

The Burger Court Opinion Writing Database

Hughes v. Oklahoma

441 U.S. 322 (1979)

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

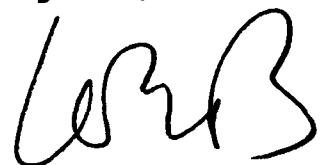
April 19, 1979

Re: 77-1439 - Hughes v. Oklahoma

Dear Bill:

I join your dissent.

Regards,



Mr. Justice Rehnquist

Copies to the Conference

WJB
Please send me
AM

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

From: Mr. Justice Brennan

Circulated: 8 MAR 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1439

William Riley Hughes, Appellant, | On Appeal from the Court
v. | of Criminal Appeals of
State of Oklahoma. | Oklahoma.

[March —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented for decision is whether Okla. Stat., Tit. 29, § 4-115 (B) (Supp. 1978) violates the Commerce Clause, Art. I, § 8, cl. 3, of the United States Constitution, insofar as it provides that "No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state. . . ." ¹

¹ Section 4-115 provides in full:

"A. No person may ship or transport minnows for sale into this state from an outside source without having first procured a license for such from the Director.

"B. No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

"1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;

"2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery.

"C. The fee for a license under this section shall be:

"1. For residents, One Hundred Dollars (\$100.00);

"2. For nonresidents, Three Hundred Dollars (\$300.00).

"D. Any person convicted of violating any provisions of this section shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than Two Hundred Dollars (\$200.00)."

The prohibition against transportation out of State for sale thus does not apply to hatchery-bred minnows, but only to "natural" minnows seined or procured from waters within the State.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 9, 1979

RE: No. 77-1439 Hughes v. Oklahoma

Dear Harry:

The oversight leaves me a bit red faced. In the next circulation Baldwin will be cited at an appropriate place. I have reference particularly to the first two sentences of the paragraph beginning at the bottom of 436 U.S. 385. Thanks so very much.

Sincerely,

W. Blackmun

Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 12, 1979

Hughes v. Oklahoma, No. 77-1439

MEMORANDUM TO THE CONFERENCE

I am sending to the printer the following additions to the Court opinion in this case:

Add to fn. 6:

My Brother Rehnquist suggests that the Court in Geer offered as an "alternative basis for its decision" (in the final paragraph of its 15 page opinion) that the "State, in exercise of its police power, could act to preserve for its people a valuable food supply, even though interstate commerce was remotely and indirectly affected." Post, at 2 n.3. That this was not an "alternative basis", however, is made clear a sentence not quoted by my Brother Rehnquist:

The power of a State to protect by adequate police regulation its people against the adulteration of articles of food, . . . although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the State, which only become the subject of ownership in a qualified way and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good.

161 U.S. at 535 (emphasis added). Thus, rather than an "alternative basis" independent of the "state ownership" and "no interstate commerce" rationales, this "preservation of valuable resource" rationale was premised on those rationales. In any event, even if an "alternative basis," this rationale has met the same fate as Geer's primary rationale. See infra, at 6-8 & n.9.

Hughes v. Oklahoma, No. 77-1439.

Add to fn. 9 on p. 8:

Significantly, my Brother Rehnquist relies on this dissent in his discussion of the "alternative basis" of Geer--the "preservation of a valuable natural resource" rationale. See n. 6, supra; Post, at 2 n.3. The Court opinion in Pennsylvania v. West Virginia, as that in West, expressly rejected this argument along with the "no interstate commerce" rationale. Id., at 599-600.

WJB Jr.

P. 12 & Lns. renumbered

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 13 MAR 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1439

William Riley Hughes, Appellant, | On Appeal from the Court
v. | of Criminal Appeals of
State of Oklahoma. | Oklahoma.

[March —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented for decision is whether Okla. Stat., Tit. 29, § 4-115 (B) (Supp. 1978) violates the Commerce Clause, Art. I, § 8, cl. 3, of the United States Constitution, insofar as it provides that "No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state. . . ." ¹

¹ Section 4-115 provides in full:

"A. No person may ship or transport minnows for sale into this state from an outside source without having first procured a license for such from the Director.

"B. No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

"1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;

"2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery.

"C. The fee for a license under this section shall be:

"1. For residents, One Hundred Dollars (\$100.00);

"2. For nonresidents, Three Hundred Dollars (\$300.00).

"D. Any person convicted of violating any provisions of this section shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than Two Hundred Dollars (\$200.00)."

The prohibition against transportation out of State for sale thus does not apply to hatchery-bred minnows, but only to "natural" minnows seined or procured from waters within the State.

pp 6, 8 & Stylistic changes

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 16 APR

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1439

William Riley Hughes, Appellant, | On Appeal from the Court
v. | of Criminal Appeals of
State of Oklahoma. | Oklahoma.

[March —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented for decision is whether Okla. Stat., Tit. 29, § 4-115 (B) (Supp. 1978) violates the Commerce Clause, Art. I, § 8, cl. 3, of the United States Constitution, insofar as it provides that "No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state . . ."¹

¹ Section 4-115 provides in full:

"A. No person may ship or transport minnows for sale into this state from an outside source without having first procured a license for such from the Director.

"B. No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

"1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;

"2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery.

"C. The fee for a license under this section shall be:

"1. For residents, One Hundred Dollars (\$100.00);

"2. For nonresidents, Three Hundred Dollars (\$300.00).

"D. Any person convicted of violating any provisions of this section shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than Two Hundred Dollars (\$200.00)."

The prohibition against transportation out of State for sale thus does not apply to hatchery-bred minnows, but only to "natural" minnows seined or procured from waters within the State.

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 2, 1979

MEMORANDUM TO THE CONFERENCE

Case Held for Hughes v. Oklahoma, No 77-1439.

One case has been held for Hughes: Reeves, Inc. v. Kelly, No. 78-1194. The question presented is whether the State of South Dakota, which owns and operates a cement plant, and which has for many years sold substantial amounts of its product in interstate commerce, violates the Commerce Clause by preferring to sell its cement first to South Dakota consumers before making sales available to non-residents of South Dakota. The suit was brought when a severe shortage of cement in the region in 1978 led the State Cement Commission, which controls the State's plant, to cut off shipments to petitioner, a Wyoming concrete manufacturer that had depended entirely on the South Dakota State plant for 20 years, and other non-resident customers.

The State Commission relied below on Geer and on Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), emphasizing that the State "owned" the cement plant and could sell to whomever it pleased. Nevertheless, the USDC for the District of South Dakota, relying on the Commerce Clause, enjoined the Cement Commission from refusing to sell to petitioner solely because petitioner was a non-resident. The opinion of the District Court paraphrased the passage from West v. Kansas Natural Gas Co. which is quoted and reaffirmed in Hughes v. Oklahoma, at 7-8. The Eighth Circuit reversed, finding that the state's ownership of the cement plant made traditional Commerce Clause analysis inapplicable.

Petitioner argues forcefully that South Dakota's actions are inconsistent with the broad principles enunciated in West v. Kansas Natural Gas Co., and reaffirmed in Hughes v. Oklahoma. He warns of the following consequences of the ruling below:

"A state with great reserves in natural gas or petroleum could create a state commission for acquiring, exploring, drilling, refining and marketing of the same. It could

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 9, 1979

Re: 77-1439 - Hughes v. Oklahoma

Dear Bill:

I am glad to join your opinion for the
Court.

Sincerely yours,

15,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 14, 1979

Re: No. 77-1439 - Hughes v. Oklahoma

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 8, 1979

Re: 77-1439 - Hughes v. Oklahoma

Dear Bill:

Please join me.

Sincerely,

T.M.
T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 9, 1979

Re: No. 77-1439 - Hughes v. Oklahoma

Dear Bill:

Of course, you don't know how you wound me by omitting any reference to Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 385-387, which probably has nothing whatsoever to do with this case.

Sincerely,



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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 9, 1979

Re: No. 77-1439 - Hughes v. Oklahoma

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 10, 1979

77-1439 Hughes v. Oklahoma

Dear Bill:

Please join me.

I understand that a citation to Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371 (1978), was omitted inadvertently, and will be added to your opinion. I think it is essential that this important recent decision be mentioned as part of the controlling law on state authority to regulate the taking of wildlife.

Sincerely,



Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 22, 1979

Re: No. 77-1439 - Hughes v. Oklahoma

Dear Bill:

The Chief has asked me to write a dissent in this case, and I will try to do so shortly.

Sincerely,

Wm

Mr. Justice Brennan

Copies to the Conference

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

From: Mr. Justice Rehnquist

Circulated: 10 APR 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1439

William Riley Hughes, Appellant, | On Appeal from the Court
v. | of Criminal Appeals of
State of Oklahoma. | Oklahoma.

[April —, 1979]

MR. JUSTICE REHNQUIST, dissenting.

This Court's seeming preoccupation in recent years with laws relating to wildlife must, I suspect, appear curious to casual observers of this institution.¹ It is no more curious, however, than this Court's recent pronouncements on the validity of *Geer v. Connecticut*, 161 U. S. 519 (1896). For less than one year ago we unreservedly reaffirmed the principles announced in *Geer*. *Baldwin v. Montana Fish & Game Commission*, 436 U. S. 371, 386 (1978). Today, the Court overrules that decision. Because I disagree with the Court's overruling of *Geer* and holding that Oklahoma's law relating to the sale of minnows violates the Commerce Clause, I dissent.

In its headlong rush to overrule *Geer*, the Court characterizes that decision as "rest[ing] on the holding that no interstate commerce was involved." *Ante*, at 5. It is true that one of the rationales relied on by the *Geer* Court was that the State could exercise its power to control the killing and ownership of animals *ferae naturae* to prohibit such game from leaving the borders of the State and thus prevent the game from ever becoming the objects of interstate commerce. 161 U. S., at 530-532. Since the Court in *Geer* was of the

¹ See, e. g., *Hughes v. Oklahoma*, *supra*, at — (minnows); *Tennessee Valley Authority v. Hill*, 437 U. S. 153 (1978) (snail darters); *Baldwin v. Montana Fish & Game Commission*, 436 U. S. 371 (1978) (elk); *Douglas v. Seacoast Products, Inc.*, 431 U. S. 265 (1977) (menhaden); *Kleppe v. New Mexico*, 426 U. S. 529 (1976) (wild horses and burros).

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

From: Mr. Justice Rehnquist

Circulated:

13 APR 1979

Recirculated:

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1439

William Riley Hughes, Appellant, | On Appeal from the Court
v. | of Criminal Appeals of
State of Oklahoma. | Oklahoma.

[April —, 1979]

MR. JUSTICE REHNQUIST, dissenting.

This Court's seeming preoccupation in recent years with laws relating to wildlife must, I suspect, appear curious to casual observers of this institution.¹ It is no more curious, however, than this Court's recent pronouncements on the validity of *Geer v. Connecticut*, 161 U. S. 519 (1896). For less than one year ago we unreservedly reaffirmed the principles announced in *Geer*. *Baldwin v. Montana Fish & Game Commission*, 436 U. S. 371, 386 (1978). Today, the Court overrules that decision. Because I disagree with the Court's overruling of *Geer* and holding that Oklahoma's law relating to the sale of minnows violates the Commerce Clause, I dissent.

In its headlong rush to overrule *Geer*, the Court characterizes that decision as "rest[ing] on the holding that no interstate commerce was involved." *Ante*, at 5. It is true that one of the rationales relied on by the *Geer* Court was that the State could exercise its power to control the killing and ownership of animals *ferae naturae* to prohibit such game from leaving the borders of the State and thus prevent the game from ever becoming the objects of interstate commerce. 161 U. S., at 530-532. Since the Court in *Geer* was of the

¹ See, e. g., *Hughes v. Oklahoma*, *supra*, at — (minnows); *Tennessee Valley Authority v. Hill*, 437 U. S. 153 (1978) (snail darters); *Baldwin v. Montana Fish & Game Commission*, 436 U. S. 371 (1978) (elk); *Douglas v. Seacoast Products, Inc.*, 431 U. S. 265 (1977) (menhaden); *Kleppe v. New Mexico*, 426 U. S. 529 (1976) (wild horses and burros).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

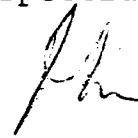
March 8, 1979

Re: 77-1439 - Hughes v. State of Oklahoma

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Brennan

Copies to the Conference