

# The Burger Court Opinion Writing Database

## *Scheuer v. Rhodes*

416 U.S. 232 (1974)

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



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

1st DRAFT

From: Mr. Chief Justice

SUPREME COURT OF THE UNITED STATES

Date: MAR 28 1974

Nos. 72-914 AND 72-1318

Recirculated: \_\_\_\_\_

Sarah Scheuer, Administra-  
 trix, Etc., Petitioner,  
 72-914 v.

James Rhodes et al.

Arthur Krause, Administra-  
 tor of the Estate of Allison  
 Krause, et al  
 Petitioners

72-1318 v.

James Rhodes et al.

On Writs of Certiorari to  
 the United States Court  
 of Appeals for the Sixth  
 Circuit.

[April --, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of  
 the Court.

We granted certiorari in these cases to resolve whether  
 the District Court correctly dismissed civil damage  
 actions, brought under 42 U. S. C. § 1983, on the  
 ground that these actions were, as a matter of law,  
 against the State of Ohio, and hence barred by the  
 Eleventh Amendment to the Constitution and, alterna-  
 tively, that the actions were against state officials who  
 were immune from liability for the acts alleged in the  
 complaints. These cases arise out of the same period of  
 alleged civil disorder on the campus of Kent State Uni-  
 versity in Ohio during May 1970 which was before us,  
 in another context, in *Gilligan v. Morgan*, 413 U. S. 1  
 (1973).

In these cases the personal representatives of the  
 estates of three students who died in that episode seek

*Editorial changes throughout as indicated*

To: Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Rehnquist  
Mr. Justice Holmes

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 72-914 AND 72-1318

From: The Clerk of the Court

Circulated: \_\_\_\_\_

Recirculated: APR 10 1974

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72-914 v.

James Rhodes et al.

Arthur Krause, Administra-  
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72-1318 v.

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(1973).

<sup>1</sup> 413 U. S. 919 (1973).

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

CHAMBERS OF  
THE CHIEF JUSTICE

May 22, 1974

MEMORANDUM FOR THE CONFERENCE

Subject: 73-801, Smith v. Losee (on petition for writ of certiorari to the U.S. Court of Appeals for the Tenth Circuit)

*Re: 5/27*  
This case was held pending our decision in 72-914, Scheuer v. Rhodes, and 72-1318, Krause v. Rhodes. ✓

Petr here was an associate professor at Dixie Junior College, St. George, Utah. The college was subject to the management and control of the Utah State Board of Education. After his third year at the college, his department and the Faculty Personnel Committee (by a divided vote) recommended that petr be granted tenure. The college President, a respondent here, recommended to the Board of Education, also a respondent here, that petr be placed on another year's probation before tenure was granted. He cited the Faculty Committee's report which "indicates one or two instances which seem to lack professionalism." Petr met with the President after this action was taken. The President cited petr's negative attitudes and his role as sponsor of the college chapter of Young Democrats and that organization's active opposition to the election of a particular state senator. He further cited petitioner's role in an internal personnel matter which the dean had considered "interference" in an area where petr had no authority. The President asserted that petr had told students that the administration was misusing student funds. Later, petr and the President met with the Personnel Committee. No proof was made as to the alleged statements but the Board reaffirmed its original recommendation. The Board of Education, although it had the power to overrule the President's "recommendation," concurred with him. Petr then brought this § 1983 action. The District Court found:

*200.2*  
"Losee, Barnum and Peterson [the president and two deans], without justifiable cause, rejected the recommendations [of the Personnel Committee] and recommended to [the Board] that permanent status be denied [Smith]. This recommendation was acquiesced in and accepted by the defendant members of the State Board of Education without their having given [Smith] an opportunity to be heard."

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

April 12, 1974

MEMO FOR THE FILES IN 72-914, SCHUEER v.  
RHODES, ET AL. and 72-1318, KRAUSE v.  
RHODES, ET AL.

I heard oral argument and later recalled that one of the petitioners had come in to see me before the filing of the case and talked, not law, but the horror of the Kent State episodes. I am not technically disqualified but withdraw from it before the opinion comes down.

  
William O. Douglas

April 1, 1974

RE: No. 72-914 & 72-1313 - Scheuer & Krause v. Rhodes

Dear Chief:

Only one sentence in your fine opinion prevents an immediate note to join me. It is the sentence at page 5, line 6 that "If the [Eleventh] Amendment has any applicability here, therefore, it is applicable to petitioner Scheuer [the Ohio resident] as well as petitioners Krause and Millar." That certainly states what the Court has held in Employees v. Missouri Public Health and Edelman, but I dissented in both cases, expressing my view that the Eleventh Amendment is wholly inapplicable to suits against a state by its own citizens. It occurs to me that the sentence may be unnecessary to your discussion. Would you consider deleting it?

Sincerely,

WJB

The Chief Justice

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. April 1, 1974

RE: No. 72-914 & 72-1318 - Scheuer & Krause  
v. Rhodes

Dear Chief:

Thank you so much for considering my  
suggestion. I am happy to join you.

Sincerely,

*Bice*

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

April 3, 1974

72-914 - Scheuer v. Rhodes  
72-1318 - Krause v. Rhodes

Dear Chief,

I am glad to join your opinion for  
the Court in these cases.

Sincerely yours,

The Chief Justice

Copies to the Conference



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

CHAMBERS OF  
JUSTICE BYRON R WHITE

April 9, 1974

Re: No. 72-914 & No. 72-1318 - Scheuer v. Rhodes

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 9, 1974

Re: No. 72-914 -- Scheuer v. Rhodes  
No. 72-1318 -- Krause v. Rhodes

Dear Chief:

Please join me.

Sincerely,

*T.M.*  
T.M.

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

April 8, 1974

Re: No. 72-914 - Scheur v. Rhodes  
No. 72-1318 - Krause v. Rhodes

Dear Chief:

May I make one minor suggestion for this opinion? On page 4, first full paragraph, the second sentence reads: "The issue is not whether a plaintiff can ultimately prevail." Would you be willing to change the "can" to "will"? It seems to me that the issue, indeed, is whether the plaintiff "can" ultimately prevail in the sense of possibly being able so to do, and that the proposed change removes this possible misinterpretation.

Sincerely,

HAB

The Chief Justice

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

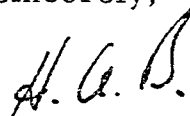
April 8, 1974

Re: No. 92-914 - Scheur v. Rhodes  
No. 72-1318 - Krause v. Rhodes

Dear Chief:

Please join me.

Sincerely,

A handwritten signature in dark ink, appearing to read "H. A. B.", written in a cursive style.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

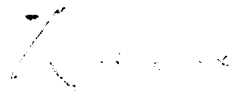
April 4, 1974

No. 72-914 Scheuer v. Rhodes  
No. 72-1318 Krause v. Rhodes

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 4, 1974

Re: No. 72-914 - Scheuer v. Rhodes  
No. 72-1318 - Krause v. Rhodes

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

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