

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF RHODE ISLAND

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4 DANIEL WEISMAN, et als) Docket No. C.A. 89-0377B
5 vs.) Providence, Rhode Island
6 ROBERT E. LEE, et als) Tuesday, October 10, 1989

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11 TRANSCRIPT OF PROCEEDINGS IN ABOVE-CAPTIONED CASE
12 BEFORE CHIEF JUDGE FRANCIS J. BOYLE.

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16 APPEARANCES:

17 For Plaintiffs: SANDRA A. BLANDING, Esquire
18 946 Centreville Road
19 Warwick, Rhode Island

20 For Defendants: JOSEPH A. ROTELLA, Esquire
21 797 Westminister Street
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23 Court Reporter: Louis V. Spertini
24 307 Federal Building
25 Providence, Rhode Island 02903

1 TUESDAY, OCTOBER 10, 1989

2 MISS BLANDING: Your Honor, I have a memorandum
3 I'd like to submit to the Court.

4 THE COURT: And do you want me to hear you or
5 do you want me to read the memorandum, or what am
6 I supposed to do at this point? You don't want me
7 to do both certainly at the same time.

8 MISS BLANDING: No, your Honor. Your Honor put
9 this on for this morning, I think when we came before
10 the Court last week, I had submitted a proposed
11 agreed statement of facts to Mr. Rotella. Mr. Rotella
12 told me this morning that there was one addition
13 that he wanted made which we discussed, and he advises
14 me now that he simply has to clear that with the
15 Superintendent of Schools.

16 THE COURT: Go right in there to the telephone
17 and call him.

18 MR. ROTELLA: Okay, your Honor. Your Honor,
19 I also wanted to point out that we filed a memorandum.

20 THE COURT: I got that this morning, too.

21 MR. ROTELLA: Thank you.

22 THE COURT: I haven't had time to read that
23 either. Maybe while you're making the phone call,
24 I can read your memo.

25 MR. ROTELLA: Thank you, your Honor.

1 (PAUSE)

2 THE COURT: I'm sorry, I did read your memo,
3 by the way.

4 MR. ROTELLA: My memo was very short.

5 THE COURT: Very brief.

6 MR. ROTELLA: It was very brief.

7 THE COURT: This one obviously I'm not going to
8 be able to read without a very long pause.

9 MISS BLANDING: Those are the cases, your Honor,
10 I'm not as verbose as the Supreme Court.

11 (DOCUMENT HANDED TO COURT)

12 THE COURT: Okay, you can go call.

13 (MR. ROTELLA EXITS COURTROOM - RETURNS)

14 MR. ROTELLA: Your Honor.

15 THE COURT: What did you find out?

16 MR. ROTELLA: We have an agreement on the
17 agreed statement of facts. We will add this paragraph
18 to clarify.

19 THE COURT: What is the paragraph you're adding?

20 MR. ROTELLA: The paragraph reads: "The
21 Defendants have not specifically directed any of
22 their agents to request clergy to deliver prayers
23 at the promotion and/or graduation ceremony sponsored
24 by the Providence School Department."

25 THE COURT: Is that agreed to?

1 MISS BLANDING: Yes, your Honor.

2 THE COURT: All right. You have given him though
3 the circular that tells them what kind of prayer
4 they can say.

5 MR. ROTELLA: Yes, we have.

6 THE COURT: Okay.

7 MR. ROTELLA: But we haven't told them to deliver
8 a prayer in that sense.

9 MISS BLANDING: Your Honor, the agreed statement
10 of facts is typed up except for the exclusion of
11 that paragraph.

12 THE COURT: All right, file that and you can
13 just supplement it with that paragraph.

14 MISS BLANDING: Okay, your Honor.

15 THE COURT: All right, I'll hear you.

16 MISS BLANDING: Your Honor, other than the
17 agreed statement of facts and the memorandum, we
18 have no need to present additional testimony.

19 THE COURT: I'll hear you then.

20 MISS BLANDING: Your Honor, as your Honor is
21 aware, this case was brought by a parent of a school
22 child who is attending the Providence Public School
23 System. Last year, Daniel Weisman's daughter was
24 an eighth grade student at the Nathan Bishop Junior
25 High School, and this year she is attending Classical

1 High School. According to the agreed statement of
 2 facts, the School Department in Providence has allowed
 3 in the past invocation and benediction delivered by
 4 clergy to be offered at the promotional ceremonies
 5 of middle schools and the graduation ceremonies of
 6 the high schools. Those invocations and benedictions,
 7 it is agreed to, to have been in the form of prayer.
 8 And last year, the Assistant Superintendent of Schools,
 9 Arthur Zarella, circulated to the Principals of each
 10 of the middle schools and high schools a circular
 11 which describes what's called in the circular
 12 non-sectarian prayer, and purports to advise what
 13 kind of prayer is appropriate for public ceremonies.

14 We have submitted as part of the agreed statement
 15 of facts the invocation and benediction which was
 16 delivered by Rabbi Gutterman at the Nathan Bishop
 17 Middle School last year. We have also submitted a
 18 list of the names and church affiliations of clergy
 19 as they were printed in programs and distributed by
 20 the various high schools and middle schools within
 21 the last several years. It's clear from the programs
 22 that were printed, and also as a part of the agreed
 23 statements of facts, that not all of the middle
 24 schools or all of the high schools have traditionally
 25 included invocations and benedictions in the form of

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1 prayer as part of their ceremony. It's our position
2 that this practice has to be evaluated under the
3 three-pronged Lemon test, and that in reviewing
4 the prior court decisions, both in the Supreme Court
5 and in the lower courts, in light of that test, that
6 the practice of the Providence School Department
7 fails each prong of the Lemon test. There have been
8 several cases that are cited in my memorandum that
9 had said that prayer is inherently a religious
10 activity and that the purpose of prayer can only
11 be religious in nature.

12 THE COURT: What is prayer?

13 MISS BLANDING: Well, your Honor, a prayer, I
14 believe in the amicus brief, there was a definition
15 of prayer.

16 THE COURT: How about your definition of prayer?

17 MISS BLANDING: My definition of prayer would
18 be anything that calls upon God in any way, either
19 God's blessing or God's assistance or anything like
20 that. A prayer is a request to a god or a higher being.

21 THE COURT: Suppose that Rabbi Gutterman said
22 this: For the legacy of America where diversity
23 is celebrated and the rights of minorities we are
24 grateful to our fellow citizens, we thank you.
25 May these young men and women grow up to enrich it

1 for the liberty of America which we all join, we
2 thank you. May those new graduates grow up to guard
3 it. For the political process of America which all
4 its citizens may participate, for its court system
5 where all can seek justice, we are grateful to our
6 fellow citizens. May those we honor this morning
7 always turn to it in trust. Suppose he said that,
8 would you have any objection to that?

9 MISS BLANDING: No, your Honor.

10 THE COURT: In other words, the only thing that
11 you object to is an appeal to a deity.

12 MISS BLANDING: That's correct, your Honor.

13 THE COURT: Suppose he said: My fellow citizens,
14 to each according to his needs, from each according
15 to his abilities. Would you let him say that?

16 MISS BLANDING: Yes, your Honor.

17 THE COURT: Because it's communist doctrine and
18 communism denies a deity, right?

19 MISS BLANDING: No, your Honor.

20 THE COURT: So you can preach communism at an
21 invocation, but he can't refer to "in God we trust."

22 MISS BLANDING: I don't think there has ever
23 been a Supreme Court case where the Court has allowed
24 a preaching or a prayer or an invocation in a school
25 setting to a deity. I think that all of the cases,

1 all of the cases that the United States Supreme
2 Court have decided suggest that when you're dealing
3 with a public school setting, that it's necessary
4 to be extremely careful and perhaps impose a more
5 severe test than one would in any other circumstances
6 because of the unique nature that the public schools
7 fulfill.

8 THE COURT: Do you agree with the amicus brief
9 that says inspirational secular speech is all right?

10 MISS BLANDING: Yes.

11 THE COURT: Okay, go out and win one for the
12 Gipper, that's perfectly all right?

13 MISS BLANDING: Yes.

14 THE COURT: Okay.

15 MISS BLANDING: What we are objecting to is the
16 School Department's allowance of a prayer to a higher
17 being.

18 THE COURT: Do you see any prior restraint
19 problem here?

20 MISS BLANDING: No, because what we are asking
21 for, your Honor, is that right now I think it's
22 clear from the circular that's been submitted to all
23 of the Principals and that Mr. Lee has said that he
24 gave to Rabbi Gutterman, that what the school expects
25 is a prayer.

1 THE COURT: Okay.

2 MISS BLANDING: And that the school is sanctioning
3 a prayer. What we would like is ---

4 THE COURT: But you want them to send out a
5 circular that says: **Thou** shall not pray.

6 MISS BLANDING: If the School Department is going
7 to request individuals to give invocations and bene-
8 dictions, I think it's necessary for them to make
9 clear that they want it to be what the amicus brief
10 said, a secular inspirational message and that prayer
11 is not allowable in a public school setting. If the
12 School Department did that, if they were enjoined
13 from suggesting or in any way allowing or authorizing
14 the inclusion of prayer in graduation ceremonies,
15 then we would be satisfied with that.

16 THE COURT: What do we do if they have Joe **Dokes**
17 who's a born-again Christian, who was asked to give
18 the invocation or the benediction and he does mention
19 God?

20 MISS BLANDING: I think, your Honor, if the
21 School Department has made it clear to the individual
22 that they are asking to give an opening inspirational
23 message, that it cannot be a prayer, that that's
24 all they can do, if they ask, if they ask an outside
25 individual to deliver an opening statement ---

1 THE COURT: Well, how about the situation now?
2 Except for that circular, if they simply said to
3 Rabbi Gutterman, can you show up next Wednesday
4 night at 7:30 to open our graduation ceremony, and
5 Rabbi Gutterman went there and gave the invocation
6 that's indicated, can he do that?

7 MISS BLANDING: I think that, first of all, I
8 think that the words invocation and benediction
9 are ambiguous. I mean, to me if someone said "Will
10 you give an invocation?" I would assume they meant
11 a prayer because to me ---

12 THE COURT: But you agree that an inspirational
13 secular speech may be made?

14 MISS BLANDING: Yes, your Honor, but what I'm
15 saying is ---

16 THE COURT: Why can't you make an inspirational
17 secular invocation?

18 MISS BLANDING: You can. What I am suggesting,
19 your Honor, is that the word "invocation" I think
20 means different things to different people. What
21 my position is is that the School Department now,
22 at the very least, has not made it clear, in fact
23 they've gone the other way, they've made it clear
24 that it is allowable to give prayers.

25 THE COURT: Suppose you had a School Committee

1 composed entirely of lawyers.

2 MISS BLANDING: Mm-hmm.

3 THE COURT: Who said "Rabbi Gutterman, we want
4 you to come to this graduation ceremony and make
5 an opening and a closing statement." Do you have
6 any problem with that?

7 MISS BLANDING: I think that ---

8 THE COURT: And he gets up and he gives this
9 statement.

10 MISS BLANDING: I think that because of the past
11 practice and because of the general knowledge that
12 prayers have been used in the past, that the School
13 Department needs to do more than just say "We want
14 you to make an opening and a closing." I think that
15 they need to say it can't be a prayer. It can be
16 an inspirational message, that that's what we would
17 like, but it needs to be not a prayer.

18 THE COURT: And that's not a prior restraint?

19 MISS BLANDING: No, I don't think so, your Honor,
20 any more than if you invited someone to deliver, to
21 deliver an opening ceremony in a classroom, that
22 you're going to tell them that they can't pray. I
23 mean, if, certainly I doubt that the Supreme Court
24 would uphold a situation where, for instance, the
25 state said every morning we are going to take an

1 outside agent into the school and ask him to deliver
2 an opening message, and that opening message happened
3 to be a prayer every single time.

4 THE COURT: That would be pretty obvious after
5 a while, wouldn't it?

6 MISS BLANDING: Well, I think it's pretty obvious
7 here, too. I think it's very obvious, that's been
8 the practice. Each time it's clergy that are asked
9 to deliver this. We have agreed that they are
10 authorized and allowed and that it's been a past
11 practice for them to deliver invocations and bene-
12 dictions in the form of prayer. We've agreed to
13 that.

14 THE COURT: And the Defendant says indeed that's
15 the case, so it's all right, it's always been done.

16 MISS BLANDING: That's right, but it isn't always
17 done because it's also clear from the agreed statement
18 of fact that there are some schools, both at the
19 middle school and the high school level, that do not
20 include prayers in their graduation ceremonies. So,
21 yes, it's been a past practice to allow it. Yes,
22 it's been a past practice to authorize it. But is
23 it universally done in the schools? No.

24 THE COURT: What do you think about the distinc-
25 tion that's made in the amicus brief that says Marsh

1 doesn't apply here because public schools didn't
2 exist at the time the Constitution was adopted,
3 that public schools, that is, free public schools
4 are a fairly recent historical development in terms
5 of 200 years of constitutional history?

6 MISS BLANDING: I agree that Marsh doesn't
7 apply here, but I'm not sure that I would use the
8 same reasoning.

9 THE COURT: You might have a problem with that
10 reasoning, might you, because the fact of the matter
11 is the history of the whole situation here is that
12 the first public schools in this country, beginning
13 with the founding of this country, and well beyond
14 the establishment of the Constitution, were all
15 religious in nature. That was the reason for them.
16 They were religious schools, isn't that so?

17 MISS BLANDING: I don't know, your Honor.

18 THE COURT: I think if you look at the history,
19 you'll find that to be the case. So if you make
20 that argument, you could be in trouble.

21 MISS BLANDING: Even if that is the case, your
22 Honor, I still don't think Marsh applies here for
23 two reasons. One is that the case of Edwards vs.
24 Aquilar was decided after Marsh and applied the
25 Lemon test to a school situation. The United States

1 Supreme Court has never applied the Marsh test to
2 a school situation. The second is that in the
3 Marsh case, the Court relied on the fact that the
4 Legislature had always in the entire history of
5 the country opened with a prayer. In this particular
6 case, it's not even true that now every school opens
7 graduation ceremony with an invocation and benediction
8 because even within the school system itself, that has
9 never been the case and is not the case now. So there
10 is not that kind of history that ---

11 THE COURT: How about those who have been doing
12 it, can continue to do it, and those who haven't
13 done it, stop them from doing it?

14 MISS BLANDING: I don't think so, your Honor,
15 but that's not the case. In any case, that's not
16 the situation that is presently before the Court.
17 I would take the position that Marsh does not apply
18 to a public school setting. And even though this is
19 not an actual classroom setting, it is certainly
20 public school setting, and if you compare this to
21 cases like Jaeger, for instance, when they are talking
22 about invocations before football games, surely a
23 graduation ceremony is much more important and
24 significant in the life of a child than is a football
25 game or a pep rally.

1 THE COURT: You're not a football fan, that's
2 the problem with that argument.

3 MISS BLANDING: That's true, your Honor, or a
4 school assembly.

5 THE COURT: You don't know how important it is
6 to win that Thanksgiving Day game, all right?

7 (LAUGHTER)

8 MISS BLANDING: So I would submit, your Honor,
9 some of the ---

10 THE COURT: Some of them who will show up for
11 the football game won't show up for the graduation,
12 all right?

13 MISS BLANDING: I'm sure that's true, your Honor,
14 I'm sure that's true. But it puts a real burden on
15 students. I mean, the school has made a point of
16 saying that graduation ceremonies are voluntary,
17 and that's true, we have agreed to that fact. But
18 it certainly puts a burden, an unfair burden, and
19 I think an unconstitutional burden, on a school child
20 who does not wish to participate in a school-promoted
21 activity that includes prayer to say you don't have
22 to come to your own school graduation if you don't
23 want to. I have nothing further, your Honor.

24 THE COURT: Okay. Mr. Rotella.

25 MR. ROTELLA: Obviously, your Honor, if your

1 Honor has read the brief that we've submitted in this
2 particular matter, we take the position that Marsh
3 is in fact, should be the test in this situation.
4 I also point out in that brief the case of Stein.

5 THE COURT: Is that the Sixth Circuit?

6 MR. ROTELLA: That's the Sixth Circuit case,
7 Stein vs. Plainville Schools.

8 THE COURT: There are other Circuits that go
9 a different way.

10 MR. ROTELLA: Yes, there are other Circuits
11 that go a different way, but most of those Circuits
12 are dealing with activities that are not graduation
13 ceremonies. They're dealing with football games.

14 THE COURT: What difference does it make if the
15 graduation takes place in the Veterans Auditorium
16 and not on the school grounds?

17 MR. ROTELLA: I'm not talking about the location,
18 your Honor, I'm talking about the spirit of the
19 thing itself, of the activity itself. In a football
20 setting, you have a coach, these children are looking
21 up to a coach. He is giving them an inspirational-type
22 rah-rah.

23 THE COURT: That wasn't what was happening in
24 that case though, was it? It was the coach who was
25 giving the invocation.

1 MR. ROTELLA: But there were other individuals,
2 they were selecting other individuals of the clergy
3 who were out there.

4 THE COURT: They were clergymen for the most
5 part.

6 MR. ROTELLA: Right, right. What I'm saying is
7 the situation in its totality was a different situation
8 than a graduation-type ceremony. When you look at
9 Marsh, okay, when you look at, as I've pointed out
10 in that brief that I've submitted, your Honor, there
11 was a very interesting dissent done by Judge Rooney
12 with regard to the -- if I can just find it -- in the
13 Jaeger case, the football case, okay, where he
14 basically looks at this and comes to a conclusion
15 that says in effect there's a common thread. It
16 says, "A common sense balancing of the danger of
17 government establishment of religion with the
18 recognition of religious traditions as part of our
19 nation's fabric." The Court pointed out just a few
20 minutes ago that the first public schools in the
21 country were religious schools.

22 THE COURT: It's never meant anything in consti-
23 tutional dimensions.

24 MR. ROTELLA: No, it has not.

25 THE COURT: For some reason or other. Why was

1 Harvard University started, all right, you begin
2 there. Brown University. But it's never meant
3 anything in the constitutional dimension, even
4 to those who look to the history of the Constitution
5 look back to 200 years and say what did these people
6 have in mind when they said establishment of religion.

7 MR. ROTELLA: Mm-hmm.

8 THE COURT: None of the cases tested against
9 that historic background, that all of the schools
10 were religious schools. That's what started them.
11 They were started so that people could learn to read
12 so they could read the Bible. That's what it was
13 all about in the beginning. Free public schools are
14 a Nineteenth Century development. But you don't see
15 that in any of these cases. What you see in these
16 cases is a pretty consistent, remarkably consistent
17 point of view from the Supreme Court that there shall
18 not be prayer in the public schools. How do you get
19 Marsh in the door on that one?

20 MR. ROTELLA: I think you get Marsh in the door
21 by looking at the circumstances.

22 THE COURT: You can say anything else you want
23 to say in the public schools, but you can't pray.
24 That's the one thing you cannot do.

25 MR. ROTELLA: You can give a secular-type prayer,

1 but not a prayer in the ---

2 THE COURT: You can't call upon a deity. You
3 can't make an appeal to a deity. Isn't that what
4 all these cases say? Isn't graduation a part of the
5 school process, so why is this constitutional?

6 MR. ROTELLA: I think the Stein Court breaks
7 away from that mold. I think the decision in Stein
8 looks at Marsh and says it has the same applicability
9 to the schools.

10 THE COURT: But you have the situation where the
11 school prayer cases, where a particular prayer is
12 prescribed, that's not appropriate, a moment of
13 silence is not appropriate. There's no praying
14 to be done on the public school premises, period.

15 MR. ROTELLA: Then the same should hold true
16 for Legislatures. The same should hold true for
17 the opening of court sessions. The same should hold
18 true for all the other areas. I mean, the Supreme
19 Court has drawn a line of demarcation. The line
20 of demarcation says public schools are exempt and
21 everyone else you can do it just a little bit. We
22 walked in this morning and your Clerk gave an invoca-
23 tion that included the name of God, okay. If you've
24 got a dollar bill in your pocket or a quarter or a
25 dime in your pocket, it has the name of God on it.

1 Why is it so ---

2 THE COURT: The pledge of allegiance has God in
3 it.

4 MR. ROTELLA: The pledge of allegiance has God.

5 THE COURT: Can you use that in school?

6 MR. ROTELLA: I think they did up until ---

7 THE COURT: They did?

8 MR. ROTELLA: Yes, I think.

9 THE COURT: Do they still?

10 MR. ROTELLA: Yes, they do.

11 THE COURT: So God gets in there somehow.

12 MR. ROTELLA: The point that I'm trying, I think
13 the point of the cases here, your Honor, are where
14 do you draw the line of demarcation? Where do you
15 say God is not allowable or the use of the word "God"
16 or anything that relates to that is not allowable in
17 the public schools? I think Marsh takes a look at
18 it, Lemon takes a look at it and they set up a
19 three-pronged test.

20 THE COURT: Doesn't the mention of God, or
21 whatever, advance religion?

22 MR. ROTELLA: I don't see how. Why should it
23 advance religion? Just because you mention the name
24 "God," where does that advance religion, okay? If
25 that be the case, then let's take it off the coin,

1 let's take it out of the Legislature, let's take it
2 out of the openings of court sessions and be done
3 with it so that the next generation of children, okay,
4 when they reach that point in time when a Court is
5 opening, they can say, "We're all here, let's open
6 it up and be done with it." Because that's where
7 we're going as far as ceremonial prayer is concerned.
8 We're going to that point where no mention of God
9 means that the pillars of the society that we have
10 developed here over the past couple of years ---

11 THE COURT: Whenever a Judge is sworn in here,
12 we have an invocation and a benediction which is a
13 prayer as defined.

14 MR. ROTELLA: When we have a swearing-in of a
15 President, I believe they have it done on the Bible
16 in most instances. The one I can remember most was
17 President Johnson being sworn in in the airplane in
18 Dallas in 1963. The point I'm trying to make, your
19 Honor, is that I think, okay, there is a place for
20 a ceremonial-type invocation and benediction. I
21 think Marsh, in the Marsh decision, the Court has
22 looked at the ability of someone to give an invoca-
23 tion at a legislative session, okay, and it's carried
24 forward in Stein to apply to those particular-type
25 ceremonial sessions that would be a high school

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graduation. Thank you, your Honor.


THE COURT: Anything else?

MISS BLANDING: No, your Honor.

THE COURT: I'm going to take the matter under advisement and we'll file a written opinion as soon as we can. Court will be in recess.

(PROCEEDINGS CONCLUDED)

I hereby certify that the foregoing, to wit, pages 2 through 22, is a true and correct transcript of proceedings had in above-captioned case.



Louis V. Spertini
Official Court Reporter

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