

# The Burger Court Opinion Writing Database

## *New Orleans v. Dukes*

427 U.S. 297 (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 4, 1976

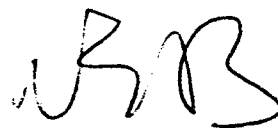
Re: 74-775 - City of New Orleans v. Dukes

Dear Bill:

I am generally with you, but I cannot join  
saying that alienage is a "suspect classification".  
I can no longer go along with these "litmus" words.

In short, I can easily be "had".

Regards,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

April 14, 1976

PERSONAL

Re: 74-775 - City of New Orleans v. Dukes

Dear Bill:

To get this case moving I now circulate a proposed concurring opinion to get the case into focus. If this gets some motion from the Brethren, I will cheerfully withdraw it.

Regards,

WSB B

Mr. Justice Brennan

WB

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

CHAMBERS OF  
THE CHIEF JUSTICE

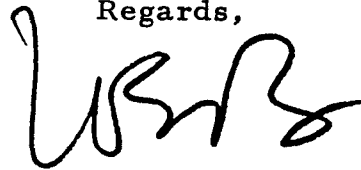
April 14, 1976

Re: 74-775 - City of New Orleans v. Duke

MEMORANDUM TO THE CONFERENCE:

I enclose a proposed concurring opinion in the  
above case.

Regards,



To: Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall ✓  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: The Chief Justice

Circulated: APR 14 1976

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

Re: 74-775 - City of New Orleans v. Duke

MR. CHIEF JUSTICE BURGER, concurring.

I join the (proposed) opinion of the Court overruling Morey v. Doud, supra, essentially because I believe that case was wrongly decided for the reasons expressed at the time by Justices Black, Frankfurter and Harlan. The political branches of government must have wide scope in regulating commercial activity, and whether the choices made by the city government here are wise and sound, or the contrary, it is not the function of judges to reassess them on the basis of the Equal Protection Clause.

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

CHAMBERS OF  
THE CHIEF JUSTICE

April 15, 1976

Re: 74-775 - City of New Orleans v. Dukes

Dear Bill:

On further reflection I think I will withdraw  
my concurring opinion and concur in the judgment. I  
have other problems with the opinion itself but prefer  
not to add to the literature with more writing.

Regards,

*WSB*

Mr. Justice Brennan

Copies to the Conference

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

✓

CHAMBERS OF  
THE CHIEF JUSTICE

June 16, 1976

Re: 74-775 - New Orleans v. Dukes

Dear Bill:

I join your opinion as modified. If you can "swallow"  
it, why not sign as originally?

Regards,

WRB

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Bhiquist  
 Mr. Justice Stevens

Mr. Justice Brennan

circulated: 1/27/76

recirculated: \_\_\_\_\_

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-775

City of New Orleans et al.,	} On Appeal from the United
Appellants,	
v.	
Nancy Dukes, dba Louisi-	
ana Concessions.	States Court of Appeals for the Fifth Circuit.

[January —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether the provision of a New Orleans ordinance, as amended in 1972, that excepts from the ordinance's prohibition against vendors' selling of foodstuffs from pushcarts in the Vieux Carre, or French Quarter, "vendors who have continually operated the same business within the Vieux Carre . . . for eight years prior to January 1, 1972 . . ." denied appellee vendor equal protection of the laws in violation of the Fourteenth Amendment.<sup>1</sup>

Appellee operates a vending business from pushcarts throughout New Orleans but had carried on that business in the Vieux Carre for only two years when the ordinance was amended in 1972 and barred her from

<sup>1</sup> The pertinent provision of the New Orleans ordinance, c. 46, §§ 1 and 1.1 of the Code of the City of New Orleans, as amended August 31, 1972, provides:

"Vendors who have continuously operated the same business within the Vieux Carre under the authority of this Chapter for eight or more years prior to January 1, 1972 may obtain a valid permit to operate such business within the Vieux Carre."



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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 16, 1976

MEMORANDUM TO THE CONFERENCE

RE: No. 74-775 New Orleans v. Nancy Dukes

If Lewis' proposed per curiam in Murgia is acceptable without any writing expressing views with which I'd have to differ, perhaps Dukes can be the subject of a like "bare-bones" per curiam disposition. I think that could be accomplished by the following changes in my circulated draft (can't get to the printer with this earlier than some time next week).

Page 1. Change "Mr. Justice Brennan delivered the opinion of the Court" to "Per Curiam."

Page 4. Delete from carryover paragraph the last sentence reading "The court also expressed the view that alternative measures such as regulation of the location or appearance of push-carts would be rational, given the city's purported objectives in enacting the ordinance." ✓

Page 6. Change the sentence after the citation of Lehnhausen to read "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

Page 7. Delete the citation of Murgia in line eight. Change opening sentence in paragraph starting at bottom of page to read: "The Court of Appeals held in this case, however, that the "grandfather provision" failed even the rationality test. We disagree.

- 2 -

The City's classification rationally furthers the purpose which the Court of Appeals recognized the city had identified as its objective in enacting the provision, that is, as a means "to preserve the appearance and custom valued by the Quarter's residents."

Page 8. Delete the third sentence of the first full paragraph reading, "It was suggested on oral argument that the city will probably ultimately eliminate even the two vendors that qualified under the "grandfather provision."

Pages 9 and 10. Delete the paragraph starting at page 9 with "Appellee contends that" and ending at page 10 with "modification of the city's permit scheme." Also delete footnote 6 at page 10.

Page 11. Delete from first line beginning "Since the city has not imposed" through "and when they occur" in line 16 of that page. Also delete footnote 7.

W.J.B. Jr.

WSE  
 "The City of New Orleans et al. v. Nancy Dukes, dba Louisiana Concessions."  
 1. The City of New Orleans et al. v. Nancy Dukes, dba Louisiana Concessions.

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

6/21/76

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-775

City of New Orleans et al.,	} On Appeal from the United States Court of Appeals for the Fifth Circuit.
Appellants,	
v.	
Nancy Dukes, dba Louisiana Concessions.	

[January —, 1976]

PER CURIAM.

The question presented by this case is whether the provision of a New Orleans ordinance, as amended in 1972, that excepts from the ordinance's prohibition against vendors' selling of foodstuffs from pushcarts in the Vieux Carre, or French Quarter, "vendors who have continually operated the same business within the Vieux Carre . . . for eight years prior to January 1, 1972 . . ." denied appellee vendor equal protection of the laws in violation of the Fourteenth Amendment.<sup>1</sup>

Appellee operates a vending business from pushcarts throughout New Orleans but had carried on that business in the Vieux Carre for only two years when the ordinance was amended in 1972 and barred her from

<sup>1</sup> The pertinent provision of the New Orleans ordinance, c. 46, §§ 1 and 1.1 of the Code of the City of New Orleans, as amended August 31, 1972, provides:

"Vendors who have continuously operated the same business within the Vieux Carre under the authority of this Chapter for eight or more years prior to January 1, 1972 may obtain a valid permit to operate such business within the Vieux Carre."

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

✓

CHAMBERS OF  
JUSTICE POTTER STEWART

June 16, 1976

No. 74-775 - New Orleans v. Dukes

Dear Bill,

Would you be willing to substitute the phrase "was erroneous" for the last five words in the third line from the bottom of the text on page 11? If this minor change is made, I shall gladly join your proposed revised opinion with no separate writing.

I should think that this should continue to be a signed opinion. This was an argued case, assigned to you for an opinion, and Lord knows you have worked on it. While relatively short, it is of considerable importance in that it squarely overrules Morey v. Doud.

Sincerely yours,

P. S.  
1.  
/

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 28, 1976

Re: No. 74-775 - City of New Orleans v. Dukes

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20540

ON BEHALF OF

Jo

Re: No. 74-775 - New Orleans v. D.

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

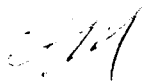
June 21, 1976

Re: No. 74-775 -- City of New Orleans v. Nancy Dukes

Dear Bill:

Please add to your Per Curiam, "Mr. Justice Marshall joins in the judgment."

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 17, 1976

Re: No. 74-775 - City of New Orleans v. Dukes

Dear Bill:

This is to let you know that I shall join the anticipated truncated per curiam opinion.

Sincerely,



Mr. Justice Brennan

cc: The Conference



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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 17, 1976

No. 74-775 City of New Orleans v. Dukes

Dear Bill:

I'll join, unhappily, the "neutered" version of  
Murgia's twin.

Sincerely,

*Lewis*

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

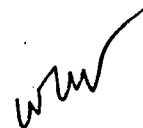
June 16, 1976

Re: No. 74-775 - New Orleans v. Dukes

Dear Bill:

Please join me in your revised circulation. I agree with Potter and the Chief that it should be a signed opinion unless you prefer otherwise.

Sincerely,



Mr. Justice Brennan

Copies to the Conference