

The Burger Court Opinion Writing Database

Gibson v. Berryhill

411 U.S. 564 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-653

Circulated: MAY 4 1973

Thomas S. Gibson et al., } On Appeal from the United
Appellants, } States District Court for
v. } the Middle District of
L. M. Berryhill et al. } Alabama.

Recirculated: _____

[May —, 1973]

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the result reached by the Court, although in my view the three-judge District Court would have been better advised, as a matter of sound judicial discretion, to have refrained from acting until the outcome of the *Lee Optical* appeal. See my dissenting opinion in *Wisconsin v. Constantineau*, 400 U. S. 433, 439-443 (1971).

(3)
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 4, 1973

Dear Byron:

Please join me in 71-653, Gibson
v. Berryhill.

W³VO
William O. Douglas

Mr. Justice White
cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 28, 1973

Dear Byron:

Please join me (if you have not
already done so) in 71-653, Gibson v.
Berryhill.

William O. Douglas

Mr. Justice White
cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 4, 1973

RE: No. 71-653 Gibson v. Berryhill

Dear Byron:

I agree.

Sincerely,



Mr. Justice White

cc: The Conference

3
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 3, 1973

71-653 - Gibson v. Berryhill

Dear Byron,

I am glad to join your opinion for
the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Please find me
Sgt

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr. Justice Marshall~~
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

No. 71-653

Thomas S. Gibson et al., Appellants, v. L. M. Berryhill et al. } On Appeal from the United States District Court for the Middle District of Alabama,

[April 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Prior to 1965, the laws of Alabama relating to the practice of optometry permitted any person, including a business firm or corporation, to maintain a department in which "eyes are examined or glasses fitted" provided that such department was in the charge of a duly licensed optometrist. This permission was expressly conferred by § 210 of the Alabama Code of 1940, set out in full in the margin, and also inferentially by § 211 of the Code which regulates the advertising practices of optometrists, and which, until 1965, appeared to contemplate the existence of commercial stores with optical departments.¹ In 1965, § 210 was repealed in its entirety by the Alabama Legislature, and § 211 was amended so

¹ Sections 210 and 211 of c. 11, Tit. 46, of the Code of Alabama, 1940, read prior to 1965, as follows:

“§ 210. Store where glasses are sold; how department conducted.—Nothing in this chapter shall be so construed as to prevent any person, firm or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such a store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must

D MM
pp 5, 9

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr.~~ Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

2d
1st DRAFT

Circulated:

SUPREME COURT OF THE UNITED STATES
Circulated: 4-9-73

No. 71-653

Thomas S. Gibson et al.,
Appellants, } On Appeal from the United
v. } States District Court for
L. M. Berryhill et al. } the Middle District of
Alabama.

[April —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Prior to 1965, the laws of Alabama relating to the practice of optometry permitted any person, including a business firm or corporation, to maintain a department in which "eyes are examined or glasses fitted" provided that such department was in the charge of a duly licensed optometrist. This permission was expressly conferred by § 210 of the Alabama Code of 1940, and also inferentially by § 211 of the Code which regulates the advertising practices of optometrists, and which, until 1965, appeared to contemplate the existence of commercial stores with optical departments.¹ In 1965, § 210 was repealed in its entirety by the Alabama Legislature, and § 211 was amended

¹ Sections 210 and 211 of c. 11, Tit. 46, of the Code of Alabama, 1940, provided, prior to 1965, as follows:

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p. 13

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

3rd DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Circulated: 4-26-73

No. 71-653

Thomas S. Gibson et al., | On Appeal from the United
Appellants, | States District Court for
v. | the Middle District of
L. M. Berryhill et al. | Alabama.

[April —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Prior to 1965, the laws of Alabama relating to the practice of optometry permitted any person, including a business firm or corporation, to maintain a department in which "eyes are examined or glasses fitted" provided that such department was in the charge of a duly licensed optometrist. This permission was expressly conferred by § 210 of the Alabama Code of 1940, and also inferentially by § 211 of the Code which regulates the advertising practices of optometrists, and which, until 1965, appeared to contemplate the existence of commercial stores with optical departments.¹ In 1965, § 210 was repealed in its entirety by the Alabama Legislature, and § 211 was amended

¹ Sections 210 and 211 of c. 11, Tit. 46, of the Code of Alabama, 1940, provided, prior to 1965, as follows:

"§ 210. Store where glasses are sold; how department conducted.— Nothing in this chapter shall be so construed as to prevent any person, firm or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such a store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 15, 1973

MEMORANDUM FOR THE CONFERENCE

Re: Cases Held for Gibson v. Berryhill, No. 71-653

Four cases have been held by the Court pending disposition of Gibson v. Berryhill. A synopsis of each with a recommendation for disposition appears below.

W.B.
1. Rosen v. Louisiana State Board of Medical Examiners (No. 70-42). Appellant, a duly licensed Louisiana physician, was noticed for a hearing before appellee Board on charges that he performed a number of illegal abortions (i.e., abortions not required to preserve the life of the mother). Prior to the hearing date, appellant filed a § 1983 suit in the USDC ED Louisiana seeking declaratory and injunctive relief on the ground that the Louisiana Abortion Law was unconstitutional. No challenge was made to the constitution of the Board or to the adequacy of its procedures. A three-judge District Court was convened; it determined that the case did not require abstention, and ruled against appellant on the merits. It does not appear that license-revocation proceedings are "quasi-criminal" in

W.B.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 3, 1973

Re: No. 71-653 - Gibson v. Berryhill

Dear Byron:

Please join me.

Sincerely,



T.M.

Mr. Justice White

cc: Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: APR - 5 1973

No. 71-653

Recirculated: _____

Thomas S. Gibson et al., } On Appeal from the United
Appellants, } States District Court for
v. } the Middle District of
L. M. Berryhill et al. } Alabama.

[April —, 1973]

MR. JUSTICE MARSHALL, concurring.

I join the opinion of the Court except insofar as it suggests that plaintiffs in some suits brought under 42 U. S. C. § 1983 may have to exhaust administrative remedies. See *ante*, at 10. In my opinion, the inapplicability of the exhaustion requirement to any suit brought under § 1983 has been firmly settled by this Court's prior decisions, *McNeese v. Board of Education*, 373 U. S. 668, 671-672 (1963). See also *Houghton v. Shafer*, 392 U. S. 639 (1968); *King v. Smith*, 392 U. S. 309, 312 n. 4 (1968); *Damico v. California*, 389 U. S. 416 (1967).

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Marshall, J.

Circulated: _____

No. 71-653

Recirculated: APR 27 1973

SUPREME COURT OF THE UNITED STATES

Thomas S. Gibson et al., On Appeal from the United
Appellants, States District Court for
v. the Middle District of
L. M. Berryhill et al. Alabama.

[April —, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring.

I join the opinion of the Court except insofar as it suggests that the question remains open whether plaintiffs in some suits brought under 42 U. S. C. § 1983 may have to exhaust administrative remedies. See *ante*, at 10. In my opinion, the inapplicability of the exhaustion requirement to any suit brought under § 1983 has been firmly settled by this Court's prior decisions, *McNeese v. Board of Education*, 373 U. S. 668, 671-672 (1963). See also *Houghton v. Shafer*, 392 U. S. 639 (1968); *King v. Smith*, 392 U. S. 309, 312 n. 4 (1968); *Damico v. California*, 389 U. S. 416 (1967).

B
You have a
concerence
Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 9, 1973

Re: No. 71-653 - Gibson v. Berryhill

Dear Byron:

This case always has been a troublesome one for me. I continue to be uncomfortable with it. Personally, I would have preferred that the District Court abstain. The remand effects a result of sorts along this line and I am content to go along. Therefore, please join me.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 3, 1973

Re: No. 71-653 Gibson v. Berryhill

Dear Byron:

Please join me.

Sincerely,

Lewis

Mr. Justice White

cc: The Conference

B
M
Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 2, 1973

Re: No. 71-653 - Gibson v. Berryhill

Dear Byron:

In due course I shall circulate a dissent.

Sincerely,

W.W.

Mr. Justice White

Copies to the Conference

⑤
Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 5, 1973

Re: No. 71-653 - Gibson v. Berryhill

Dear Byron:

Your opinion in this case seems to me to have improved with age; I will not write myself, and ask you to join me in your opinion.

Sincerely,

WW

Mr. Justice White

Copies to the Conference