

# The Burger Court Opinion Writing Database

*Abbott Laboratories v. Portland Retail Druggists Association*

425 U.S. 1 (1976)

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 8, 1976

Re: 74-1274 - Abbott Laboratories v. Portland Retail  
Druggists Association, Inc.

Dear Harry:

I join in your opinion of February 25, 1976.

Regards,



Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

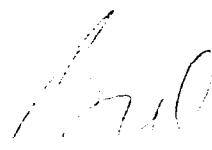
February 24, 1976

RE: No. 74-1274 Abbott Laboratories, et al. v. Portland  
Retail Druggists Association, et al.

Dear Potter:

Please join me in your dissenting opinion in the  
above.

Sincerely,



Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

February 23, 1976

Re: No. 74-1274, Abbott Laboratories v. Portland Retail  
Druggists Association, Inc.

Dear Harry,

As you know, it is my view that the judgment of the Court of Appeals should be affirmed in this case. Upon the assumption that neither you nor a majority of the Court would be willing to move the "line" back to that extent, I shall shortly circulate a very brief proposed dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

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

From: Mr. Justice Stewart

Circulated: FCB 2/3 N/b

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**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 74-1274

Abbott Laboratories et al.,  
 Petitioners, }  
 v. } On Writ of Certiorari to the  
 Portland Retail Druggists } United States Court of Ap-  
 Association, Inc., etc. } peals for the Ninth Circuit.

[March —, 1976]

MR. JUSTICE STEWART, dissenting.

It is common ground in this case that the dispensation of pharmaceutical products for consumption by a hospital's patients upon the hospital's premises constitutes the hospital's "own use" of the products within the meaning of 15 U. S. C. § 13c. The controversy concerns the various other "uses" of these products catalogued in the Court's opinion. *Ante*, pp. 6-7. As to those uses the Court of Appeals expressed its views as follows:

"We may concede that in these respects distribution by the hospitals can be justified as a proper and useful community service and thus can be regarded as a proper hospital function. It is not, however, the hospitals' 'own use.' . . . The purpose for which these supplies are purchased—the use to which they are to be put—is their consumption. Section 13c can apply here only to cases in which a hospital can be said to be the consumer. It cannot apply to cases of resale by the hospital to a private consumer.

"The hospitals here are (quite properly) accommodating patients, staff and strangers with means whereby they can conveniently purchase for *their* use. The question is not whether the hospitals can continue to provide this useful community service.

2

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 24, 1976

Re: No. 74-1274 - Abbott Laboratories v.  
Portland Retail Druggists Assn Inc.

Dear Harry:

I agree.

Sincerely,



Mr. Justice Blackmun

Copies to Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 24, 1976

Re: No. 74-1274 - Abbott Laboratories v.  
Portland Retail Druggists Assn Inc.

Dear Harry:

I agree.

Sincerely,



Mr. Justice Blackmun

Copies to Conference

Dear Harry -  
1. Re P18 - as to who takes Kovisk - 15 USC 131f makes  
it unlawful to receive a forbidden price discrimination.  
2. I have thought it ironic, if not foreboding, for the case  
to suggest construing the R-P Act, which restrains price  
competition, "strictly" in favor of competition. See P 9  
*Byron*

3/19/76

✓

No. 74-1274, Abbott Laboratories v. Portland Retail  
Druggists Ass'n

Mr. Justice Marshall, concurring.

While I join the Court's opinion, I wish to add a word about the applicability of the exemption provided by the Nonprofit Institutions Act. To my mind, the key to the Act is that it exempts from the Robinson-Patman Act not only an itemized list of institutions, but also all "charitable institutions not operated for profit." 15 U.S.C. § 13c. This suggests to me that the named institutions -- schools, colleges, universities, public libraries, churches and hospitals -- were not intended to be limited to their traditional activities in qualifying for the exemption, but may expand those activities and still qualify so long as any new activities for which exempted supplies are purchased are charitable and not operated for profit.

I agree with the Court that the exemption is not "to be applied and expanded automatically to whatever new venture the nonprofit hospital finds attractive in these changing days." Ante, at 11. But I believe the exemption is applicable to any new venture the hospital finds attractive and that is both charitable and not operated for profit. There is no suggestion -- nor could one be made -- that the activities the Court today finds outside the exemption fall within this category, <sup>\*/</sup> so there is no need

J  
MAR 22 1976

1st DRAFT

SUPREME COURT OF THE UNITED STATES

—  
No. 74-1274  
—

Abbott Laboratories et al.,  
Petitioners,  
v.  
Portland Retail Druggists  
Association, Inc., etc. } On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit.

[March 24, 1976]

MR. JUSTICE MARSHALL, concurring.

While I join the Court's opinion, I wish to add a word about the applicability of the exemption provided by the Nonprofit Institutions Act. To my mind, the key to the Act is that it exempts from the Robinson-Patman Act not only an itemized list of institutions, but also all "charitable institutions not operated for profit." 15 U. S. C. § 13c. This suggests to me that the named institutions—schools, colleges, universities, public libraries, churches, and hospitals—were not intended to be limited to their traditional activities in qualifying for the exemption, but may expand those activities and still qualify so long as any new activities for which exempted supplies are purchased are charitable and not operated for profit.

I agree with the Court that the exemption is not "to be applied and expanded automatically to whatever new venture the nonprofit hospital finds attractive in these changing days." *Ante*, at 11. But I believe the exemption is applicable to any new venture the hospital finds attractive and that is both charitable and not operated for profit. There is no suggestion—nor could one be made—that the activities the Court today finds outside the exemption fall within this category,\* so there is no

\*This case would be much more difficult for me if the hospitals.

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 20, 1976

MEMORANDUM TO THE CONFERENCE:

Re: No. 74-1274 - Abbott Laboratories, et al. v. Portland  
Retail Druggists Association, Inc.

My notes indicate that at the Conference, despite initial suggestions by each side in favor of an absolute position, most of us agreed that this case involved line drawing. At that time we did not seem to be in complete agreement as to where the line was to be drawn; nearly all of us cautioned that views then expressed were tentative.

The proposed opinion I am circulating today does indulge in the drawing of a line. I have drawn it as best I can in the light of such assistance as the briefs afford and in the light of such knowledge and awareness I possess with respect to hospital operations. You may or may not agree with me as to where I have drawn the line.

I suspect that this is one of those cases where agreement is important and where the precise placement of the line is perhaps secondary. I would hope that we shall have a working, and not a bare, majority for whatever we do and that the votes are not fractionated on details. What I am saying is that if a majority feels the line I have drawn should be moved somewhat ahead or back, I am willing to reconsider my position in order to have as much agreement among us as possible.



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

From: Mr. Justice Blackmun

Circulated: 2/20/76

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1274

Abbott Laboratories et al.,  
Petitioners, }  
v. } On Writ of Certiorari to the  
Portland Retail Druggists Association, Inc., etc. } United States Court of Appeals for the Ninth Circuit.

[February —, 1976]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Robinson-Patman Price Discrimination Act (Robinson-Patman), adopted in 1936, 49 Stat. 1526, in general makes it unlawful for one engaged in commerce to discriminate in price between different purchasers of like commodities where, among other things, "the effect of such discrimination may be substantially to lessen competition." 15 U. S. C. § 13 (a). The Nonprofit Institutions Act, adopted only two years later, in 1938, 52 Stat. 446, exempts from the application of Robinson-Patman "purchases of their supplies for their own use by schools . . . hospitals, and charitable institutions not operated for profit." 15 U. S. C. § 13c.<sup>1</sup>

This case concerns nonprofit hospitals' purchases of products at favored prices from pharmaceutical companies. The issue is the proper construction of the

<sup>1</sup> 15 U. S. C. § 13c.

"Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

✓  
3, 13, 16, 17  
pp.

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

From: Mr. Justice Blackmun

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

Recirculated: 2/20/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1274

Abbott Laboratories et al.,  
Petitioners, }  
v. } On Writ of Certiorari to the  
Portland Retail Druggists Association, Inc., etc. } United States Court of Appeals for the Ninth Circuit.

[February —, 1976]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Robinson-Patman Price Discrimination Act (Robinson-Patman), adopted in 1936, 49 Stat. 1526, in general makes it unlawful for one engaged in commerce to discriminate in price between different purchasers of like commodities where, among other things, "the effect of such discrimination may be substantially to lessen competition." 15 U. S. C. § 13 (a). The Nonprofit Institutions Act, adopted only two years later, in 1938, 52 Stat. 446, exempts from the application of Robinson-Patman "purchases of their supplies for their own use by schools . . . hospitals, and charitable institutions not operated for profit." 15 U. S. C. § 13c.<sup>1</sup>

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"Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

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

From: Mr. Justice Blackmun

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

Recirculated: 2/25/76

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 74-1274

Abbott Laboratories et al.,  
Petitioners,  
*v.*  
Portland Retail Druggists  
Association, Inc., etc. } On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit.

[February 1, 1976]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Robinson-Patman Price Discrimination Act (Robinson-Patman), adopted in 1936, 49 Stat. 1526, in general makes it unlawful for one engaged in commerce to discriminate in price between different purchasers of like commodities where, among other things, "the effect of such discrimination may be substantially to lessen competition." 15 U. S. C. § 13 (a). The Nonprofit Institutions Act, adopted only two years later, in 1938, 52 Stat. 446, exempts from the application of Robinson-Patman "purchases of their supplies for their own use by schools . . . hospitals, and charitable institutions not operated for profit." 15 U. S. C. § 13c.<sup>1</sup>

This case concerns nonprofit hospitals' purchases of products at favored prices from pharmaceutical companies. The issue is the proper construction of the

<sup>1</sup> 15 U. S. C. § 13c.

"Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 26, 1976

No. 74-1274 Abbott Laboratories v. Portland  
Retail Druggists

Dear Harry:

Please join me.

Sincerely,

L Lewis

Mr. Justice Blackmun

1fp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 15, 1976

Re: No. 74-1274 - Abbott Laboratories v. Portland  
Retail Druggists Ass'n

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference