

The Burger Court Opinion Writing Database

*Jefferson County Pharmaceutical
Association, Inc. v. Abbott Laboratories*
460 U.S. 150 (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

February 4, 1983

Re: No. 81-827 - Jefferson Co. Pharmaceutical Assn., Inc.
v. Abbott Laboratories

Dear Lewis:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'W. Powell', written in a cursive style.

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

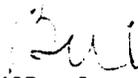
January 11, 1983

Re: No. 81-827 -- Jefferson County Pharmaceutical
Assn. v. Abbott Laboratories, Inc.

Dear Lewis:

I will await the dissent.

Sincerely,


WJB, Jr.

Justice Powell
Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 24, 1983

RE: No. 81-827 Jefferson County Pharmaceutical Assn. v.
Abbott Laboratories, et al.

Dear Sandra:

I agree with your dissent, except for footnote 12.

Could you agree to delete it?

Sincerely,

Bill

Justice O'Connor

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 24, 1983

RE: No. 81-827 Jefferson Co. Pharmaceutical Association
v. Abbott Laboratories

Dear Sandra:

Please join me in your dissent.

Sincerely,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 7, 1983

Re: 81-827 - Jefferson County Pharmaceutical
Ass'n, Inc. v. Abbott Laboratories

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

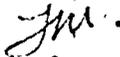
January 13, 1983

Re: No. 81-827 - Jefferson County Pharmaceutical
Association v. Abbott Laboratories

Dear Lewis:

Please join me.

Sincerely,


T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 14, 1983

Re: No. 81-827 - Jefferson Company Pharmaceutical
Association v. Abbott Laboratories

Dear Lewis:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath it.

Justice Powell

cc: The Conference

November 15, 1982

81-827 Jefferson Co. Pharmaceutical v. Abbott Laboratories

Dear Chief:

John's letter of November 12 (that just came to my attention) records a change in his vote in this case. This leaves five votes to reverse, including one or more that was tentative.

The case is close. If you follow your usual practice of assigning it to the Justice who wrote a "dissent from denial of cert", I will be glad to try my hand at an opinion that will hold five votes.

In view of the "iffiness" of this case, I would be more than glad to take two other cases.

Sincerely,

The Chief Justice

lfp/ss

JAN 5 1983

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

From: Justice Powell

JAN 7 1983

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

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

[January —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to state and local government hospitals for resale in competition with private retail pharmacies is exempt from the proscriptions of the Robinson-Patman Act.

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents are fifteen pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 & 26, for alleged violations of § 2(a) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. § 13(a) and

Joint?

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

From: Justice Powell

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JAN 12 1983

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

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

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LEP
Changes: 1, 3-4, 6, 9, 11-12, 14-15, 17-19
Please see TM

Join

FEB 15 1983

Changes: 1, 4, 6-21

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

From: Justice Powell

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

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

[February —, 1983]

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FEB 17 1983

pp. 10-11

Stylistic changes throughout

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

From: Justice Powell

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Recirculated: FEB 17 1983

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

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

[February —, 1983]

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FEB 18 1983

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

Stylistic Changes Throughout

From: Justice Powell

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Recirculated: FEB 18 1983

5
th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

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

[February —, 1983]

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 24, 1983

Re: No. 81-827 Jefferson County Pharmaceutical
Assn. v. Abbott Laboratories

Dear Sandra:

Please join me in your dissenting opinion.

Sincerely,



Justice O'Connor

cc: The Conference

1

MA

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

All

November 12, 1982

Proposed

Re: 81-827 - Jefferson Co. Pharmaceutical
v. Abbott Laboratories

Dear Chief:

After further reflection I have decided to vote to affirm. I am now persuaded that the approach that Bill Rehnquist took in his Blue Chip opinion should be followed here. Regardless of how the Court might have regarded the availability of a 10b(5) cause of action if it had confronted the question in the 1940's or 1950's, the general recognition of such a claim in the intervening years really compelled the Court to accept such claims as a legitimate part of our law. In a way this case presents the other side of a similar coin. Even though I would have sustained the claim such as the petitioners if it had arisen in the 1940's or 1950's, it seems wrong to ignore the consistent and virtually uniform understanding of the legal and business community that the Robinson-Patman Act simply does not apply to sales to governmental entities. Even without any ruling from this Court, the considerations that underlie the doctrine of stare decisis seem fully applicable.

A multitude of marketing relationships have unquestionably been developed on the assumption that the statute is wholly inapplicable to this area of the economy. I am inclined to believe that the vast majority of those relationships would remain undisturbed by a holding that the statute is applicable because few would pose any practical threat to competition. Nevertheless, the process of re-examination with its attendant litigation costs would give rise to the adverse consequences that the doctrine of stare decisis is intended to forestall.

Moreover, if we take the petitioner's counsel at his word and assume that not only all sales for the university's

own use but also all sales for resale to students, faculty, and possibly their families as well, are beyond the reach of the Act, that which remains seems relatively insignificant. In sum, although I would have voted otherwise thirty or forty years ago, I am now inclined to let the sleeping dog lie.

Respectfully,

A handwritten signature in dark ink, appearing to be 'John' or similar, written in a cursive style.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 11, 1983

Re: 81-827 - Jefferson County Pharmaceutical
Assn. v. Abbott Laboratories, Inc.

Dear Lewis:

I shall await the dissent.

Respectfully,



Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 4, 1983

Re: 81-827 - Jefferson County Pharmaceutical
Assn. v. Abbott Laboratories

Dear Sandra:

Please join me in your dissent.

Respectfully,

A handwritten signature in cursive script, appearing to read "John / O'Connor".

Justice O'Connor

Copies to the Conference

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

From: Justice Stevens

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

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

[February —, 1983]

JUSTICE STEVENS, dissenting.

While I join JUSTICE O'CONNOR's dissenting opinion, I believe an additional comment on the text of the Robinson-Patman Act may help to explain my vote. I think federal, state, and local agencies are "purchasers" within the meaning of the Act, but I am convinced that such governmental agencies are not engaged in "competition" with private parties even when they resell purchased goods to consumers who might otherwise have patronized a private retailer.

It is universally agreed that federal purchases are not covered by the Act. Even though it has always been obvious that primary line competition might be injured by discriminatory prices on sales to the federal government, and also that goods sold to military post exchanges would normally be resold at a substantial discount, no one in the 1936 legislative deliberations questioned the inapplicability of the Act to these sales. The explanation, in my opinion, does not rest on the sovereign status of the federal government,* but rather

*When Mr. Teegarden responded to specific written questions about the Act, he gave two reasons why the bill would not prevent competitive bidding on government purchases below trade price levels. First, he stated that a statute would not be construed to restrict the rights, preroga-

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

From: **Justice Stevens**

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77. 1.4

2nd
~~1st~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

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

[February —, 1983]

JUSTICE STEVENS, dissenting.

While I join JUSTICE O'CONNOR's dissenting opinion, I believe an additional comment on the text of the Robinson-Patman Act may help to explain my vote. For purposes of interpreting that statute, I think that federal, state, and local agencies are "purchasers," but that such governmental agencies are not engaged in "competition" with private parties even when they resell purchased goods to consumers who might otherwise have patronized a private retailer. Both before and after the 1936 statute amended § 2 of the Clayton Act, the requirement of proving an adverse effect on "competition" played an important part in limiting the coverage of the statute.

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*When Mr. Teegarden responded to specific written questions about

7p. 2-4

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

From: Justice Stevens

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

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

[February —, 1983]

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*When Mr. Teegarden responded to specific written questions about

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 7, 1983

No. 81-827 Jefferson County Pharmaceutical
Association, Inc. v. Abbott Laboratories

Dear Lewis,

In due course, I will circulate a dissent.

Sincerely,



Justice Powell

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: JAN 22 1983

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

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

[January —, 1983]

JUSTICE O'CONNOR, dissenting.

The issue that confronts the Court is one of statutory construction: whether the Robinson-Patman Act covers purchases of commodities by state and local governments for resale in competition with private retailers.¹ The Court's task, therefore, is to discern the intent of the 1936 Congress which enacted the Robinson-Patman Act. I do not agree with the majority that this issue can be resolved by reference to cases under the Sherman Act or other statutes, or by reliance on the broad remedial purposes of the antitrust laws generally. The 1936 Congress simply did not focus on this issue. The business and legal communities have assumed for the past four decades that such purchases are not covered. For these reasons, as explained more fully below, I respectfully dissent.

¹This case does not require us to consider, as the majority suggests, *ante*, at 7, whether compliance with other federal statutes necessitates an implied exemption from the provisions of the Act. The question is simply one of congressional intent—*i. e.*, what Congress intended when it enacted the Robinson-Patman Act with respect to coverage of governmental purchases for resale.

ND

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

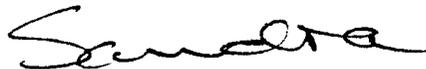
January 24, 1983

No. 81-827 Jefferson County Pharmaceutical
Assn. v. Abbott Laboratories

Dear Bill,

No doubt I have already made my position concerning the Tenth Amendment sufficiently clear in other cases that I can agree to delete footnote 12, and I will do so in the next circulation.

Sincerely,



Justice Brennan

PP. 4, 3, 4, 6, 7, 8, 11, 13, 14

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: JAN 25 1983

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

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

[January —, 1983]

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PP. 1

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

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PP. 4

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

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

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