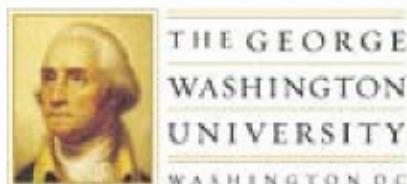


# The Burger Court Opinion Writing Database

*NLRB v. Catholic Bishop of Chicago*  
440 U.S. 490 (1979)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



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

JAN 17 1975

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

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

**1st DRAFT**

SUPREME COURT OF THE UNITED STATES

No. 77-752

[January —, 1979]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case arises out of the National Labor Relations Board's exercise of jurisdiction over lay faculty members at two groups of Catholic high schools. We granted certiorari to consider two questions. (a) Whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act; and (b) If the Act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses of the First Amendment? 434 U. S. 1061 (1978).

One group of schools is operated by the Catholic Bishop of Chicago, a corporation sole; the other group is operated by the Diocese of Fort Wayne-South Bend, Inc. The group operated by the Catholic Bishop of Chicago consists of two schools, Quigley North and Quigley South.<sup>1</sup> Those schools are termed "minor seminaries" because of their role in educating high school students who may become priests.

<sup>1</sup> The Catholic Bishop operates other schools in the Chicago area, but they were not involved in the proceedings before the Board.

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

CHAMBERS OF  
THE CHIEF JUSTICE

January 22, 1979

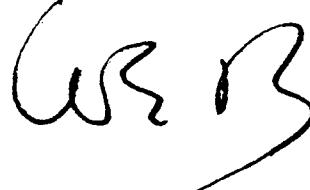
Re: 77-752 - NLRB v. Catholic Bishop

Dear Potter:

I agree I do not need the material beginning with the second sentence under Part IV and going to the bottom of that page. I am deleting it. However, I am not deleting the first sentence under Part IV. Your suggestion that we omit that which is "so self evident as to require no citation of authority" is a revolutionary one! Applied universally, it would cut down our writing vastly (which might be good). As it stands, it introduces the subject of Part IV.

As is usual, there are a number of other stylistic changes, none of which go to substance. A new draft is at the printer.

Regards,



Mr. Justice Stewart

Copies to the Conference

STYLISTIC CHANGES AS MARKED:

2-5, 7-16

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: \_\_\_\_\_

Recirculated: JAN 23 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-752

National Labor Relations Board, Petitioner,  
v.  
The Catholic Bishop of Chicago et al. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1979]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case arises out of the National Labor Relations Board's exercise of jurisdiction over lay faculty members at two groups of Catholic high schools. We granted certiorari to consider two questions: (a) Whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act; and (b) If the Act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses of the First Amendment? 434 U. S. 1061 (1978).

I

One group of schools is operated by the Catholic Bishop of Chicago, a corporation sole; the other group is operated by the Diocese of Fort Wayne-South Bend, Inc. The group operated by the Catholic Bishop of Chicago consists of two schools, Quigley North and Quigley South.<sup>1</sup> Those schools are termed "minor seminaries" because of their role in educating high school students who may become priests.

<sup>1</sup> The Catholic Bishop operates other schools in the Chicago area, but they were not involved in the proceedings before the Board.

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

CHAMBERS OF  
THE CHIEF JUSTICE

March 2, 1979

MEMORANDUM TO THE CONFERENCE:

Re: No. 77-752, National Labor Relations Board v. The  
Catholic Bishop of Chicago

Minor stylistic changes are being made as indicated on the attached two pages. I do not plan on any changes in response to Bill's dissent. Each position is clear cut and I think we are ready when the remaining votes come in.

Regards,

*Les B*

12                    NLRB v. CATHOLIC BISHOP OF CHICAGO

well motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon*, *Meek*, and *Wolman*.

The Board argues that it can avoid excessive entanglement since it will resolve only factual issues such as whether an anti-union animus motivated an employer's action. But at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, our inquiry is directed toward determining whether there is a significant risk that the First Amendment will be infringed.

Moreover, it is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F. 2d. at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.<sup>10</sup>

The Board's exercise of jurisdiction will have at least one other impact on church-operated schools. The Board will be called upon to decide what are "terms and conditions of employment" and therefore mandatory subjects of bargaining. See 29 U. S. C. § 158 (d). Although the Board has not interpreted that phrase as it relates to educational institutions, similar state provisions provide insight into the effect of mandatory bargaining. The Oregon Court of Appeals noted,

we make a  
narrow inquiry  
whether the  
exercise of the  
Board's  
jurisdiction  
presents a

<sup>10</sup> This kind of inquiry and its sensitivity is illustrated in the examination of Monsignor O'Donnell by the Board's Hearing Officer, which is reproduced in an appendix to this opinion.

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

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

November 13, 1978

Dear Byron and Harry:

The three of us are in dissent in the Chief's  
No. 77-752 N.L.R.B. v. Catholic Bishop of Chicago.  
I am willing to undertake the dissent.

Sincerely,



Mr. Justice White

Mr. Justice Blackmun

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 19, 1979

RE: No. 77-752 N.L.R.B. v. Catholic Bishop of Chicago

Dear Chief:

In due course I shall circulate a dissent in the  
above.

Sincerely,



The Chief Justice -

cc: The Conference

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

From: Mr. Justice [redacted]

Circulated: 7 MAR

1st DRAFT

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-752

National Labor Relations Board,

Petitioner,

v.

The Catholic Bishop of  
Chicago et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the Sev-  
enth Circuit.

[March —, 1979]

MR. JUSTICE BRENNAN, dissenting.

The Court today holds that coverage of the National Labor Relations Act does not extend to lay teachers employed by church-operated schools. That construction is plainly wrong in light of the Act's language, its legislative history, and this Court's precedents. It is justified solely on the basis of a canon of statutory construction seemingly invented by the Court for the purpose of deciding this case. I dissent.

### I

The general principle of construing statutes to avoid unnecessary constitutional decisions is a well-settled and salutary one. The governing canon, however, is *not* that expressed by the Court today. The Court requires that there be a "clear expression of an affirmative intention of Congress" before it will bring within the coverage of a broadly worded regulatory statute certain persons whose coverage might raise constitutional questions. *Ante*, at 14. But those familiar with the legislative process know that explicit expressions of congressional intent in such broadly inclusive statutes are not commonplace. Thus, by strictly or loosely applying its requirement the Court can virtually remake congressional enactments. This flouts Chief Justice Taft's admonition "that amendment may not be substituted for construction, and that

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice F1  
Mr. Justice B1  
Mr. Justice R1  
Mr. Justice St

From: Mr. Justice [redacted]

**2nd DRAFT**

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

**SUPREME COURT OF THE UNITED STATES**

Recirculated: 5 11

**No. 77-752**

National Labor Relations Board,

Petitioner,

v.

The Catholic Bishop of  
Chicago et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the Sev-  
enth Circuit.

[March —, 1979]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE,  
MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join,  
dissenting.

The Court today holds that coverage of the National Labor Relations Act does not extend to lay teachers employed by church-operated schools. That construction is plainly wrong in light of the Act's language, its legislative history, and this Court's precedents. It is justified solely on the basis of a canon of statutory construction seemingly invented by the Court for the purpose of deciding this case. I dissent.

I

The general principle of construing statutes to avoid unnecessary constitutional decisions is a well-settled and salutary one. The governing canon, however, is *not* that expressed by the Court today. The Court requires that there be a "clear expression of an affirmative intention of Congress" before it will bring within the coverage of a broadly worded regulatory statute certain persons whose coverage might raise constitutional questions. *Ante*, at 14. But those familiar with the legislative process know that explicit expressions of congressional intent in such broadly inclusive statutes are not commonplace. Thus, by strictly or loosely applying its requirement the Court can virtually remake congressional enactments. This flouts Chief Justice Taft's admonition "that

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

CHAMBERS OF  
JUSTICE POTTER STEWART

January 18, 1979

Re: No. 77-752 - NLRB v. Catholic Bishop of Chicago

Dear Chief:

I have problems with the first paragraph of Part IV of your opinion, beginning on page nine and carrying over onto page ten. My difficulties with this paragraph are these:

1. It seems to me to be so self-evident as to require no citation of authority that the Labor Board cannot act in violation of the Constitution.
2. I am bothered by the use of cases discussing the extent of a power explicitly conferred upon Congress (i.e., the commerce power) as analogies for considering the impact of an explicit prohibition contained in the Bill of Rights (i.e., the First Amendment).
3. The language you quote from the Reliance Fuel opinion suggests that it is the Court's duty in the present case to decide the constitutional issue.

If the paragraph in question were eliminated, I would have no difficulty whatever in joining your opinion for the Court.

Sincerely yours,

P.S.  
P.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

February 8, 1979

Re: No. 77-752, NLRB v. Catholic Bishop of Chicago

Dear Chief,

This is to confirm that I join your opinion in  
the above case as recirculated on January 23, 1979.

Sincerely yours,

The Chief Justice

Copies to the Conference

P.S.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 18, 1979

Re: No. 77-752 - NLRB v. Catholic Bishop  
of Chicago, et al.

Dear Chief,

I shall await the dissent in this  
case.

Sincerely yours,

The Chief Justice  
Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 1, 1979

Re: No. 77-752 - NLRB v. Catholic Bishop  
of Chicago, et al.

Dear Bill,

Please join me in your dissent  
in this case.

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

January 19, 1979

Re: No. 77-752 - N.L.R.B. v. Catholic Bishop  
of Chicago

Dear Chief:

I await the dissent.

Sincerely,

*T.M.*

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 5, 1979

Re: 77-752 - NLRB v. Catholic Bishop of Chicago

Dear Bill:

Please join me in your dissent.

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

January 18, 1979

Re: No. 77-752 - NLRB v. Catholic Bishop of Chicago

Dear Chief:

I, too, shall await the dissent in this case.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 2, 1979

Re: No. 77-752 - NLRB v. Catholic Bishop of Chicago

Dear Bill:

Please join me in your dissenting 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.

January 22, 1979

No. 77-752 NLRB v. Catholic Bishop

Dear Chief:

I agree with Potter that the first paragraph of Part IV of your opinion probably detracts from the otherwise consistent flow of your analysis.

Otherwise, I think you have written a fine opinion and, with the removal of the paragraph mentioned, will be glad to join you.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 30, 1979

77-752 NLRB v. Catholic Bishop

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 29, 1979

Re: No. 77-752 - NLRB v. Catholic Bishop of Chicago

Dear Chief:

Please join me.

Sincerely,

*W. H. R.*

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

January 18, 1979

Re: 77-752 - NLRB v. Catholic Bishop  
of Chicago

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference