

# The Burger Court Opinion Writing Database

## *Wheeler v. Barrera*

417 U.S. 402 (1974)

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

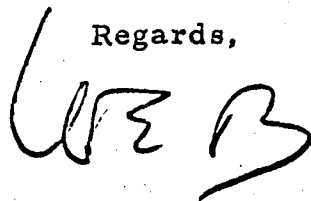
May 29, 1974

Re: 73-62 - Wheeler v. Barrera

Dear Harry:

Please join me.

Regards,

A handwritten signature in dark ink, appearing to be "WE B", likely representing Warren E. Burger.

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

May 11, 1974

MEMORANDUM TO THE CONFERENCE:

In 73-62, Wheeler v. Barrera, I will be circulating a dissent with more than the customary "all deliberate speed".

  
William O. Douglas

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Douglas; J.

No. 73-62

Circulate: 5-16

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

Hubert Wheeler et al.,  
Petitioners,  
v.  
Anna Barrera et al. } On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Eighth Circuit.

[May —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The case comes to us in an attractive posture, as the Act of Congress is in terms aimed to help "educationally deprived" children, whether they are in public or parochial schools, and I fear the judiciary has been seduced.

But we must remember that "the propriety of the legislature's purposes may not immunize from further scrutiny a law which either has a primary effect which advances religion, or which fosters excessive entanglements between Church and State." *Committee for Public Education v. Nyquist*, 413 U. S. 756, 774.

All education in essence is aimed to help children, whether bright or retarded. Schools do not exist—whether public or parochial—to keep teachers employed. Education is a skein with many threads—from classical Greek to Latin, to grammar, to philosophy, to science, to athletics, to religion. There might well be political motivation to use federal funds to make up deficits in any part of a school's budget or to strengthen it by financing all or a part of any sector of educational activity.

There are some who think it constitutionally wise to do so; and others who think it is constitutionally permissible. But the First Amendment says "Congress shall make no laws respecting an establishment of

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-62

Circulate: 5-

Recirculated: 15-28

Hubert Wheeler et al.,  
Petitioners,  
v.  
Anna Barrera et al. } On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Eighth Circuit.

[May —, 1974]

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3

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

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-62

From: Douglas; J.

Circulate: \_\_\_\_\_

Hubert Wheeler et al.,  
Petitioners,  
v.  
Anna Barrera et al.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Eighth Circuit.

6-7

[May —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 16, 1974

RE: No. 73-62 Wheeler v. Barrera

Dear Harry:

I agree.

Sincerely,



Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 13, 1974

73-62 - Wheeler v. Barrera

Dear Harry,

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

Sincerely yours,

T.S.

Mr. Justice Blackmun

Copies to the Conference



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.

Circulated: 6-6-74

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

No. 73-62 - Wheeler v. Barrera

Mr. Justice White, concurring in the judgment.

As I read the majority opinion, the Court understands well enough that Title I funds are being used in Missouri to pay the salaries of teachers giving special instruction on public school premises, that the State is obligated to furnish comparable services to private schools and that the State has not satisfied the comparability requirement. It must do so if it is to continue to use Title I funds in the manner they are now being used.

The Court intimates no opinion as to whether using federal funds to pay teachers giving special instruction on private school premises would be constitutional. It suggests, however, that there may be other ways of satisfying the comparability requirement that the State should consider; and unless the State is being asked to chase rainbows, it is inferred that there are programs and services comparable to on-the-premises-instruction that the State could furnish private schools without violating the First Amendment. I would have thought that any such arrangement would be impermissible under the Court's recent cases construing the Establishment Clause. Not having joined those opinions, I am pleasantly surprised by what appears to be a suggestion that federal funds may in some respects be used to finance sectarian instruction of students in private elementary and secondary schools. If this is the case, I suggest that the Court should say so expressly. Failing that, however, I concur in the judgment.

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

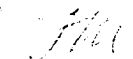
May 29, 1974

Re: No. 73-62, Hubert Wheeler v. Anna Barrera

Dear Harry:

Please record me as concurring in the result.

Sincerely,



T.M.

Mr. Justice Blackmun

cc: The Conference

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

1st DRAFT

From: Blackmun, J.

**SUPREME COURT OF THE UNITED STATES**

Filed: 5/10/74

No. 73-62

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

Hubert Wheeler et al.,  
Petitioners,  
v.  
Anna Barrera et al. } On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Eighth Circuit.

[May —, 1974]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U. S. C. § 241a *et seq.*, provides for federal funding of special programs for educationally deprived children in both public and private schools.

This suit was instituted on behalf of parochial school students who were eligible for Title I benefits and who claimed that the public school authorities in their area, in violation of the Act, failed to provide adequate Title I programs for private school children as compared with those programs provided for public school children. The defendants answered that the extensive aid sought by the plaintiffs exceeded the requirements of Title I and contravened the State's Constitution and state law and public policy. First Amendment rights were also raised by the parties. The District Court, concluding that the State had fulfilled its Title I obligations, denied relief. The United States Court of Appeals for the Eighth Circuit, by a divided vote, reversed. 475 F. 2d 1338 (1973). We granted certiorari to examine serious questions that appeared to be present as to the scope and constitutionality of Title I. 414 U. S. 908 (1973).

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PP. 15 & 16  
STYLISTIC CHANGES

2nd DRAFT

Tom The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

No. 73-62

Recirculated: 5/16/74

Hubert Wheeler et al.,  
Petitioners,  
v.  
Anna Barrera et al. } On Writ of Certiorari to the  
United States Court of Ap-  
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[May —, 1974]

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 7, 1974

MEMORANDUM TO THE CONFERENCE

Re: Cases Held For No. 73-62 - Wheeler v. Barrera

No. 73-120 - Marburger, Commissioner of Education of New Jersey, et al. v. Public Funds for Public Schools of New Jersey, et al.

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No. 73-121 - Griggs, et al. v. Public Funds for Public Schools of New Jersey, et al.

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A three-judge District Court (D. N.J., Hunter, Barlow, Kitchen) on April 5, 1973, held unconstitutional §§ 5 and 6 of New Jersey's Non-Public Elementary and Secondary Education Act enacted December 7, 1971. Section 5 of the Act provides for reimbursement to parents of nonpublic school children for money spent to purchase "secular, nonideological textbooks, instructional materials and supplies." Section 6 of the Act provides for distribution of items of equipment (projectors, TV's, typewriters, microscopes, etc.) directly to nonpublic schools. Section 6 of the Act also authorizes the state to provide certain auxiliary services (e.g., remedial reading courses, testing services, health services) to nonpublic schools.

The District Court found that all three provisions violate the Establishment Clause. On May 15 it ordered the state to repossess all nonconsumable materials at the end of the school year and forbade the state from paying vendors for such materials and equipment delivered after the vendors had received notice of the USDC opinion. On May 29 Mr. Justice Brennan referred an application for stay of preliminary injunction to the Court, and the Court granted this application pending further order. 412 U.S. 916. On June 25, 1973, the Court vacated this stay order with the Chief Justice and Justices White and Rehnquist dissenting. 413 U.S. 916. Between May 29 and June 25, 1973, allegedly in reliance on the stay order, vendors

delivered some \$3 million in supplies. After the Court vacated the stay, the USDC refused to modify its order prohibiting reimbursement, and apparently the materials delivered between May 29 and June 25 are either unpaid for or unreimbursed.

Last October Mr. Justice Powell circulated a proposed order summarily affirming the three-judge court on the merits and modifying the order to permit reimbursement for goods delivered during the pendency of the stay. The tentative vote had Mr. Justice Stewart and myself joining Mr. Justice Powell in the entire disposition; Justices Douglas, Brennan and Marshall would have affirmed in full; and the Chief Justice and Justices White and Rehnquist would have noted probable jurisdiction, while at the same time agreeing with the modification in the order.

On October 15, 1973, however, we granted certiorari in No. 73-62, Wheeler v. Barrera, 414 U.S. 908, which appeared to present similar constitutional issues in the context of the Federal Elementary and Secondary Education Act of 1965. Consequently, on October 23 we voted to hold No. 73-120 and No. 73-121 for Wheeler. As is now apparent, the constitutional issues never came to the surface in Wheeler. Therefore, the petitions in Marburger, which appear to present the constitutional issues squarely, must be considered on their own merits.

4.4.15.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 3, 1974

No. 73-62 Wheeler v. Barrera

Dear Harry:

Although I intend to join your opinion for the Court,  
I will write a brief concurring opinion.

Sincerely,

*Lewis*

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 73-62

Circulated: JUN 4 1974

Hubert Wheeler et al.,  
Petitioners,  
v.  
Anna Barrera et al. } On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Eighth Circuit.

Recirculated:

[June —, 1974]

MR. JUSTICE POWELL, concurring.

The Court holds that under Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U. S. C. § 241a *et seq.*, federal courts may not ignore state-law prohibitions against the use of publicly employed teachers in private schools, *ante*, p. 12, that Title I does not mandate on-the-premises instruction in private schools, *id.*, p. 15, and that Title I does not require that the services to be provided in private schools be identical in all respects to those offered in public schools. *Id.*, p. 17. It is thus unnecessary to decide whether the assignment of publicly employed teachers to provide instruction in sectarian schools would contravene the Establishment Clause of the First Amendment. *Id.*, p. 11. On that basis, I join the Court's opinion. I would have serious misgivings about the constitutionality of a statute that required the utilization of public-school teachers in sectarian schools. See *Committee for Public Education v. Nyquist*, 413 U. S. 756 (1973).



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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 17, 1974

Re: No. 73-62 - Wheeler v. Barrera

Dear Harry:

Please join me in your opinion for the Court in this case.

Sincerely,



Mr. Justice Blackmun

Copies to the Conference