

The Burger Court Opinion Writing Database

Poelker v. Doe

432 U.S. 519 (1977)

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

November 21, 1975

Re: No. 75-442 - Poelker v. Doe

Dear Byron:

Please show me as joining your dissent.

Regards,

W2-B

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

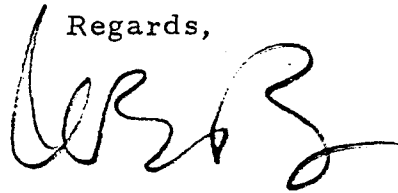
December 3, 1975

Re: 75-442 - Poelker v. Doe

Dear Byron:

I join your proposed December 1 circulating
per curiam opinion.

Regards,

A handwritten signature in dark ink, appearing to be 'WR', written in a cursive, stylized manner.

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

✓

December 2, 1975

Re: No. 75-442, Poelker v. Doe

Dear Byron,

I agree with the Per Curiam you have circulated
in this case.

Sincerely yours,

P.S.

Mr. Justice White

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

This draft, Part I,
presents strongly
the view that E/P does
not require free abortions.

From: White, J.

Circulated: 11-18-75

Recirculated:

Part II would reverse
CA 8's odd performance
on Atty's fees. I agree in this.

SUPREME COURT OF THE UNITED STATES

JOHN H. POELKER, ETC., ET AL. v. JANE DOE, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-442. Decided November —, 1975

MR. JUSTICE WHITE, dissenting:

The court below held unconstitutional a city policy against the use of city hospitals for the performance of elective abortions. The question whether a state instrumentality may limit use of state subsidized hospitals or state funds to the performance of medical operations other than abortions has arisen repeatedly in the federal courts since this Court's decisions in *Roe v. Wade*, 410 U. S. 113, and *Doe v. Bolton*, 410 U. S. 179;¹ it would be an understatement to say that it is a question of considerable importance to the public; and the result below seems a considerable extension of this Court's prior decisions. Accordingly, I believe the Court should grant the petition for a writ of certiorari and set the case for oral argument.

The facts in this case are simple. The city of St. Louis, largely through its mayor who is the petitioner here, has adopted a policy against using either of the two city-owned hospitals in St. Louis for the perform-

¹ See *Nyberg v. City of Virginia*, 495 F. 2d 1342 (CA8 1974); *Doe v. Hale Hospital*, 500 F. 2d 144 (CA1 1974); *Greco v. Orange County Memorial Hospital Corp.*, 513 F. 2d 873 (CA5 1975), and *Doe v. Rose*, 499 F. 2d 1112 (CA10 1974); *Wulff v. Singleton*, 508 F. 2d 1211 (CA8 1974); *Doe v. Poelker*, 515 F. 2d 541 (CA8 1975); *Doe v. Mundy*, 514 F. 2d 1179 (CA7 1975); *Roe v. Horton*, 380 F. Supp. 726 (Conn. 1974); *Doe v. Wohlgenuth*, 376 F. Supp. 173 (WD Pa. 1974); *Doe v. Ramptor*, 366 F. Supp. 189 (Utah 1973); *Klein v. Nassau Co. Medical Center*, 347 F. Supp. 496 (EDNY 1972); *Doe v. Westby*, 383 F. Supp. 1143 (WDSD 1974), vacated 420 U. S. 968 (1975).

Renewed
LTP

I'll not
join

(I'd still
deny)

11/20

(But see
PC of 12/1
that I joined)

Factor

But see
Byron's
P.C. of
12/1/75
limited
to Atty's fees
- which I
did join.

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: 12-1-75

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

JOHN H. POELKER, ETC., ET AL. v. JANE DOE, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-442. Decided December —, 1975

PER CURIAM.

The court below held unconstitutional a policy of the city of St. Louis against the use of city hospitals for the performance of elective abortions. In addition, it awarded attorney's fees against the petitioner, mayor of St. Louis, on the ground that his policy was pursued in bad faith. We grant certiorari, limited to the question whether attorney's fees were properly awarded, and vacate the judgment of the Court of Appeals.

The facts in this case are simple. The city of St. Louis, largely through its mayor who is the petitioner here, has adopted a policy against using either of the two city-owned hospitals in St. Louis for the performance of elective abortions. As a result of this policy,* respondent Doe was refused an abortion in a city hospital. She obtained one, however, at a private clinic shortly after the complaint in this case was filed. The District Court found nothing unconstitutional in the city's choice to subsidize operations other than abortions without also subsidizing abortions. However, the Court of Appeals for the Eighth Circuit reversed, reasoning that since the city had made its publicly funded hospital available for other operations,

*Petitioner argues that respondent's inability to obtain an abortion in the City Hospital resulted not from the city's policy but from the fact that the doctors approached had personal scruples against performing abortions. The conclusion of the Eighth Circuit Court of Appeals was to the contrary.

Reviewed
L. F. P.
12/1
John

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

HAB

pp 6, 7

From: White, J.

Circulated: _____

Recirculated: 12-3-75

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

JOHN H. POELKER, ETC., ET AL. v. JANE DOE, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-442. Decided November —, 1975

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

The court below held unconstitutional a city policy against the use of city hospitals for the performance of elective abortions. The question whether a state instrumentality may limit use of state subsidized hospitals or state funds to the performance of medical operations other than abortions has arisen repeatedly in the federal courts since this Court's decisions in *Roe v. Wade*, 410 U. S. 113, and *Doe v. Bolton*, 410 U. S. 179;¹ it would be an understatement to say that it is a question of considerable importance to the public; and the result below seems a considerable extension of this Court's prior decisions. Accordingly, I believe the Court should grant the petition for a writ of certiorari and set the case for oral argument.

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¹See *Nyberg v. City of Virginia*, 495 F. 2d 1342 (CA8 1974); *Doe v. Hale Hospital*, 500 F. 2d 144 (CA1 1974); *Greco v. Orange County Memorial Hospital Corp.*, 513 F. 2d 873 (CA5 1975), and *Doe v. Rose*, 499 F. 2d 1112 (CA10 1974); *Wulff v. Singleton*, 508 F. 2d 1211 (CA8 1974); *Doe v. Poelker*, 515 F. 2d 541 (CA8 1975); *Doe v. Mundy*, 514 F. 2d 1179 (CA7 1975); *Roe v. Horton*, 380 F. Supp. 726 (Conn. 1974); *Doe v. Wohlgemuth*, 376 F. Supp. 173 (WD Pa. 1974); *Doe v. Ramptor*, 366 F. Supp. 189 (Utah 1973); *Klein v. Nassau Co. Medical Center*, 347 F. Supp. 496 (EDNY 1972); *Doe v. Westby*, 383 F. Supp. 1143 (WDSD 1974), vacated 420 U. S. 968 (1975).

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: _____

Recirculated: 12-8-75

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

JOHN H. POELKER, ETC., ET AL. v. JANE DOE, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-442. Decided December —, 1975

PER CURIAM.

The court below held unconstitutional a policy of the city of St. Louis against the use of city hospitals for the performance of elective abortions. In addition, it awarded attorney's fees against the petitioner, mayor of St. Louis, on the ground that, in defending this policy in the courts below, the mayor had been in bad faith. We grant certiorari, limited to the question whether attorney's fees were properly awarded, and vacate the judgment of the Court of Appeals.

The facts in this case are simple. The city of St. Louis, largely through its mayor who is the petitioner here, has adopted a policy against using either of the two city-owned hospitals in St. Louis for the performance of elective abortions. As a result of this policy,* respondent Doe was refused an abortion in a city hospital. She obtained one, however, at a private clinic shortly after the complaint in this case was filed. The District Court found nothing unconstitutional in the city's choice to subsidize operations other than abortions without also subsidizing abortions. However, the Court of Appeals for the Eighth Circuit reversed, reasoning that since the city had made its publicly funded hospital available for other operations,

*Petitioner argues that respondent's inability to obtain an abortion in the City Hospital resulted not from the city's policy but from the fact that the doctors approached had personal scruples against performing abortions. The conclusion of the Eighth Circuit Court of Appeals was to the contrary.

pp 1, 5-7

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: _____

4th DRAFT

Recirculated: 12-9-75

SUPREME COURT OF THE UNITED STATES

JOHN H. POELKER, ETC., ET AL. v. JANE DOE, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-442. Decided November —, 1975

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

The court below held unconstitutional a city policy against the use of city hospitals for the performance of elective abortions. The question whether a state instrumentality may limit use of state subsidized hospitals or state funds to the performance of medical operations other than abortions has arisen repeatedly in the federal courts since this Court's decisions in *Roe v. Wade*, 410 U. S. 113, and *Doe v. Bolton*, 410 U. S. 179;¹ it would be an understatement to say that it is a question of considerable importance to the public; and the result below seems a considerable extension of this Court's prior decisions. Accordingly, I believe the Court should grant the petition for a writ of certiorari and set the case for oral argument.

The facts in this case are simple. The city of St.

¹ See *Nyberg v. City of Virginia*, 495 F. 2d 1342 (CA8 1974); *Doe v. Hale Hospital*, 500 F. 2d 144 (CA1 1974); *Greco v. Orange County Memorial Hospital Corp.*, 513 F. 2d 873 (CA5 1975), and *Doe v. Rose*, 499 F. 2d 1112 (CA10 1974); *Wulff v. Singleton*, 508 F. 2d 1211 (CA8 1974); *Doe v. Poelker*, 515 F. 2d 541 (CA8 1975); *Doe v. Mundy*, 514 F. 2d 1179 (CA7 1975); *Roe v. Norton*, 380 F. Supp. 726 (Conn. 1974); *Doe v. Wohlgemuth*, 376 F. Supp. 173 (WD Pa. 1974); *Doe v. Ramptor*, 366 F. Supp. 189 (Utah 1973); *Klein v. Nassau Co. Medical Center*, 347 F. Supp. 496 (EDNY 1972); *Doe v. Westby*, 383 F. Supp. 1143 (WDSO 1974), vacated 420 U. S. 968 (1975); *Franklin v. Beal*, — F. Supp. —, Civ. 74-2440 (ED Pa. Sept. 4, 1975) (3-Judge Court), appeal docketed No. 75-709.

To: The Chief Justice HH
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: _____

Recirculated: 12-17-75

5th DRAFT

SUPREME COURT OF THE UNITED STATES

JOHN H. POELKER, ETC., ET AL. v. JANE DOE, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-442. Decided November —, 1975

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE
joins, dissenting.

The court below held unconstitutional a city policy
against the use of city hospitals for the performance of
elective abortions. The question whether a state instru-
mentality may limit use of state subsidized hospitals or
state funds to the performance of medical operations
other than abortions has arisen repeatedly in the federal
courts since this Court's decisions in *Roe v. Wade*, 410
U. S. 113, and *Doe v. Bolton*, 410 U. S. 179;¹ it would
be an understatement to say that it is a question of
considerable importance to the public; and the result
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prior decisions. Accordingly, I believe the Court should
grant the petition for a writ of certiorari and set the case
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The facts in this case are simple. The city of St.

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Doe v. Hale Hospital, 500 F. 2d 144 (CA1 1974); *Greco v. Orange
County Memorial Hospital Corp.*, 513 F. 2d 873 (CA5 1975), and
Doe v. Rose, 499 F. 2d 1112 (CA10 1974); *Wulff v. Singleton*, 508
F. 2d 1211 (CA8 1974); *Doe v. Poelker*, 515 F. 2d 541 (CA8
1975); *Doe v. Mundy*, 514 F. 2d 1179 (CA7 1975); *Roe v. Norton*,
380 F. Supp. 726 (Conn. 1974); *Doe v. Wohlgemuth*, 376 F. Supp.
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1973); *Klein v. Nassau Co. Medical Center*, 347 F. Supp. 496
(EDNY 1972); *Doe v. Westby*, 383 F. Supp. 1143 (WDSD 1974),
vacated 420 U. S. 968 (1975); *Franklin v. Beal*, — F. Supp. —,
Civ. 74-2440 (ED Pa. Sept. 4, 1975) (3-Judge Court), appeal
docketed No. 75-709.

p. 2

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

From: Mr. Justice White

Circulated: _____

Recirculated: 1-21-76

5th DRAFT

SUPREME COURT OF THE UNITED STATES

JOHN H. POELKER, ETC., ET AL. v. JANE DOE, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-442. Decided December —, 1975

PER CURIAM.

The court below held unconstitutional a policy of the city of St. Louis against the use of city hospitals for the performance of elective abortions. In addition, it awarded attorney's fees against the petitioner, mayor of St. Louis, on the ground that, in defending this policy in the courts below, the mayor had been in bad faith. We grant certiorari, limited to the question whether attorney's fees were properly awarded, and vacate the judgment of the Court of Appeals.

The facts in this case are simple. The city of St. Louis, largely through its mayor who is the petitioner here, has adopted a policy against using either of the two city-owned hospitals in St. Louis for the performance of elective abortions. As a result of this policy,¹ respondent Doe was refused an abortion in a city hospital. She obtained one, however, at a private clinic shortly after the complaint in this case was filed. The District Court found nothing unconstitutional in the city's choice to subsidize operations other than abortions without also subsidizing abortions. However, the Court of Appeals for the Eighth Circuit reversed, reasoning that since the city had made its publicly funded hospitals available for other operations,

¹ Petitioner argues that respondent's inability to obtain an abortion in the City Hospital resulted not from the city's policy but from the fact that the doctors approached had personal scruples against performing abortions. The conclusion of the Eighth Circuit Court of Appeals was to the contrary.

STYLISTIC CHANGES THROUGHOUT

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

From: Mr. Justice Marshall

Circulated: _____

Recirculated: JAN 13 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

JOHN H. POELKER, ETC., ET AL. v. JANE DOE, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-442. Decided January —, 1976

MR. JUSTICE MARSHALL, concurring.

I join the Court's *per curiam* opinion on the understanding that it does no more than hold that, on the facts of this case, the Court of Appeals erred in awarding attorney's fees. Despite the long history of the "bad faith" exception to the American rule against awarding attorney's fees, the standards governing the application of the exception have not been fully developed in the case law. I write separately to emphasize that the Court today does not imply resolution of far-reaching questions relating to those standards in the absence of full briefing and oral argument.

In *Alyeska Pipeline Co. v. Wilderness Society*, 421 U. S. 240 (1975), the Court noted that attorney's fees may properly be awarded "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .'" *Id.*, at 258-259, quoting *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U. S. 116, 129 (1974). The Court added that this exception to the American rule is unquestionably an assertion "of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, . . ." 421 U. S., at 259. While this equitable power of the federal courts to award attorney's fees is well settled, see the extensive analysis in *Guardian Trust Co. v. Kansas City Southern R. Co.*, 28 F. 2d 233 (CA8 1928), rev'd on other grounds, 281 U. S. (1930), few courts have addressed the questions relating to its implementation that lurk behind this case.

✓

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 2, 1975

Re: No. 75-442 - Poelker v. Doe

Dear Byron:

Please join me in your proposed per curiam
circulated December 1.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 19, 1976

Re: No. 75-442 - Poelker v. Doe

Dear Byron:

The Eighth Circuit opinions routinely come across my desk. I endeavor at least to skim them.

I was at first startled, and then somewhat amused, that there is further activity on the fee issue. The enclosed per curiam, filed January 5, concerns attorneys' fees at the district court level. Fees of \$9317.50 now appear to be upheld.

I send the opinion along to you. I do not know whether it is worth at least a footnote reference in the pending per curiam.

Sincerely,



Mr. Justice White

cc: The Conference

December 1, 1975

No. 75-442 Poelker v. Doe

Dear Byron:

Please join me in your Per Curiam,

Sincerely,

*of this
Date.*

Mr. Justice White

lfp/ss

cc: The Conference

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

✓

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 2, 1975

Re: No. 75-442 - Poelker v. Doe

Dear Byron:

Please join me.

Sincerely,

WRM

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 22, 1976

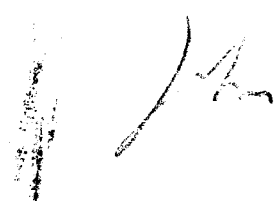
RE: John H. Poelker, etc., et al v.
Jane Doe, etc., 75-442

Dear Byron:

Please join me in your proposed Per Curiam.

With respect to the subject matter of your
dissenting opinion, I vote to deny certiorari.

Respectfully,



Mr. Justice White

Copies to the Conference