The Burger Court Opinion Writing Database

Westby v. Doe
420 U.S. 968 (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

March 13, 1975

Re: No. 74-684 - Westby v. Doe

Dear Bill:

I join in the proposed order remanding the case as per your letter of February 28, 1975.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 28, 1975

RE: No. 74-684 Westby v. Doe

Dear Bill:

I agree with the Order you have prepared in the above.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conferencd

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 28, 1975

Re: No. 74-684, Westby v. Doe

Dear Bill,

The order you propose is satisfactory to me. My only thought is whether we should be a bit more explicit--e.g. the addition of some phrase such as "for consideration of the statutory claim."

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 25, 1975

Re: No. 74-684 - Westby v. Doe

Dear Bill:

Please join me in your dissenting opinion. I am as distressed as you are that the Court chooses to depart from its normal appellate procedures in this case.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 28, 1975

Re: No. 74-684 - Westby v. Doe

Dear Bill:

Your suggested order is satisfactory.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 3, 1975

Re: No. 74-684 -- Westby v. Doe

Dear Bill:

I agree with your suggested order in this case.

Sincerely,

T. M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 28, 1975

Re: No. 74-684 - Westby v. Doe

Dear Bill:

The order you propose is satisfactory with me.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 27, 1975

No. 74-684 Westby v. Doe

MEMORANDUM TO THE CONFERENCE:

I am persuaded by Bill Rehnquist's dissent that the District Court should have addressed the statutory claim before considering the constitutional question. This is required by Hagans v. Lavine, 415 U.S. 528.

Accordingly, I would join in vacating the judgment and remanding the case to the District Court with instructions to consider appellee's statutory claim before reaching the constitutional issue.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 3, 1975

No. 74-684 Westby v. Doe

Dear Bill:

I agree with your suggested order in this case.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

FRITHJOF O. M. WESTBY, ETC., ET AL. *v.* JANE DOE, ETC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

No. 74-684. Decided February —, 1975

MR. JUSTICE REHNQUIST, dissenting.

The Court's summary affirmance of the District Court's judgment seems to me to be wrong for two independent reasons. The District Court was able to reach the constitutional question which it decided only by completely ignoring appellees' claim that the challenged South Dakota regulation conflicted with the cognate provisions of federal law establishing the Medicaid program. It thus decided a constitutional question which it might have avoided had it addressed the statutory claim first, a practice condemned in *Hagans* v. *Lavine*, 415 U. S. 528 (1974).

But if this Court insists on dealing with the merits of the constitutional question, contrary to its own teachings in *Hagans, supra,* I am at a loss to know how it may dispose of the question by a summary affirmance with no opinion. In *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), the Court held that Texas and Georgia abortion statutes unconstitutionally infringed upon the due process right of a woman to decide to abort her pregnancy. The District Court judgment which is affirmed today has read those decisions to mandate a "fundamental right to an elective abortion," 383 F. Supp. 1143, 1145 (SD 1974), *financed at public expense.*

I believe the holding of the District Court is both an unwarranted and ill conceived extension of *Wade* and *Bolton*

— 1, 5, 8

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

From: Rehnquist, J.

Circulated: _____

Recirculated: 3 FEB 1975

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

FRITHJOF O. M. WESTBY, ETC., ET AL. *v.* JANE DOE, ETC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

No. 74-684. Decided February —, 1975

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, dissenting.

The Court's summary affirmance of the District Court's judgment seems to me to be wrong for two independent reasons. The District Court was able to reach the constitutional question which it decided only by completely ignoring appellees' claim that the challenged South Dakota regulation conflicted with the cognate provisions of federal law establishing the Medicaid program. It thus decided a constitutional question which it might have avoided had it addressed the statutory claim first, a practice condemned in *Hagans* v. *Lavine*, 415 U. S. 528 (1974).

But if this Court insists on dealing with the merits of the constitutional question, contrary to its own teachings in *Hagans, supra*, I am at a loss to know how it may dispose of the question by a summary affirmance with no opinion. In *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), the Court held that Texas and Georgia abortion statutes unconstitutionally infringed upon the due process right of a woman with medical approval to decide to abort her pregnancy. The District Court judgment which is affirmed today has read those decisions to mandate a "fundamental right to an elective abortion," 383 F. Supp. 1143, 1145 (SD 1974), *financed at public expense*.

I believe the holding of the District Court is both an unwarranted and ill conceived extension of *Wade* and *Bolton*

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 28, 1975

Re: No. 74-684 - Westby v. Doe

Dear Chief:

In accordance with the Conference discussion today, I suggest the following order which, if approved by the Conference, would presumably appear on the March 17th Order List:

> "The judgment is vacated and the case is remanded to the United States District Court for the District of South Dakota for further consideration in light of Hagans v. Lavine, 415 U.S. 528, 543-545 (1974). Mr. Justice Douglas took no part in the consideration or decision of this appeal.

Sincerely,

WER

The Chief Justice

Copies to the Conference