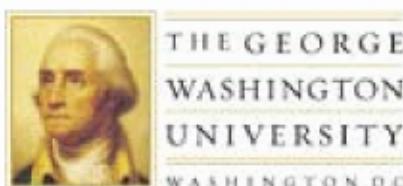


The Burger Court Opinion Writing Database

*North Dakota Board of Pharmacy v.
Snyder's Drug Stores, Inc.*

414 U.S. 156 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

November 29, 1973

Re: No. 72-1176 - North Dakota State Board of
Pharmacy v. Snyder's Drug Stores

Dear Bill:

Please join me.

Regards,

WSB

Mr. Justice Douglas

Copies to the Conference

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

1st DRAFT

From: Douglas, J.

No. 72-1176

Circulate: 11-13

SUPREME COURT OF THE UNITED STATES

North Dakota State Board of
Pharmacy, Petitioner,
v.
Snyder's Drug Stores, Inc.

On Reciprocal Writ of Certiorari to
the Supreme Court of
North Dakota.

[November —, 1973]

Memorandum to the Conference.

The finality requirement of 28 U. S. C. § 1257 which limits our review of state court judgments serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

Our holding that the judgment in the instant case is "final" would, I believe, be wholly consistent with those policy considerations.

Mr. Justice Frankfurter writing for the Court in *Radio Station WOW v. Johnson*, 326 U. S. 120, 124, summarized the requirement by Congress that in appeals from federal district courts as well as in review of state court decisions the judgments be "final": "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. The prerequisite to review derives added force

To: (1) The General Justice
Mr. Justice of America
Mr. Justice of Canada
Mr. Justice of England
Mr. Justice of Scotland
Mr. Justice of Australia
Mr. Justice of New Zealand
Mr. Justice of South Africa
Mr. Justice of India
Mr. Justice of Canada
Mr. Justice of Australia
Mr. Justice of New Zealand
Mr. Justice of South Africa
Mr. Justice of India

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Bangalore, S.

No. 72-1176

Circulation: 11-21

North Dakota State Board of
Pharmacy, Petitioner,
v.
Snyder's Drug Stores, Inc.

On Writ of Certiorari to
the Supreme Court of
North Dakota.

[November —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

North Dakota passed a statute¹ that requires that the applicant for a permit to operate a pharmacy be "a registered pharmacist in good standing" or "a cor-

¹ N. Dak. Century Code § 43-15-35 (5) provides:

"Requirements for permit to operate pharmacy.—The board shall issue a permit to operate a pharmacy, or a renewal permit, upon satisfactory proof that:

5. The applicant for such permit is qualified to conduct the pharmacy, and is a registered pharmacist in good standing or is a partnership, each active member of which is a registered pharmacist in good standing, or a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy; and

"The provision of subsection 5 of this section shall not apply to the holder of a permit on July 1, 1963, if otherwise qualified to conduct the pharmacy, provided that any such permit holder who shall discontinue operations under such permit or fail to renew such permit upon expiration shall not thereafter be exempt from the provisions of such subsection as to such discontinued or lapsed permit. The provisions of subsection 5 of this section shall not apply to hospital pharmacies furnishing service only to patients in such Hospital."

November 23, 1973

Dear Harry:

I thank you for your letter of November 23rd about 72-1176,
North Dakota State Board v. Snyder's Drug Stores.

You are quite right about the factual confusion and I have remedied that by a rewriting of the paragraph on page 7. The recirculation will be around soon.

As to the Commerce Clause I am inclined to agree with you that it is not substantial. But it is not raised by the parties; nor did the North Dakota Court pass on it. So I think it best to say nothing on it.

William O. Douglas

Mr. Justice Blackmun

Re: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Douglas
Mr. Justice Black
Mr. Justice Marshall
Mr. Justice White

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1176

Circulate:

Recirculated:

11/24/73

North Dakota State Board of
Pharmacy, Petitioner,
v.
Snyder's Drug Stores, Inc. } On Writ of Certiorari to
the Supreme Court of
North Dakota.

[November —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

North Dakota passed a statute¹ that requires that the applicant for a permit to operate a pharmacy be "a registered pharmacist in good standing" or "a cor-

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"The provision of subsection 5 of this section shall not apply to the holder of a permit on July 1, 1963, if otherwise qualified to conduct the pharmacy, provided that any such permit holder who shall discontinue operations under such permit or fail to renew such permit upon expiration shall not thereafter be exempt from the provisions of such subsection as to such discontinued or lapsed permit. The provisions of subsection 5 of this section shall not apply to hospital pharmacies furnishing service only to patients in such Hospital."

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice White
Mr. Justice Stewart
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice White
Mr. Justice Stewart
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Supreme Court

No. 72-1176

Circulate.

North Dakota State Board of Pharmacy, Petitioner, } Recirculate. 11-26
 } On Writ of Certiorari to
 the Supreme Court of
 North Dakota.
Snyder's Drug Stores, Inc.

[November —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

North Dakota passed a statute¹ that requires that the applicant for a permit to operate a pharmacy be "a registered pharmacist in good standing" or "a cor-

¹ N. Dak. Century Code § 43-15-35 (5) provides:

Requirements for permit to operate pharmacy.—The board shall issue a permit to operate a pharmacy, or a renewal permit, upon satisfactory proof that:

"5. The applicant for such permit is qualified to conduct the pharmacy, and is a registered pharmacist in good standing or is a partnership, each active member of which is a registered pharmacist in good standing, or a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy; and

"The provision of subsection 5 of this section shall not apply to the holder of a permit on July 1, 1963, if otherwise qualified to conduct the pharmacy, provided that any such permit holder who shall discontinue operations under such permit or fail to renew such permit upon expiration shall not thereafter be exempt from the provisions of such subsection as to such discontinued or lapsed permit. The provisions of subsection 5 of this section shall not apply to hospital pharmacies furnishing service only to patients in such Hospital."

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. November 26, 1973

RE: No. 72-1176 - North Dakota State Board of
Pharmacy v. Snyder's Drug Stores, Inc.

Dear Bill:

I agree.

Sincerely,



Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 26, 1973

No. 72-1176, North Dakota Pharmacy Board
v. Snyder's Stores

Dear Bill,

Upon the understanding that the minor change we discussed on the telephone this morning will be made, I am glad to join your opinion for the Court in this case.

Sincerely yours,

76
1

Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 27, 1973

Re: No. 72-1176 - North Dakota State Board of
Pharmacy v. Snyder's Drug Stores Inc.

Dear Bill:

I shall acquiesce.

Sincerely,



Mr. Justice Douglas

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 28, 1973

Re: No. 72-1176 -- North Dakota State Board of Pharmacy v.
Snyder's Drug Stores, Inc.

Dear Bill:

Please join me in your opinion in this case.

Sincerely,

T. M.
T. M.

Mr. Justice Douglas

cc: The Conference

S
CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Supreme Court of the United States

Washington, D. C. 20543

November 23, 1973

Re: No. 72-1176 - North Dakota State Board
v. Snyder's Drug Stores

Dear Bill:

I am probably with you, but I have some difficulty with the paragraph at the top of page 7 of your proposed opinion.

The paragraph speaks of North Dakota's "new Act" and states that "respondent has long enjoyed one" (a license). I believe that § 43-15-35 went on the State's books in 1963. I suppose a decade's age is not "old." Nevertheless, the statute was enacted some years before Snyder's or Red Owl applied for a license and in this respect it is "old." Also, I was under the impression that the respondent never had a North Dakota license. It has operated pharmacies in Minnesota for some time, but not in North Dakota. The impression I get from the paragraph on page 7 is that North Dakota amended its statute in midstream and Snyder's, being unable to comply with the new provisions, was losing the license it already possessed. I think this is not the case. Perhaps you can straighten me out.

The one amicus brief stresses the Commerce Clause. Is it worth passing mention even though the point was not raised in the state courts? I feel there is no force in the Commerce Clause argument. If we mention it and reject it, perhaps we shall avoid a petition for rehearing.

Sincerely,

Harry

Mr. Justice Douglas

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 27, 1973

Re: No. 72-1176 - North Dakota State Board v.
Snyder's Drug Stores

Dear Bill:

Please join me in your circulation of
November 26.

Sincerely,



Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 28, 1973

No. 72-1176 North Dakota State Board of
Pharmacy v. Snyder's Drug

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Douglas

lfp/ss

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1176

North Dakota State Board of
Pharmacy, Petitioner.
v.
Snyder's Drug Stores, Inc.

On Writ of Certiorari to
the Supreme Court of
North Dakota.

[November —, 1973]

Counter-memorandum to the Conference.

The congressional grant of jurisdiction by which we review judgments of state courts begins with the familiar language of 28 U. S. C. § 1257:

“Final judgments or decrees rendered by the highest court of the state in which a decision could be had may be reviewed by the Supreme Court as follows . . .”

Then follows the statutory differentiation between appeals and certiorari. It is surely clear from this language that *not only* must the judgment be that of the highest court of the State in which a decision could be had, *and* that there must have been drawn in question the validity of a treaty or statute of the United States or the validity of a statute of any State, but *also* that the judgment reviewed be *final*. The language of § 1257 contrasts strikingly with that of 28 U. S. C. § 1254, dealing with our jurisdiction over cases in the Courts of Appeals. That section simply provides that “cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods . . .”

Obviously Congress intended to apply a significantly stricter standard in our review of the state court judgments than it did to our review of judgments of the courts of appeals.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

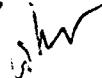
November 27, 1973

Re: No. 72-1176 - North Dakota State Board of Pharmacy
v. Snyder's Drug Stores

Dear Bill:

Please join me in your circulation of November 26th.

Sincerely,



Mr. Justice Douglas

Copies to the Conference