

The Burger Court Opinion Writing Database

Edward J. DeBartolo Corp. v. NLRB

463 U.S. 147 (1983)

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

June 1, 1983

Re: No. 81-1985, Edward J. DeBartolo Corp. v. NLRB

Dear John:

I join.

Regards,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 4, 1983

Re: No. 81-1985

DeBartolo Corp. v. NLRB

Dear Thurgood,

You and I are in dissent in the
above. I will try my hand at the
dissent.

Sincerely,

Justice Marshall

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 31, 1983

Re: No. 81-1985

DeBartolo Corp. v. NLRB

Dear John,

I'll undertake a short dissent in
the above.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 21, 1983

No. 81-1985

DeBartolo Corporation v. NLRB

Dear John,

I give up. The dissent won't
write. Please join me.

Sincerely,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1983

Re: 81-1985 -
Edward J. DeBartolo Corp. v. NLRB

Dear John,

Please join me.

Sincerely yours,



Justice Stevens

cc: The Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 31, 1983

Re: No. 81-1985-DeBartolo Corp. v. NLRB

Dear John:

I await the dissent.

Sincerely,



T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 21, 1983

Re: No. 81-1985-DeBartolo Corp. v. NLRB

Dear John:

Please join me.

Sincerely,

T.M.
T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1983

Re: No. 81-1985 - Edward J. DeBartolo Corp. v. NLRB

Dear John:

Your opinion for this case is a persuasive one, and I may well join it eventually. For now, I would like to see what the dissent has to say.

Sincerely,

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 21, 1983

Re: No. 81-1985, Edward J. DeBartolo Corp. v. NLRB

Dear John:

Please join me.

Sincerely,



Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1983

81-1985 DeBartolo Corp. v. NLRB

Dear John:

In view of the fact that DeBartolo is willing for the Court to assume that High is a producer, would it not be appropriate to modify the last paragraph on page 7? It can be viewed as approval by this Court of the Board's conclusion that High was a producer - a decision that we need not make in this case.

I thought several of us expressed doubt at Conference as to whether High is a producer within the meaning of the proviso. Congress referred in Section 8(b)(4) to "producer, processor, or manufacturer, or ... any other person" when it desired to encompass employers. The proviso limited the scope of the lawful publicity exception expressly to "produc[ers]" and "distribut[ors]". Presumably, Congress was identifying a sub-category. Moreover, in Servett, the Court noted that when the proviso was adopted, the term producer had been given independent significance in the FLSA and the War Labor Disputes Act.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

✓

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1983

81-1985 DeBartolo v. NLRB

Dear John:

The change in the paragraph at the bottom of page 7, suggested in your note of yesterday, brings us closer together. I am still troubled, however, by the paragraph because I think it can be read as a holding that a construction company like High is a producer within the meaning of the proviso. This may be the court's view in a proper case, but it is unnecessary to make this holding in this case.

On p. 9, in response to Byron's concern, your opinion notes DeBartolo's concession on this point. Would it not be more logical to move this to the beginning of the analytical part of your opinion, preferably to the paragraph on p. 7 we are discussing? I suggest the following revision to include DeBartolo's concession:

"The focus of the analysis in Servette was on the meaning of the term 'producer.' In this case, DeBartolo is willing to concede that Wilson distributes products that are "produced" by High within the meaning of the statute. This would mean that construction workers, like truck drivers, may perform services that are essential to the production and distribution of consumer goods. We may therefore assume in this case that High, the primary employer, is a producer within the meaning of the proviso.⁶ Indeed, we may assume here that the proviso's 'coverage'--the types of primary disputes it allows to be publicized--is broad enough to include almost any primary dispute that might result in prohibited secondary activity."

I hesitate to worry you further (busy as we all are!). I agree with you fully with respect to the tenants in this shopping center, and this - it seems to me - disposes of the case.

Sincerely,

Justice Stevens



lfp/ss
cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

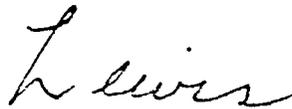
June 8, 1983

81-1985 DeBartolo v. NLRB

Dear John:

Please join me.

Sincerely,

A handwritten signature in cursive script that reads "Lewis".

Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1983

Re: No. 81-1985 DeBartolo Corp. v. NLRB

Dear John:

Please join me.

Sincerely,



Justice Stevens

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 9

From: Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1985

EDWARD J. DEBARTOLO CORP., PETITIONER *v.*
NATIONAL LABOR RELATIONS BOARD ET AL.

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

[June —, 1983]

JUSTICE STEVENS delivered the opinion of the court.

As a result of a labor dispute between respondent union and the H.J. High Construction Company (High), the union passed out handbills urging consumers not to trade with a group of employers who had no business relationship of any kind with High. The question presented is whether that handbilling is exempted from the prohibition against secondary boycotts contained in §8(b)(4)¹ of the Labor Management Relations Act, 29 U. S. C. § 158(b)(4), by what is known as the “publicity proviso” to that section.²

¹That section makes it an unfair labor practice for a labor organization or its agents

“(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: “(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person. . . .” 61 Stat. 140, as amended, 29 U. S. C. § 158(b)(4).

²That proviso reads as follows:

“*Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to per-

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1983

Re: 81-1985 - DeBartolo v. NLRB

Dear Lewis:

Thank you for your note. Byron had expressed a somewhat similar concern which led me to make the change on page 9 to make it clear that we are not holding that the products sold in the Wilson store have been "produced" by High. I have a little difficulty in denying that High was a producer of something; I suppose he at least produced the building in which Wilson conducted its store. Nevertheless, I wonder if changing the paragraph at the bottom of page 7 to read this way would make the opinion more acceptable to you:

"The focus of the analysis in *Servette* was on the meaning of the term 'producer.' Construction workers, like truck drivers, perform services that are essential to the production and distribution of consumer goods. We may therefore assume that High, the primary employer in this case, is a producer within the meaning of the proviso.^{6/} Indeed, we may assume that the proviso's 'coverage'--the types of primary disputes it allows to be publicized--is broad enough to include almost any primary dispute that might result in prohibited secondary activity.^{7/}

"We nevertheless must reject the Board's interpretation ...".

Respectfully,



Justice Powell

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 77-7-8

From: Justice Stevens

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1985

EDWARD J. DEBARTOLO CORP., PETITIONER *v.*
NATIONAL LABOR RELATIONS BOARD ET AL.

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

[June —, 1983]

JUSTICE STEVENS delivered the opinion of the court.

As a result of a labor dispute between respondent union and the H.J. High Construction Company (High), the union passed out handbills urging consumers not to trade with a group of employers who had no business relationship of any kind with High. The question presented is whether that handbilling is exempted from the prohibition against secondary boycotts contained in § 8(b)(4)¹ of the National Labor Relations Act, as amended, 29 U. S. C. § 158(b)(4), by what is known as the "publicity proviso" to that section.²

¹That section makes it an unfair labor practice for a labor organization or its agents

"(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person. . . ." 61 Stat. 140, as amended, 29 U. S. C. § 158(b)(4).

²That proviso reads as follows:

"*Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to per-

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

B. 8, 10

From: Justice Stevens

Circulated: _____

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-1985

EDWARD J. DEBARTOLO CORP., PETITIONER *v.*
NATIONAL LABOR RELATIONS BOARD ET AL.

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

[June 24, 1983]

JUSTICE STEVENS delivered the opinion of the court.

As a result of a labor dispute between respondent union and the H.J. High Construction Company (High), the union passed out handbills urging consumers not to trade with a group of employers who had no business relationship of any kind with High. The question presented is whether that handbilling is exempted from the prohibition against secondary boycotts contained in § 8(b)(4)¹ of the National Labor Relations Act, as amended, 29 U. S. C. § 158(b)(4), by what is known as the "publicity proviso" to that section.²

¹ That section makes it an unfair labor practice for a labor organization or its agents

"(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person. . . ." 61 Stat. 140, as amended, 29 U. S. C. § 158(b)(4).

² That proviso reads as follows:

"*Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 31, 1983

No. 81-1985 DeBartolo Corp. v. NLRB

Dear John,

Please join me.

Sincerely,



Justice Stevens

Copies to the Conference