religious discrimination, the Supreme Court of Connecticut had held that this prohibition did not require the accommodation of religious practices[2]. Thus §53-303e(b) was the only state law protection for Sabbath observers in Connecticut[3].

B. THORNTON'S COMPLAINT

Thornton (who died while this case was being litigated) was employed as a manager by Caldor Inc., a department store chain, which, with the revision of the Blue Law, began to operate on Sundays. Although he was a devout Presbyterian, Thornton at first agreed to work Sundays. Ultimately, however, he refused to work on his Sabbath; Caldor offered him a transfer to a store in Massachussets which was closed on Sundays, or a non-managerial (and lower paying) job, which, because of the provisions of a union contract, did not require employees to work on Sundays in violation of their religious beliefs. Thornton refused these offers, resigned, and filed a complaint under the statute.

The administrative agency charged with enforcing §53-303e upheld Thornton's complaint. It was in turn upheld by the trial court, which also rejected Caldor's Establishment Clause challenge to the statute[4].

C. THE DECISION OF THE CONNECTICUT SUPREME COURT 191 Conn. 336, 464 A. 2d 785 (1983)

The Connecticut Supreme Court reversed, and found the statute unconstitutional under the three-part test of Lemon v. Kurtzman, 403 U.S. 602 (1971). (That test requires that, to pass constitutional muster, a statute must have a secular purpose, a primary effect which is secular, and not unduly entangle government with religion.)

Before turning to the application of this test to §53-303e, the Court first rejected the contention that the law was intended only to permit all employees to choose their days off. Such a statute would, of course, be constitutional. The Court found that the use of the term "Sabbath" precluded any such interpretation, for it was a word pregnant with religious overtones and because, to the extent that Sabbath means a day of rest, it has that meaning because some religions so interpret it.

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2 Corey v. Avco Corp., 163 Conn. 309, 307 A.2d 155 (1972)

3 Employers with more than 15 employees were, of course, subject to the religious accommodation provision of Title VII, 42 U.S.C. §2000e(j) and 2000e-2(a)(1).

4 The challenge was somewhat ironic, since Caldor's counsel had played a major role in drafting Connecticut's revised Blue Law, including §53-303e.

In the Sunday Blue Law Cases, 366 U.S. 420 (1961), the United States Supreme Court upheld the constitutionality of Blue Law statutes in the face of Establishment Clause claims. Those statutes, said the Court, serve the legitimate secular function of providing a common day of rest. By contrast, the Connecticut statute allowing every individual employee to designate his or her own Sabbath has "the unmistakable purpose of [allowing] those persons who wish to worship on a particular day to do so." Hence, it had a religious purpose.

Second, the statute had the effect of advancing religion because, while it did not "favor one religion over another, and does not provide direct aid to religious institutions in the form of money or property," it confers its "benefit on an explicitly religious basis." "Nonreligious" workers could not, as their "religious" counterparts could, designate their days off.

Third, the Connecticut Court said, the statute impermissibly entangled church and state by requiring the state to pass on religious claims and determine which were sincere and which beliefs constituted a Sabbath.

Perhaps because counsel for Thornton did not cite to them, the Connecticut court made no mention of the several state and lower federal court decisions upholding the religious accommodation provision of Title VII. Nor did that Court discuss the Supreme Court's free exercise cases.

D. THE UNITED STATES SUPREME COURT

The appellant's estate would have let the matter stand there, but for the action of the National Jewish Commission on Law and Public Affairs, and particularly one of its officers, Nathan Lewin, who offered to carry the case to the United States Supreme Court. AJCongress joined in this offer, and served with Mr. Lewin as counsel for the Estate.

A petition for certiorari was filed, and the Court agreed to hear the case, which was argued in December in tandem with Jenson v. Quaring[5].

E. ARGUMENTS OF THE PARTIES

i. For Petitioner Thornton

a) Laws which protect Sabbath observers protect the free exercise of religion. The Connecticut Supreme Court erred in assessing this statute under the constitutional standard applicable to cases involving sponsorship of, or financial support for, religion. Statutes designed to protect free religious exercise should be upheld if they are rationally related to a legitimate state purpose.

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5 Jenson v. Quaring is the subject of a separate CLSA report.

b) The three-part test is satisfied here. The purpose and effect of the law are secular--the elimination of discrimination. There is no realistic possibility of administrative entanglement.

ii. Intervenor, State of Connecticut

a) The Constitution forbids some accommodations of religion, permits others, and requires still others. Because any accommodation intentionally aids religion, the three-part test must be applied flexibly.

b) While the Constitution does not require accommodation as embodied in §53-303(e) (because it does not apply to private employers), it permits the state to require accommodation of employees' religious practices, just as a state may exempt a Sabbath observer from its Blue Law.

c) Contrary to the assertions of Caldor, the statute does not require accommodation no matter what the cost. Rather, it requires reasonable accommodation.

iii. The United States, as Amicus Curiae

a) The Connecticut Supreme Court erroneously applied the three-part test. Since the statute makes it possible to practice one's religion, coerces no religious choice, and is neutral among religions, it is constitutional.

iv. Brief Amici Curiae of ACLU and American Jewish Committee[6]

a) It was error to pass on the facial constitutionality of the statute. It was unclear whether it called only for reasonable accommodation or whether it absolutely required Sabbath observers to be given their choice of days off. The latter interpretation would invalidate the statute.

v. Brief of Respondent, Caldor, Inc.

a) The statute was unconstitutional because 1) it gave Sabbath observers a valuable right not accorded other employees: the right to choose a day off. 2) is not an anti-discrimination law; it requires discrimination; 3) coerces non-religious employees to give up their days off and 4) enmeshes employers in religious inquiries.

b) Because the law is absolute, it sends a message that government regards Sabbath observance as more important than competing concerns.

c) The statute departs from the Court's teaching that the First Amendment requires "flexibility, neutral accommodation and attention to context." Because most other statutes do not call for absolute accommodation, they would be constitutional.

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6 The Anti-Defamation League filed a brief in support of Thornton.

d) The Court should not pass on the constitutionality of §53-303(e), because Connecticut had, since the decision below, enacted a reasonable accommodation statute.

II. THE DECISION OF THE SUPREME COURT

A. MAJORITY OPINION

Chief Justice Burger wrote the opinion of the Court. The opinion was short—seven pages in all, four of which were devoted to a statement of the facts.

The government is required by the Establishment Clause to guard against activity which impinges on religious liberty, or which compels people to act in the name of religion. The three-part test has "frequently" been used by the Court in Establishment Clause cases, and was appropriate for use here.

Adopting the absolute construction of the statute urged by Caldor, the Court held that

> the unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religious Clauses, so well articulated by Judge Learned Hand: 'The First Amendment...gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his religious necessities' (citation omitted).

Because the statute made no exception for special circumstances (e.g., a teacher who is a Friday Sabbath observer) or instances where accommodation casts a substantial burden on employers or other employees (as by denying other employees week-end days off), it has the impermissible effect of advancing religion.

B. CONCURRING OPINION OF JUSTICE O'CONNOR

In a two page concurrence, Justice O'Connor noted that the statute was invalid because it gave absolute protection to Sabbath observers without affording similar protection to "ethical and religious beliefs and practices" of other employees. There can be little doubt, she argued, "that an objective observer or the public at large would perceive this statutory scheme [as an] endorsement of a particular religious belief, to the detriment of those who do not share it."

However, a statute like Title VII, calling only for reasonable accommodation, would pass constitutional muster. Justice O'Connor suggested that, because Title VII and similar statutes apply to private employers who are not subject to the strictures of the Free Exercise Clause[7], it was necessary for such statutes to pass muster under the

7 With only a few exceptions (the ban on any citizen holding a title of nobility, Art I, §9, cl. 8, and perhaps the Thirteenth Amendment) the Constitution applies only to the actions of government.

Establishment Clause. They must therefore have a "secular purpose and effect[8]. (Implicit in this suggestion is the idea that accommodation by the state need not have such a purpose.) However, "a statute outlawing employment discrimination based on...religion...has a valid secular purpose of assuring employment opportunity to all groups in our pluralistic society...[A]n objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion..."

III. ANALYSIS

1) In TWA v. Hardison, 432 U.S. 63 (1977) the Supreme Court interpreted the religious accommodation provision of Title VII requiring the "reasonable accommodation" of employee religious practices in the work place "as requiring employers to incur only[9] de minimus burdens. There was some question as to whether this rather narrow construction of Title VII was intended to avoid constitutional difficulties or was merely the Court's reading of the statute. The Caldor decision indicates that it is very likely that constitutional concerns played a large role in the Hardison decision, although it does not follow that the de minimus standard is all that the Constitution permits. (New York, for example, applies a somewhat stricter standard).

2) It seems likely that statutes calling for reasonable accommodation will be upheld. However, it is less clear whether these statutes may be enforced in cases where there is some insubstantial cost to other employers or employees. Employers and unions will no doubt litigate these issues.

3) Connecticut's statute was unusual, and so the decision itself invalidates few statutes. As noted, Connecticut itself, at the behest of AJCongress and COLPA, has enacted Title VII's requirements into law. Title VII is in any event substantially broader than the invalidated Connecticut statute, for it applies to all religious practices, not just Sabbath observance, a point which appears to have been significant for Justice O'Connor.

4) Last term, Chief Justice Burger wrote in Lynch v. Donnelly, 104 S.Ct. 1355, 1359 (1984) that the Constitution "affirmatively mandates

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8 No mention was made of the need to avoid entanglement, but no explanation was offered for this omission. In her Lynch v. Donnelly, 104 S. Ct. 1355, 1367 (1984) opinion, Justice O'Connor suggested that the entanglement test was properly limited to institutional entanglement, but in her dissent in Aguilar v. Felton, she questioned the "utility of entanglement as a separate Establishment Clause standard in most cases."

9 In that case, Leo Pfeffer on behalf of 10 of the 11 NJCRAC agencies, argued that Title VII was not unconstitutional under the Establishment Clause. The brief did not take a position on whether TWA had made reasonable accommodation of Hardison. The Union of Orthodox Jewish Congregations filed a separate brief in which it urged an affirmance of the judgement of the Court of Appeals that Hardison had not been reasonably accommodated.

accommodation, not merely tolerance, of all religions." Yet in this case, which unlike Lynch, truly is an accommodation case, the Court found an accommodation an unconstitutional establishment of religion. While the result in this case is surely reasonable, it is difficult to reconcile it with the Chief Justice's language in Lynch--language which is perhaps best understood as descriptive, not prescriptive.

5) That the Court was willing to invalidate a statute which could plausibly be written off as an accommodation--and indeed construe it so as to make its invalidation more likely--is surprising, at least if one took seriously that part of the criticism of the Lynch decision suggesting that the Court was no longer serious about the separation of church and state. Either the Court was stung by that criticism (or perhaps scared by last fall's election campaign in which religion figured so prominently) or the criticism was unwarranted in the first place.

6) In any event, the Court's decision, coupled with its decision in Wallace v. Jaffree and the parochial school aid cases, suggest that separation is alive and well. The most immediate significance of these cases is political--they signal that the Supreme Court takes the Establishment Clause very seriously.

7) Needless to say, Caldor is not a victory without cost. The decision will mean that some religious practices will not--indeed cannot be--accommodated. Some industries may be off-limits to Jews who wish to observe the Sabbath or Jewish holidays.

8) The decision may also adversely impact on the ability of sectarian institutions to secure exemption from statutes of general applicability--at least if, as will usually be the case, the interests of others are adversely affected.

9) The opinion suggests that there are limits to religious accommodation, but it offers little guidance as to what those limits are. This failure is part of the Court's unwillingness or inability to devise a comprehensive theoretical reconciliation of the Establishment and Free Exercise Clauses. It may well be that no overarching theory is possible, and decisions will continue to be made on an ad hoc basis.

Marc D. Stern

July 1985

Memorandum from... AMERICAN JEWISH CONGRESS
15 East 84th St., New York, N. Y. 10028 • TR 9-4500

May 28, 1985

TO: CRC's and Federations
Regional Directors
Commission on Law and Social Action

FROM Lois C. Waldman

RE: Secular Humanism

In reenacting a federal program to fund "magnet schools" (which are often created to counter racial segregation in large school districts) Congress stipulated that (20 U.S.C.§ 4059) "grants under this title may not be used...for the courses of instruction the substance of which is secular humanism."

There is almost no legislative history to this provision, which Senator Hatch had added during a House-Senate conference. What little debate there is (see attached) suggests that only local school districts are empowered to determine what is, or is not "secular humanism." In keeping with this legislative history, the United States Department of Education last week issued final regulations which track the exact language of the statute.

The upshot of this rather unusual state of affairs is that local school districts will, as in the case of equal access, be responsible for decision making in this controversial area. If school boards interpret § 4059 so as to ban on the teaching of the religion of Secular Humanism - i.e. the belief that man must make moral decisions without any reference to religious teaching - it will pose no major difficulties under the Constitition or for the Jewish community. I doubtful if any school district anywhere is teaching that set of beliefs, but if one is, it is no doubt violating the Constitution. Rather, the danger posed by this legislation is, that those on the religious right, who equate a failure to teach religion with "secular humanism" - an entirely different understanding of secular humanism - will use this provision as ammunition in their efforts to gain influence over the public school curriculum.

As detailed in AJCongress' letter to the Department of Education (attached) "secular humanism" so defined is simply a back door effort to circumvent the Supreme Court's decision outlawing religious instruction in the schools. The federal courts, including the Supreme Court, have several times so held, School Dist. of Abington Twshp. v. Schempp, 374 U.S. 203, 225 (1963); Grove v. Mead School Dist., 753 F.2d 1528 (9th Cir. 1985); Mozart v. Hawkins County Public Schools, 582 F.Supp. 201 (E.D. Tenn. 1984), app. pending, (6th Cir. 1985); Williams v. Bd. of Educ., 388 F. Supp. 93 (S.D.W. Va. 1975), aff'd, 530 F. 2d 972 (4th Cir. 1975); Civic Awareness of America, Inc. v. Richardson, 343 F.Supp. 1358 (E.D. Wis. 1972).

Although the provision enacted last year, and the just issued regulations, apply only to programs funded under the magnet school program, and hence apply to only a relatively small number of school districts, these provisions are likely to serve as prototypes for other similar efforts on the federal, state and local level. In addition to being on guard against such legislative efforts at the federal, state and local levels, it is particularly important to monitor the reaction of school boards to this legislation.

We suggest that you contact school districts in your area to determine whether they are applying for magnet school grants, and if so, how they intend to ocomply with the no-secular humanism proviso. Such inquiries should be made informally, in a non-threatening fashion, and should not in any way suggest to a school district that is currently observing the law and not injecting religion into its courses, that any changes in current policy should or must be made. If your district receives federal magnet school funds, you should carefully monitor the District's performance to ensure that changes are not made in the curriculum to incorporate religious teaching. We are most interested in learning the results of your efforts.

schools assistance. Is it your understanding that a school district can meet any one of these conditions, but need not meet all three, in order to be eligible?

Mr. PERKINS. That is correct, I wish to say to the gentleman.

Mr. KILDEE. One other question on behalf of the gentleman from Pennsylvania [Mr. GRAY] and myself.

Another question on the magnet schools portion of H.R. 1310 as amended by the Senate. Section 702(3) makes voluntary desegregation plans in school systems which have adopted or are implementing a desegregation plan without having been required to do so eligible for funds. Is it your understanding that the term "voluntary plan" can mean plans that were not necessarily initiated by the courts and could include such voluntary plans as exist in the cities of Flint, MI; Rochester, NY; Seattle WA; and Philadelphia, PA; but that are otherwise meeting guidelines established under title VI of the Civil Rights Act of 1964?

Mr. PERKINS. The gentleman is correct.

Mr. KILDEE. One further question on behalf of myself, the gentleman from New York [Mr. NOWAK] and the gentleman from Pennsylvania [Mr. GRAY] relating to the magnet schools portion of H.R. 1310 as amended by the Senate. Section 702(1) of the bill states that a school system would be eligible for funds if it had lost at least $1 million following the repeal of the old Emergency School Aid Act. Is it your understanding, Mr. Chairman, that this $1 million loss applies to the total funding received by a school system under all chapter 2 antecedent categorical programs in the year immediately preceding the implementation of chapter 2 when compared to total funding received in the first year of chapter 2?

Mr. PERKINS. That is correct, likewise.

Mrs. BURTON of California. Mr. Speaker, will the gentleman yield?

Mr. PERKINS. I yield to the gentlewoman from California.

Mrs. BURTON of California. Mr. Speaker, I would like to ask the chairman whether section 709 of the Senate bill prohibits school districts from using their magnet schools assistance under title VII for courses the subject which is secular humanism. First of all, I want to know what that means. I thought I understood English. I might have an accent, but I do not know what secular humanism means.

□ 1240

Mr. PERKINS. Well, let me state that since there is no definition of secular humanism, the Department of Education is not authorized to promulgate any definition of that term. Furthermore, since the Secretary is not authorized to define the term, determination of which courses are or are not secular humanism should be left purely up to the judgment of the local educational agencies. That is the essence of it.

Mrs. BURTON of California. Mr. Chairman, I do not understand the terminology. I do not know why we need it in the bill.

Mr. PERKINS. The local educational agencies will make that determination.

The SPEAKER. The time of the gentleman from Kentucky [Mr. PERKINS] has expired.

Mr. PERKINS. Mr. Speaker, I yield myself 1 additional minute.

Mr. SEIBERLING. Mr. Speaker, will the gentleman yield for the purpose of a question on this subject?

Mr. PERKINS. Yes, I yield to the gentleman from Ohio.

Mr. SEIBERLING. I am not sure what is meant by the term "secular humanism," but if this bill is intended to start regulating the content of teachers' subject matter in such vague terms, it seems to me that it is a real invasion of academic freedom, and I am equally concerned with the gentlewoman from California. Can the gentleman give us further assurances as to what the effect of this provision is?

Mr. PERKINS. Well, let me say to the gentleman, as I understand it, that there is no intent to bring into play any Federal interference, that teachers and the local boards will make the decision exclusively of everybody else. So I see no harm here.

Mr. SEIBERLING. Could I just ask one other question of the distinguished chairman?

The SPEAKER. The time of the gentleman from Kentucky [Mr. PERKINS] has again expired.

Mr. PERKINS. Mr. Speaker, I yield myself 30 additional seconds.

Mr. SEIBERLING. If the gentleman will yield further, is the theory of evolution and natural selection secular humanism, as the gentleman understands it?

Mr. PERKINS. That decision is to be made locally, I will say to the gentleman, by your local boards and your teachers.

Mr. SEIBERLING. I thank the gentleman.

Ms. OAKAR. Mr. Speaker, will the gentleman yield?

Mr. PERKINS. I yield to the gentlewoman from Ohio.

[Ms. OAKAR addressed the House. Her remarks will appear hereafter in the Extensions of Remarks.]

Mr. GOODLING. Mr. Speaker, I yield 3 minutes to the gentleman from New Hampshire [Mr. GREGG].

Mr. GREGG. I thank the gentleman for yielding.

Mr. Speaker, I rise in support of the legislation as proposed. As the ranking minority member on the Science and Technology Committee which has the responsibility for this math-science education bill, I think it is appropriate that we move it at this time. This bill addresses what we have all recognized here in the House to be a critical problem, and that is that we have an abysmal situation occurring in our math and science education, especially at the elementary and secondary school level. We are finding that we are short of qualified teachers, that those qualified teachers which we do have are difficult to retain because of the competition from the private sector and that we do not have adequate materials and adequate instrumentation in order to teach math and science at the elementary and secondary school level.

The role of the National Science Foundation under this bill has been significantly increased, and I think it can be an effective tool in addressing the need to educate our children in math and science. There are a number of programs under this bill which are really excellent in concept and which I hope will be promoted aggressively. We have a program which would allow teachers to go to summer institutions and be retrained by the National Science Foundation. We have a program which would encourage people to go into the teaching profession. We now find, unfortunately, that people going into the teaching profession are sometimes not at the top of their class. This program would encourage people to go into the teaching program and would retain and attract extremely qualified teachers.

We have a program in here which would identify the top students and the top teachers throughout the country and would reward them on the basis of the quality and the expertise of their experience and their educational activities.

This is an excellent bill. The issue of secular humanism is really a red herring in this bill. It is a minor line item in the bill which will not affect the vast amount of money which would be appropriated and spent under this bill and which has been approved by the Senate.

In fact, this bill would significantly reduce the strings which this Congress applies to educational activity, as the majority of the funds under the bill are block granted for the specific purpose of math-science education but the actual decision as to how the math-science education will be promoted is left at the local and the State school board level.

So it is a positive bill and it is the type of bill which those of us who have been talking about we need to do something in the area of math and science education should be willing to support.

Mr. PERKINS. Mr. Speaker, I yield 6 minutes to the distinguished gentleman from Florida [Mr. FUQUA].

(Mr. FUQUA asked and was given permission to revise and extend his remarks, and include extraneous material.)

Mr. FUQUA. Mr. Speaker I rise in support of the request of the gentleman from Kentucky, my good friend Mr. PERKINS, to suspend the rules and

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COMMISSION ON LAW AND SOCIAL ACTION

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January 4, 1985

Ms. Patricia Goins
Division of Educational Support
United States Department of Education
Room 2007, F.O.B.-6
400 Maryland Avenue, S. W.
Washington, D. C. 20202

Dear Ms. Goins:

The Department of Education has requested comments in respect to a notice of proposed rule-making in connection with the recently enacted Education for Economic Security Act, P.L. 98-377.

These comments, submitted by the American Jewish Congress, deal with only one section of these proposed rules, Section 280.40, relating to § 709 of the Act. That section provides that grants for magnet schools "may not be used...for the courses of instruction the substance of which is secular humanism." The only legislative history suggests that the determination of whether a particular course is "secular humanism" is left to teachers and local school boards -- 130 Cong. Rec. H. 7755 (July 25, 1984) (remarks of Representative Perkins). The proposed rule states in full " An LEA that receives federal assistance under this part may not .... (d) use funds for any course of instruction the substance of which the LEA determines is secular humanism."

In Torcaso v. Watkins, 367 U.S. 488, 495, n.11 (1961) the Supreme Court of the United States determined that secular humanism is a "religion" for constitutional purposes. Moreover, the Court has also held in School District of Abington Township v.Schempp, 374 U.S. 203, 225 (1963), that schools may not "establish a religion of secularism" in the sense of affirmatively opposing or showing hostility to religion. If all the Act means by "secular humanism" is either the teaching of the belief system of secular humanism, (e.g., the Humanist Manifesto), or the affirmative hostility to religion articulated in Schempp, it may well pass constitutional muster.

There is, however, a common usage of the term "secular humanism" which poses far greater constitutional difficulties. If "secular humanism" as used in Section 709 is understood to mean any course of study in which religious views are not affirmatively urged upon the students, it is without question unconstitutional, Epperson v. Arkansas, 393 U.S. 97 (1968) (prohibition on the teaching of evolution unconstitutional): School District of Abington Township v. Schempp, supra; Engel v. Vitale, 370 U.S. 421, 433-34 (1962).

In Schempp, the Court dismissed the argument that forbidding the reading of the Bible as an opening exercise would constitute a "religion of secularism," and would require the exclusion of all discussion of religion from the public schools:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education , may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.
>
> 374 U.S. at 225.

See also Stone v. Graham, 449 U.S. 39, 42-3 (1981); McLean v. Arkansas, 529 F. Supp. 1255 (E.D. Ark. 1982) (schools must teach evolution without teaching "scientific creationism," despite arguments that doing so constituted religion of secularism).

The public schools are not, under our constitution, charged with religious education or with teaching religious values. In a society whose members are of so many faiths, it could not be otherwise. Whose views and whose values would be taught? And who would insure that the faith was taught properly? Religious education is the responsibility of parents and churches, not the public schools. That responsibility cannot be unconstitutionally shifted to the public schools under the rubric of avoiding "secular humanism."

We recognize that Congress has given the Department no specific authority to define the term "secular humanism". The proposed regulation is consistent with this mandate. However, it is a well settled rule of constitutional interpretation that statutes will be construed if at all possible to avoid constitutional difficulties, if for no other reason than Congress is presumed to act consistent with limitations on its power, Regan v. Time, Inc., 53 U.S.L.W. 5084

(1984); Welsh v. U.S., 398 U.S. 333 (1970). While the first interpretation of the statute suggested above is not wholly without constitutional difficulties, these are insubstantial compared to those created by the second reading of the statute.

We believe, therefore, that in keeping with the cases cited, the regulations should be amended to make clear that the Act does not authorize, much less require, public schools to urge religious views on their students. At a minimum the rule should make clear that neither the Act nor the regulations in any way are in derogation of established constitutional principles. Such a provision would not be inconsistent with the Congressional intent, in light of the presumption that it intended to act within constitutional limitation.

In the course of debate over Section 709, Representative Perkins several times stated, 130 Cong. Rec. H. 7755, that both teachers and local school boards would have sole authority to determine whether a particular course of study constitutes secular humanism. The regulation properly limits the authority to make such determinations to local education agencies, and not teachers. We believe this is appropriate.

In the first place, it is the LEA's which are the recipients of the grants and hence should have the responsibility for enforcing this provision. Moreover, Local Education Agencies operate in public view, frequently under compulsion of Government in the Sunshine Acts. They are thus likely to make the determination of whether a course is "secular humanism" only after public debate. Allowing teachers to make these determinations would undermine the authority of local school boards to make curriculum choices, See e.g., Island Trees Bd. of Educ. v. Pico, 457 U.S. 853 (1982); Seyfried v. Walton, 668 F.23d 214 (3d Cir. 1981), and would necessarily create anarchy with the same subject being treated as secular humanism in some classrooms, but not in others.

Moreover, because, as already noted, some consider "secular humanism" any course of study not affirmatively urging religious views, allowing individual teachers to make these determinations would be viewed by some teachers as an excuse to incorporate religion into their program of instruction. But because these decisions would be made informally by teachers without any formal public procedures, it would be far harder for parents to prevent such abuses.

We hope these comments prove helpful.

Sincerely,

Marc D. Stern

cc: Mark Pace

Released by the American Jewish Congress and
People for the American Way

March 14, 1984

MAR 21 1984

DON'T TAMPER WITH THE BILL OF RIGHTS

Listed below are law professors and practicing attorneys who oppose a constitutional amendment to permit prayer in the public schools. They are men and women deeply committed, personally and professionally, to the Constitution of the United States.

The First Amendment to the Constitution secures religious liberty for all of our people by guaranteeing that government must not favor one religion over another or become involved in religious matters. These principles are embedded in the first words of the Bill of Rights which prevent government from passing laws "respecting an establishment of religion or prohibiting the free exercise thereof." Freedom of speech, freedom of the press and our other precious personal freedoms are similarly protected by the Bill of Rights which, for almost 200 years, has spread the mantle of protection over persons of all faiths and creeds - political, cultural and religious.

Now, the Reagan Administration wants to amend the Bill of Rights. Various proposals have been introduced to allow public schools to introduce prayer in the classroom. Such practices have been ruled unconstitutional by the United States Supreme Court. But a constitutional amendment, if passed, would circumvent the court rulings and make public school prayer legal. If adopted, the amendment would permit government officials to become directly and actively involved in sponsoring religious activities in public schools and other public buildings, even to the point of favoring one faith over others. Such an amendment would strike at the heart of the American tradition of religious liberty and separation of church and state. It should be defeated.

An alternative proposal, introduced by Senator Hatch, would permit "individual or group silent prayer" in public schools. In our view, the proposed Hatch amendment is unnecessary and potentially divisive. The United States Supreme Court has never ruled that schools may not set aside a moment of silence during which students may choose to pray or meditate. Although the lower courts have been divided on particular cases, some constitutional scholars believe that the Supreme Court will sustain public school policies to set aside a moment of silence during which students may pray or meditate.

We are strongly of the opinion that it would be unwise for Congress to tamper with the First Amendment by proposing a constitutional amendment dealing with issues that have not yet been before the Supreme Court. It would be irresponsible for the Congress to submit to the state legislatures an amendment that may well be wholly unnecessary and will be a source of religious strife in 50 capitals for many years.

As students and teachers of Constitutional law, we oppose changes in the Bill of Rights. We recognize that no provision of the Constitution is totally immune from repeal or alteration through amendment. But we also know that the Bill of Rights, which protects our fundamental

freedom, derives its strength precisely from its unique ability to inspire a reverence so deep that Americans have refrained from changing it since it was made part of our Constitution nearly two centuries ago.

If now, for the first time, an amendment to "narrow the operation" of the First Amendment is adopted, a precedent will have been established that may prove too easy to follow when other controversial decisions interpreting the Bill of Rights are handed down. Certainly, the religion clauses, which have served America so well, should not be amended, absent the most pressing reason - a showing proponents of these amendments have not made. The Constitutional experts whose names appear below urge Congress not to approve the prayer amendments.

(Names of institutions given for identification purposes only)

BENJAMIN AARON, Professor of Law, University of California at Los Angeles
NORMAN AMAKER, Professor of Law, Loyola University
HOWARD C. ANAWALT, Professor of Law, University of Santa Clara
FRANCIS H. ANDERSON, Professor of Law, Albany Law School
CHARLES E. ARES, Professor of Law, University of Arizona
DENNIS WAYNE ARROW, Associate Dean and Professor of Law, Oklahoma City University School of Law
C. EDWIN BAKER, Professor of Law, University of Pennsylvania
FLETCHER N. BALDWIN, Jr., Professor of Law, University of Florida
GORDON B. BALDWIN, Professor of Law, University of Wisconsin
MILNER S. BALL, Harmon W. Caldwell Professor of Law, University of Georgia
PHIL BAUM, Associate Executive Director, American Jewish Congress
CHARLES H. BARON, Professor of Law, Boston College
JEROME A. BARRON, Dean & Professor of Law, George Washington University National Law Center
RICHARD J. BARTLETT, Dean, Albany Law School
JACKSON B. BATTLE, Professor of Law, University of Wyoming
WILLIAM M. BEANEY, Professor of Law, University of Denver
ALBERT R. BEISEL, Professor of Law, Boston University
MICHAEL R. BELKNAP, Associate Professor of History, Attorney at Law, University of Houston
PAUL BENDER, Professor of Law, University of Pennsylvania
PAUL BERGER, Esq.
JUDITH W. BERKAN, Assistant Professor, Inter American University
ALFRED W. BLUMROSEN, Professor of Law, Rutgers, Newark
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MICHAEL H. BOTEIN, Professor of Law, New York Law School

DAAN BRAVEMAN, Professor of Law, Syracuse University
ALBERT BRODERICK, Professor of Law, North Carolina Central University
JUDITH OLANS BROWN, Professor of Law, Northeastern University
ALAN E. BROWNSTEIN, Acting Professor of Law, University of California at Davis
ELIZABETH BUCHANAN, Associate Professor of Law, University of Arizona
JOHN M. BURKOFF, Professor of Law, University of Pittsburgh
MICHAEL M. BURNS, Associate Professor of Law, Nova University
CLAUDIA BURTON, Professor of Law, Wilamette University
BURTON CAINE, Professor of Law, Temple University; President, Greater Philadelphia Branch, American Civil Liberties Union
NORMAN L. CANTOR, Professor of Law, Rutgers, Newark
KENNETH M. CASEBEER, Professor of Constitutional Law, University of Miami
RONALD A. CASS, Professor of Law, Boston University
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ROBERT CLINTON, Professor of Law, University of Iowa
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NEIL H. COGAN, Associate Professor of Law,Southern Methodist University
NEIL B. COHEN, Associate Professor of Law, Seton Hall University
SIDNEY COHEN, Esq.
WILLIAM COHEN, C. Wendell and Edith M. Professor of Law, Stanford Law School
ROBERT H. COLE, Professor of Law, University of California at Berkeley
CHARLES E. CORKER, Professor of Law, University of Washington
ROBERT M. COVER, Chancellor Kent Professor of Law & Legal History, Yale Law School
MELVIN G. DAKIN, Professor of Law Emeritus Louisiana State University
JOSEPH L. DALY, Associate Professor and Director, Community Law Center, Hamline University
ANTHONY D'AMATO, Professor of Law, Northwestern University
RICHARD A. DAYNARD, Professor of Law, Northeastern University
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DANIEL FARBER, Professor of Law, University of Minnesota
MARTHA A. FIELD, Professor of Law, Harvard University

DAVID B. FILVAROFF, Professor of Law, The University of Texas
HOWARD FINK, Joseph S. Platt--Porter, Wright, Morris & Arthur Professor of Law, Ohio State University
TED FINMAN, Professor of Law, University of Wisconsin
DAVID B. FIRESTONE, Professor of Law, Vermont Law School
WILLIAM A. FLETCHER, Acting Professor of Law, University of California at Berkeley
THOMAS M. FRANCK, Professor of Law and Director of Center for International Studies, New York University
MONROE H. FREEDMAN, Professor of Law, Hofstra University
BRIAN A. FREEMAN, Professor of Law, Capital University
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HOWARD A. GLICKSTEIN, Dean, University of Bridgeport School of Law
DAVID GOLDBERGER, Associate Professor of Law, Ohio State University
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Testimony

of

Marc A. Pearl

on behalf of the

American Jewish Congress

before the

Senate Committee on the Judiciary

on

S. 1059, the Equal Access Act

15 East 84th Street
New York, New York 10028

July 27, 1983

I am Marc A. Pearl, Washington representative of the American Jewish Congress. The American Jewish Congress is an organization of American Jews, founded in 1918, which has as one of its principal goals the preservation of the separation of church and state mandated by the Establishment Clause. It is particularly concerned with insuring that this principle is strictly enforced in the nation's public schools. Because S. 1059 is, in our view, incompatible with that principle, I urge its rejection.

As a religious minority, the Jewish community is particularly sensitive to any effort to allow religious activities in the public schools. In a child's life, school and school officials occupy a special niche. Their influence, coupled with that of a child's peers, is almost as great, perhaps greater, than the influence of parents and family. Any indication, judged by a child's particularly acute sensitivities, that a school or its officials favor a religion different than that taught and observed in the home sets up a conflict which the child must resolve. Because, as Justice Frankfurter once observed, non-conformity is not the outstanding characteristic of children, that conflict is all too likely to be resolved in favor of the school favored creed.

I say this not as a matter of abstract theorizing. These comments are based upon the sad experience of the Jewish community across the country over many years. All too many Jewish children have rejected their religion because they felt uncomfortable with being at

odds with the school sanctioned religion. Thus, our opposition to this bill goes beyond our belief that it is unconstitutional.

Of course, we recognize that our children cannot forever be immunized from the inevitable pressures to conform to the views and practices of the religious majority. I am not here today to urge any limitation on the right of the religious majority to observe its religion, or for governmental action designed to encourage Jewish children to adhere to their parents' faith. Rather, the American Jewish Congress asks only that the public schools not be employed to magnify the pressures on students of minority faiths.

S. 1059 is a relatively simple bill. It provides that no federal education funds may be provided to any state or local educational agency if any elementary or secondary school for which that agency has responsibility denies equal access to students or faculty seeking to engage in voluntary religious activities. The bill creates a private right of action to enforce this right of equal access.

The question of whether religious clubs must be permitted equal access to public school facilities is one which is being litigated around the country. So far, the majority of courts have concluded that schools must exclude such clubs in order to comply with the Establishment Clause. Lubbock Civil Liberties Union v. Lubbock Ind. School District, 669 F.2d 1038 (5th Cir.); rehearing denied, 680 F.2d 424 (5th Cir. 1982), cert. denied, U.S. (1983); Brandon v. Bd of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), rehearing denied, 455 U.S. 983 (1982); Nartowitz v. Clayton

County School District, F. Supp. , 83 Civ. 1A (M.D. Ga. 1983), appeal pending, No. 83-8115 (11th Cir. 1983); Hunt v. Bd of Educ., 321 F. Supp. 1263 (S.D. W.Va. 1971); Johnson v. Huntington Beach Union H.S. District, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, cert. denied, 434 U.S. 8787 (1977); Trietly v. Bd of Educ, 65 A.D. 2d 1, 409 N.Y.S. 2d 912 (4th Dept. 1978). Recently, however, the United States District Court for the Middle District of Pennsylvania reached a contrary result, Bender v. Williamsport Area School District, F. Supp. (M.D. Pa. 1983), appeal pending, 83-3254 (3d Cir. 1983).

I believe that the majority view of the Constitution's requirements is correct, for reasons which are set forth in the attached amicus brief which AJCongress submitted in the Nartowicz case, and which I therefore do not repeat here at length. In summary, it is our view that a public high school is not a public forum, that content based distinctions are therefore permissible, but that even if the public school is a public forum the exclusion of religious clubs is justified by the Establishment Clause. However, it is surely true that this issue is a difficult one. Because it involves conflicting constitutional principles, the case will almost certainly be resolved by the United States Supreme Court. Moreover, it seems likely that the Court will resolve it either by holding that those clubs must be permitted to function because to hold otherwise would deny students their right to free exercise and free expression or that they must be excluded.

Given this state of affairs, it is difficult to see why Congress should legislate on this subject. If equal access is constitutionally required, then this bill is unnecessary. If equal access is an unconstitutional establishment of religion, in derogation of the rights of students, then this bill, too, is unconstitutional. It is surely true that Congress cannot attach unconstitutional requirements to federal grants. Finally, the bill is not necessary to permit students to engage in purely personal religious activities. Not only do we know of no instance in which school officials have sought to prohibit such activity, but it is clear to us that such activity is constitutionally protected.

Moreover, it cannot be contended, as it sometimes is, that the bill is needed to create a private right of action, as the cases cited above demonstrate. Existing statutory provisions, chiefly 28 U.S.C. § 1343(3) and 42 U.S.C. § 1903, are sufficient jurisdictional vehicles to allow challenges. And there are already so many docket preference statutes littering the United States Code that the one created by this bill will simply be lost in the crowd.

The cases which have been litigated so far all involve high schools. Unlike these cases, however, S. 1059 would extend the "right of equal access"to the elementary schools. Although the bill extends only to voluntary activities, it is difficult for us to conceive of any circumstances under which elementary students would be able to voluntarily organize their own group without the guidance of a teacher. But it is precisely such guidance which is constitutionally

objectionable. For younger children in particular, the problem of resisting peer pressure to join a particular club would be insurmountable. Moreover, the peer pressure which would be created on those not joining the school religious "club" would be tremendous. The extension of the bill to cover elementary school, therefore, must be either meaningless, or some indication that the "voluntariness" limitation is not really a meaningful one.

Equally troubling is the inclusion of teachers within the provisions of this bill. It is by now settled that teachers have no right to conduct religious servicesin the public schools. Fink v. Bd of Educ., 442 A.2d 837 (Pa. Commonwealth 1982), app. dismissed for want of a substantial federal question, 51 U.S.L.W. (1983). Even those judges who, in the Lubbock case, thought that student religious groups ought to be free to meet, were careful to note that this was so only if there were no continuing teacher supervision. And while Judge Nealon in Bender was willing to tolerate teacher supervision where it was needed only to insure order, there is no question that active teacher participation in religious clubs, such as contemplated by S. 1059, will make it impossible for teachers to maintain the posture of religious neutrality which is required of them. As we said in the brief we filed in Nartowicz:

> "[Such participation] is pregnant with the danger of administrative entanglement. Will the supervising teacher see to it that the activities of the group do not become religiously exclusionary or that the theological statements made do not offend other students? Will he or she silence those who disagree with the beliefs of the

majority? Could he or she influence, perhaps even dictate, the subjects discussed by the group?

"Moreover, the presence of a teacher is not a neutral factor in a student's decision whether or not to participate in a particular club. In some cases, students will view a particular teacher as a role model, and therefore imitate him or her as much as possible. If a junior high school student believes that a teacher sponsors a Youth for Christ club because he or she believes that club to be engaged in a worthwhile activity -- a not unreasonable conclusion -- that student will, as a result, decide to participate in that club's activities. A student whose grade depends on the good will of a teacher will feel it advantageous for him or her to participate in a club sponsored by that teacher in order to curry favor with that teacher. Conversely, a student who desires not to participate in a religious club may feel ill at ease in the sponsoring or supervising teacher's regular class because of that refusal.

"In any of these cases the decision to participate or not to participate may be 'voluntary' in the ordinary sense of the word, but it is not one as to which government may be regarded as being indifferent. This government thumb on the scale is constitutionally objectionable, notwithstanding that coercion is not a necessary element of an Establishment Clause violation."

On the other hand, the bill may only protect the "right" of teachers to have their own religious groups. While the school community plays a special role in the life of students, it does not occupy such a place in the life of faculty. Unless one wishes to have students receive the message that they should engage in religious activities following the example of their teachers, there is no more reason for teachers to be permitted group religious activity in school -- even if nominally separate from students -- than an employee of some other type of employer.

S. 1059 might likewise require that the clubs receive, on the same basis as other groups, financial subsidies and other forms of assistance from school officials or from student governments. Although the bill is cast in terms of "equality," the only decision to date which permits such clubs to function, Bender v. Williamsport Area School District, did not by any means fully adopt the "equality" argument. The Court there emphasized that the religious club in question had disavowed any aid from the school such as announcements over the loudspeaker, publicity on school bulletin boards and the like. The "equality," thus, was limited to use of empty classrooms and not, as this proposal would have it, absolute equality.

It is true that our understanding of the Constitution which underlies our position on S. 1059 inhibits religion in the sense that religion cannot control the secular government, have it do religious work, or use religious criteria in its decisionmaking. But this type of inhibition of religion -- which is what the Establishment Clause accomplishes and was intended to accomplish, -- is surely not unconstitutional.

In sum, this bill proceeds on the mistaken, if currently popular, assumption that the relationship between a school and religious activities or speech need be no different that the relationship which exists between a school and secular activities or speech. Government sponsorship of religious activities and religious sepeech, for constitutional purposes, is in our view different than its sponsorship of secular activities and secular speech, as the very existence of the religion clauses testifies and as the Supreme Court unequivocally held in Widmar.

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