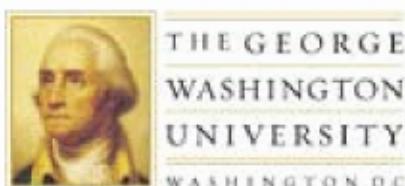


# The Burger Court Opinion Writing Database

*McLain v. Real Estate Board of New Orleans, Inc.*

444 U.S. 232 (1980)

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  
DEC 14 1979

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

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

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No 78-1501

James Jefferson McLain et al.,  
Petitioners,  
v.  
Real Estate Board of New Orleans, Inc., et al. } On Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit.

{January —, 1980}

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

The question in this case is whether the Sherman Act extends to an agreement among real estate brokers in a market area to conform to a fixed rate of brokerage commissions on sales of residential property.

The complaint in this private antitrust action, filed in the Eastern District of Louisiana in 1975, alleges that real estate brokers in the Greater New Orleans area have engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act, 15 U. S. C. § 1. No trial has as yet been had on the merits of the claims. The complaint asserts a claim individually and on behalf of that class of persons who employed the services of a respondent real estate broker in the purchase or sale of residential property in the Louisiana parishes of Jefferson or Orleans (the Greater New Orleans area) during the four years preceding the filing of the complaint. The respondents are two real estate trade associations, six named real estate firms, and that class of realtors who at some time during the period covered by the complaint transacted realty

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

CHAMBERS OF  
THE CHIEF JUSTICE

December 18, 1979

Re: McLain v. Real Estate Board of New Orleans, Inc.  
78-1501.

Dear Potter:

Your December 18 suggested sentence makes explicit what is implicit and it is entirely acceptable to me.

Regards,

WJB

Mr. Justice Stewart

Copies to the Conference

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

pp. 2, 3, 6, 7, 9, 10, 12, 13,

From: The Chief Justice

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

Recirculated: DEC 26 1979

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No 78-1501

James Jefferson McLain et al.,  
Petitioners,  
v.  
Real Estate Board of New Orleans, Inc., et al. } On Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit.

[January —, 1980]

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

The question in this case is whether the Sherman Act extends to an agreement among real estate brokers in a market area to conform to a fixed rate of brokerage commissions on sales of residential property.

### I

The complaint in this private antitrust action, filed in the Eastern District of Louisiana in 1975, alleges that real estate brokers in the Greater New Orleans area have engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act, 15 U. S. C. § 1. No trial has as yet been had on the merits of the claims. The complaint asserts a claim individually and on behalf of that class of persons who employed the services of a respondent real estate broker in the purchase or sale of residential property in the Louisiana parishes of Jefferson or Orleans (the Greater New Orleans area) during the four years preceding the filing of the complaint. The respondents are two real estate trade associations, six named real estate firms, and that class of realtors who at some time during the period covered by the complaint transacted realty

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

CHAMBERS OF  
THE CHIEF JUSTICE

December 27, 1979

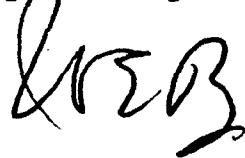
Re: No. 78-1501 - McLain v. Real Estate Bd. of New Orleans

Dear John:

Your suggested "sharpening" on page 9 is helpful and I will insert an adaptation as follows:

"Although the cases demonstrate the breadth of Sherman Act prohibitions, jurisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce."

Respectfully,



Mr. Justice Stevens

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:

DEC 28 1979

Recirculated:

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

**No 78-1501**

James Jefferson McLain et al.,  
 Petitioners,  
 v.  
 Real Estate Board of New Orleans, Inc., et al. } On Writ of Certiorari to the  
 } United States Court of Appeals for the Fifth Circuit.

[January —, 1980]

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

The question in this case is whether the Sherman Act extends to an agreement among real estate brokers in a market area to conform to a fixed rate of brokerage commissions on sales of residential property.

**I**

The complaint in this private antitrust action, filed in the Eastern District of Louisiana in 1975, alleges that real estate brokers in the Greater New Orleans area have engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act, 15 U. S. C. § 1. No trial has as yet been had on the merits of the claims since the complaint was dismissed for failure to establish the interstate commerce component of Sherman Act jurisdiction.

The complaint asserts a claim individually and on behalf of that class of persons who employed the services of a respondent real estate broker in the purchase or sale of residential property in the Louisiana parishes of Jefferson or Orleans (the Greater New Orleans area) during the four years preceding the filing of the complaint. The respondents are two real estate trade associations, six named real

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

CHAMBERS OF  
THE CHIEF JUSTICE

January 9, 1980

file

Re: Cases held for No. 78-1501, McLain v. Real Estate Board

MEMORANDUM TO THE CONFERENCE:

Two sets of cases have been held for McLain

1) No. 78-1737, Foley v. United States;

No. 78-1838, Gruen v. United States;

No. 79-93, Shannon & Luchs Co. v. United States;

No. 79-186, Bogley, Inc. v. United States

2) No. 79-248, Cerilli, et al. v. United States

Petitioners in the first group of cases were codefendants in a criminal prosecution under the Sherman Act arising out of their activities to fix realty brokerage commission rates. Their challenge to federal jurisdiction on interstate commerce grounds was rejected by the CA4. Our holding in McLain makes it clear that the ruling of the Court of Appeals was correct. The cases also raise what, in my view, is an insubstantial challenge to the application of the intent standard under United States v. United States Gypsum Co. I WILL VOTE TO DENY THE FIRST FOUR PETITIONS LISTED ABOVE.

Petitioners in the second case were convicted of violation of the Hobbs Act, which like the Sherman Act extends its prohibitions to the full extent of the Commerce Power. The CA3 applied accepted precedent in rejecting petitioners' contention that no adequate interstate commerce nexus had been established. McLain made no change in the law in this regard. The petition also raises an issue involving the nature of the conduct prohibited by the Hobbs Act that I do not consider warrants further review. I WILL VOTE TO DENY IN 79-248.

Regards,

WSB

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

December 26, 1979

RE: No. 78-1501 McLain v. Real Estate Board of New  
Orleans

Dear Chief:

I am happy to join your opinion for the Court in  
the above.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

December 18, 1979

Re: No. 78-1501, McLain v. Real Estate Board  
of New Orleans

Dear Chief,

Your persuasive opinion has largely overcome my doubts in this case. My only remaining concern is that some of the language of Part II C in the last three pages of the opinion may be too broad and insufficiently tentative in the present posture of the case.

This concern could be met, I think, by a modest change in one sentence of the opinion. The sentence in question is the last sentence of the next to last paragraph of the opinion, at about the middle of page 13. I would hope that this sentence could be changed to read as follows: Where, as here, the services of respondent real estate brokers are often employed in transactions in the relevant market, the plaintiff at trial may be able to show that their activities have a not insubstantial effect on interstate commerce.

If you are disposed to change the sentence along the lines indicated above, I shall be glad to join your opinion for the Court.

Sincerely yours,

PS.  
P.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 14, 1979

Re: No. 78-1501 - McLain v. Real Estate  
Board of New Orleans,  
Inc.

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice  
Copies to the Conference  
cmc

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 17, 1979

Re: No. 78-1501 - McLain v. Real Estate Board  
of New Orleans

Dear Chief:

Please show me as not participating in this  
case.

Sincerely,

*T.M.*

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 26, 1979

Re: 78-1501 - McLain v. Real Estate Board of New Orleans

Dear Chief:

My comments at conference on this case indicated that I would have the same concerns that Potter expressed in his letter to you of December 18. His suggestion, and your acceptance of it, generally alleviate my reservation, and I therefore am glad to join your opinion.

Sincerely,

*H. A. B.*

1

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 17, 1979

No. 78-1501 McLain v. Real Estate Bd. of New Orleans

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

LFP/lab

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 28, 1979

Re: No. 78-1501 - McLain v. Real Estate Board

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

December 28, 1979

Re: No. 78-1501 - McLain v. Real Estate Bd. of New Orleans

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

cc: The Conference