The Burger Court Opinion Writing Database

Fry v. United States

421 U.S. 542 (1975)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

January 8, 1975

PERSONAL

Re: No. 73-822 - Ernest Fry and Thelma Boehm v. United States

Dear Thurgood:

Would you give some consideration to expanding the discussion of the economic factors in Part II beginning after "States" at the end of the first full paragraph of Part II, adding:

> "would have an impact of significant consequence on the effort to control inflation. Not only would it undermine the legitimate objectives of the inflation controls directly by the infusion of untold millions of purchasing power into the economy, but it would tend to exert pressure on all other segments of the work force of the country to demand comparable increases." or something to this effect?

It seems clear that this is what is meant and I would think it desirable to spell it out.

Regards,

WEB

Mr. Justice Marshall

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

CHAMBERS OF
THE CHIEF JUSTICE

March 27, 1975

PERSONAL

Re: 73-822 - Fry v. United States

Dear Lewis:

I can join your limited concurrence in the above if you can see your way to insert the words "temporary emergency" after "President" on the 9th line of your opinion. The powers were both temporary and emergency, and I think it crucial to hit this aspect "hard" to avoid implications as to our next case in this area.

Regards,

WEB

Mr. Justice Powell

cc: Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

May 23, 1975

Re: 73-822 - Fry v. U. S.

Dear Thurgood:

Please join me.

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 11, 1975

Dear Thurgood:

Re: Fry v. United States, No. 73-822.

Please add at the end of your opinion in Fry v. Unites States the following statement.

Less than three months after we granted certiorari, Congress allowed the Economic Stabilization Act to expire on April 30, 1974. There is therefore no continuing impediment to the payment of salary increases of the kind at issue in this case. I would therefore dismiss the writ as improvidently granted.

WILLIAM O. DOUGLAS

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 6, 1975

RE: No. 73-822 Ernest Fry & Thelma Boehm v. United States

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

J

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 6, 1975

Re: No. 73-822, Fry v. United States

Dear Thurgood,

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

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 6, 1975

Re: No. 73-822 - Fry v. United States

Dear Thurgood:

Please join me.

Sincerely,

Byron

Mr. Justice Marshall

Copies to 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: JAN 3 1975

Recirculated: _____

No. 73-822

Ernest Fry and Thelma Boehm, Petitioners, *v.* United States.	On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

[January —, 1975]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Economic Stabilization Act of 1970[1] authorized the President to issue orders and regulations to stabilize wages and salaries at levels not less than those prevailing on May 25, 1970. By Executive Order, the President created the Pay Board to oversee wage and salary controls imposed under the Act's authorization. Executive Order 11627, 36 Fed. Reg. 20136. In implementing the wage stabilization program, the Pay Board issued regulations that limited annual salary increases for covered employees to 5.5% and required prior Board approval for all salary adjustments affecting 5,000 or more employees.[2] The State of Ohio subsequently enacted legislation providing for a 10.6% wage and salary increase, effective January 1, 1972, for almost 65,000 state employees.[3] The State applied to the Pay Board for

[1] Pub. L. 91-379, Aug. 15, 1970, 84 Stat. 799, as amended, 12 U. S. C. § 1204 (Supp. I, 1970). The Act was extended five times before it expired on April 30, 1974.

[2] 6 CFR §§ 201.10; 101.21 (1972). See also *id.*, § 101.28.

[3] Ohio Revised Code § 143.102 (A), as amended, § 124.15 (A) (1972). The Act provided for salary increases for employees of the state government, state universities, and county welfare departments. Elected state officials were not included.

Wm. Doyle
Oct 74

p. 4

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.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: JAN 9 1975

No. 73-822

Ernest Fry and Thelma Boehm, Petitioners, *v.* United States. | On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

[January —, 1975]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Economic Stabilization Act of 1970[1] authorized the President to issue orders and regulations to stabilize wages and salaries at levels not less than those prevailing on May 25, 1970. By Executive Order, the President created the Pay Board to oversee wage and salary controls imposed under the Act's authorization. Executive Order 11627, 36 Fed. Reg. 20136. In implementing the wage stabilization program, the Pay Board issued regulations that limited annual salary increases for covered employees to 5.5% and required prior Board approval for all salary adjustments affecting 5,000 or more employees.[2] The State of Ohio subsequently enacted legislation providing for a 10.6% wage and salary increase, effective January 1, 1972, for almost 65,000 state employees.[3] The State applied to the Pay Board for

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[2] 6 CFR §§ 201.10; 101.21 (1972). See also *id.*, § 101.28.

[3] Ohio Revised Code § 143.102 (A), as amended, § 124.15 (A) (1972). The Act provided for salary increases for employees of the state government, state universities, and county welfare departments. Elected state officials were not included.

Wm. Douglas
OCT 74

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 16, 1975

No. 73-822 -- Fry v. United States

Dear Lewis:

I have read and reread your note concerning this case. I have considered your suggestions along with a rereading of my opinion and regret that I cannot agree with you.

Fry was carefully cut to the bone and about as narrow a holding as I can imagine. That was true before National League of Cities came along, and, I submit is true now.

You are correct about one decision affecting a later case. Since both sides of the case heard on Tuesday cited our opinion in the I. T. T. case handed down an hour or so before, maybe we should have held up the I. T. T. opinion.

More than that, I fear if we follow your suggestions we will be doing just what you fear: we will indeed be prejudging National League of Cities.

Sincerely,

T. M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 25, 1975

Memorandum to: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White

Re: No. 73-822, Fry v. U.S.

Enclosed is the new draft in this case.

I have copied Lewis' opinion in place of several paragraphs of the original opinion.

If you do not object, I will circulate. If we do not pick up another vote, we can always go back to the original opinion.

T.M.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-822

Ernest Fry and Thelma Boehm, Petitioners, *v.* United States.	On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

[January —, 1975]

MR. JUSTICE MARSHALL delivered the judgment of the Court.

The Economic Stabilization Act of 1970[1] authorized the President to issue orders and regulations to stabilize wages and salaries at levels not less than those prevailing on May 25, 1970. By Executive Order, the President created the Pay Board to oversee wage and salary controls imposed under the Act's authorization. Executive Order 11627, 36 Fed. Reg. 20136. In implementing the wage stabilization program, the Pay Board issued regulations that limited annual salary increases for covered employees to 5.5% and required prior Board approval for all salary adjustments affecting 5,000 or more employees.[2] The State of Ohio subsequently enacted legislation providing for a 10.6% wage and salary increase, effective January 1, 1972, for almost 65,000 state employees.[3] The State applied to the Pay Board for

[1] Pub. L. 91-379, Aug. 15, 1970, 84 Stat. 799, as amended, note following 12 U. S. C. § 1904 (1970 ed. Supp. I). The Act was extended five times before it expired on April 30, 1974.

[2] 6 CFR §§ 201.10; 101.21 (1972). See also *id.*, § 101.28.

[3] Ohio Revised Code § 143.102 (A), as amended, § 124.15 (A) (1972). The Act provided for salary increases for employees of the state government, state universities, and county welfare departments. Elected state officials were not included.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 27, 1975

Memorandum to: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White

Re: No. 73-822, Fry v. U.S.

Since no objection has been interposed, I am today circulating the new draft in this case.

T.M.

pp 1-3, 5-6

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

From: Marshall, J.

Circulated: _____

Recirculated MAR 27 1975

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-822

Ernest Fry and Thelma Boehm, Petitioners, *v.* United States.	On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

[January —, 1975]

MR. JUSTICE MARSHALL delivered the judgment of the Court.

The Economic Stabilization Act of 1970[1] authorized the President to issue orders and regulations to stabilize wages and salaries at levels not less than those prevailing on May 25, 1970. By Executive Order, the President created the Pay Board to oversee wage and salary controls imposed under the Act's authorization. Executive Order 11627, 36 Fed. Reg. 20136. In implementing the wage stabilization program, the Pay Board issued regulations that limited annual salary increases for covered employees to 5.5% and required prior Board approval for all salary adjustments affecting 5,000 or more employees.[2] The State of Ohio subsequently enacted legislation providing for a 10.6% wage and salary increase, effective January 1, 1972, for almost 65,000 state employees.[3] The State applied to the Pay Board for

[1] Pub. L. 91-379, Aug. 15, 1970, 84 Stat. 799, as amended, note following 12 U. S. C. § 1904 (1970 ed. Supp. I). The Act was extended five times before it expired on April 30, 1974.

[2] 6 CFR §§ 201.10; 101.21 (1972). See also *id.*, § 101.28.

[3] Ohio Revised Code § 143.102 (A), as amended, § 124.15 (A) (1972). The Act provided for salary increases for employees of the state government, state universities, and county welfare departments. Elected state officials were not included.

Wm. Douglas 3/27/75

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 3, 1975

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 73-822, Fry v. United States

Four cases were held for Fry. Only one involves the constitutionality of the Economic Stabilization Act (ESA) decided in Fry and that petition is probably jurisdictionally time-barred. One requires interpretation of the savings clause of the ESA, and the other two deal with the provisions of the Fair Labor Standards Act (FLSA) prior to the 1974 amendments. I believe the Court's decision to grant or deny certiorari will not turn on our decision in Fry.

No. 73-839, Ohio v. United States

This is the same case as Fry, and is, of course, controlled by the decision. Beyond this, it appears that the petition is also jurisdictionally time-barred. The ESA prescribes a 30-day period for filing a petition for certiorari to review a judgment of the Temporary Emergency Court of Appeals (TECA). That provision, unlike 28 U.S.C. §2102(c), relating to the time within which petitions for writs of certiorari in other civil actions may be filed, does not authorize us to grant extensions of time for filing. It thus appears that, despite an extension of time by the Chief Justice, the petition which was filed 34 days after the entry of judgment in the TECA, was untimely. In any event either ground suggests no further review is warranted. I shall vote to deny the petition for certiorari.

No. 73-1565, Iowa v. Dunlop

The Secretary of Labor brought this action against the State of Iowa to enforce the minimum wage and overtime provisions of the FLSA at several state institutions: state hospitals, institutions for the aged or mentally ill, and

Wm. Douglas 6/11/75

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 9, 1975

Dear Thurgood:

Re: No. 73-822 - Fry, et al. v. United States

Please join me.

Sincerely,

H.A.B.

Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 15, 1975

Re: No. 73-822 - Fry v. United States

Dear Thurgood:

I have already joined your opinion in this case and you have a court. There is much to be said, however, for Lewis' point of view, set forth in his letter to you of January 14. This note is just to state that it is all right with me if you wish to accommodate him.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 20, 1975

Re: No. 73-822 - Fry v. United States

Dear Thurgood:

I expressed to you some time ago my discomfort with the implications of the opinion, and in my note of January 15 I indicated my sympathy with Lewis' point of view as set forth in his letter of the preceding day.

I have now determined that my views coincide with those of Lewis. I am therefore joining his separate concurrence and am withdrawing my joinder in your opinion.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 20, 1975

Re: No. 73-822 - Fry v. United States

Dear Lewis:

Please join me in your separate concurring opinion.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 7, 1975

Re: No. 73-822 - Fry v. United States

Dear Thurgood:

If you will permit me, I am glad to join your recirculation of March 27.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 14, 1975

No. 73-822 Fry v. United States

Dear Thurgood:

As I mentioned at Friday's Conference, I have refrained from joining you in Fry because of concern as to its effect on National League of Cities v. Brennan and California v. Brennan.

There were at least five, perhaps six of us, who indicated that we will vote to note these cases. I have reread your circulation in Fry, and it seems to me that in its present form Fry would make it difficult for us to consider National League of Cities with genuine freedom to decide it on its own merits. Putting it differently, Fry (as now written) will strengthen the force of Wirtz as a precedent and possibly be viewed as extending Wirtz.

In my view, Fry need not constitute an extention or even an endorsement of Wirtz. The Economic Stabilization Act was addressed to a national emergency regarded by everyone as being temporary in character. No one supposed that the wage and price freeze was permanent legislation comparable to the Fair Labor Standards Act. As you point out in your opinion, the freeze applied as an emergency measure across the board to all wages and salaries both public and private. It was an extraordinary exercise of commerce clause power, designed to meet an emergency. I would gladly join an opinion focused primarily on this aspect of the case.

On page 5 of your draft in Fry you point out, quite correctly, that Wirtz was "limited in character", and that it applied only to state employees who "performed functions normally covered by the Fair Labor Standards Act," namely,

employees in privately operated schools and hospitals. This leaves open the possibility of distinguishing Wirtz in National League of Cities.

In the last paragraph in your draft (p. 6), you conclude, that there is no merit to the distinction between "proprietary" and "governmental" functions so far as the Fair Labor Standards Act is concerned. It is true that Wirtz so indicated in a dictum. But I am unwilling to go so far, at least until we have considered oral arguments and briefs in National League of Cities v. Brennan.

In summary, if you are disposed to write Fry somewhat more narrowly, emphasizing the national emergency and its temporary nature, and eliminating or modifying the next to the last paragraph with respect to proprietary functions, I will happily join you now. Otherwise, I suggest we hold Fry for National League of Cities.

If Fry comes down in its present form, I am afraid the the Court will have gone a long way to pre-judge National League of Cities.

Sincerely,

Lewis

Mr. Justice Marshall

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 Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: MAR 20 1975

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-822

Ernest Fry and Thelma Boehm, Petitioners, *v.* United States.	On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

[March —, 1975]

MR. JUSTICE POWELL, concurring in the judgment.

I am persuaded that principles of federalism impose some limits on direct congressional regulation of state government, but I do not think they have been exceeded in this case. In 1970 Congress enacted the Economic Stabilization Act as an emergency measure to counter severe inflation that threatened the national economy. H. R. Rep. No. 91-1330, 91st Cong., 2d Sess., at 9-11 (1970). The method it chose, under the Commerce Clause, was to give the President authority to freeze virtually all wages and prices, including the wages of state and local government employees. In 1971, when the freeze was activated, state and local government employees composed 14% of the Nation's work force. Brief for the United States, at 20. It seems inescapable that the effectiveness of federal action would have been drastically impaired if wage increases to this sizeable group of employees were left outside the reach of these emergency federal wage controls.

Although the issue is not free from doubt, I am willing to sustain the action of Congress under the circumstances of this case.

Wm Dougl
Oct 74

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 8, 1975

No. 73-822 Fry v. United States

Dear Thurgood:

In view of the changes made in your circulation of March 27, I am happy to withdraw my concurring opinion and join you.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 14, 1975

Re: No. 73-822 - Fry v. United States

Dear Thurgood:

I am substantially in accord with the sentiments Lewis expressed to you in his letter of January 14th; I cannot offer you the same assurance that a narrower rendition, on your part, would procure my vote, but I can't join the opinion in its present form and if no one else writes either a dissent or concurrence, I probably will. I will decide in the next few days and let you know.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 17, 1975

Re: Fry v. United States - No. 73-822

Dear Thurgood:

I will circulate a dissent in this case. I am sorry to have taken so long to fish or cut bait, and will do my best to get it out during the week after next.

Sincerely,

WHR

cc: The Conference

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

1st DRAFT

From: Rehnquist, J.

Circulated: 1/28/75

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 73-822

Ernest Fry and Thelma Boehm, Petitioners, *v.* United States. | On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

[February —, 1975]

MR. JUSTICE REHNQUIST, dissenting.

Mr. Chief Justice Chase in his opinion for the Court in *Texas* v. *White*, 7 Wall. 700, 725 (1868), declared that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." A little over a century later, there can be no doubt that we have an indestructible Union, but the Court's opinion in this case is the latest in a series of decisions which casts some doubt upon whether those States are indeed "indestructible."

Maryland v. *Wirtz*, 392 U. S. 183 (1968), held that Congress could impose the provisions of the Fair Labor Standards Act upon state entities, so as to regulate the maximum number of hours and minimum wages received by state employees of hospitals, institutions, and schools. The Court's opinion in this case not unreasonably relies on *Wirtz* in holding that Congress may impose across-the-board limitations on salary increases for all state employees. Petitioners' effort to distinguish *Wirtz* on the ground that the employees there regulated were performing primarily "proprietary" functions, is rejected on the authority of *United States* v. *California*, 297 U. S. 175 (1936). There the Court held that the State of California, in operating a railroad wholly within its own boundaries, was subject to the provisions of the Federal Safety Appliance Act.

Wm. Douglas
Oct 74

1-3-75

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-822

Ernest Fry and Thelma Boehm, Petitioners, *v.* United States.	On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

[February —, 1975]

MR. JUSTICE REHNQUIST, dissenting.

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Maryland v. *Wirtz*, 392 U. S. 183 (1968), held that Congress could impose the provisions of the Fair Labor Standards Act upon state entities, so as to regulate the maximum number of hours and minimum wages received by state employees of hospitals, institutions, and schools. The Court's opinion in this case not unreasonably relies on *Wirtz* in holding that Congress may impose across-the-board limitations on salary increases for all state employees. In their briefs and arguments to this Court, petitioners sought to distinguish *Wirtz* on the ground that the employees there regulated were performing primarily "proprietary" functions. Respondent countered this argument with language from *United States* v. *California*, 297 U. S. 175 (1936), a case which is not discussed by the Court but which was critical to the development of the doctrine which the Court today applies.