

The Burger Court Opinion Writing Database

Bender v. Williamsport Area School District

475 U.S. 534 (1986)

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



RECEIVED
Supreme Court of the United States
SUPREME COURT
JUSTICE
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

'85 OCT 28 A10:36

October 26, 1985

RE: No. 84-773 - Bender v. Williamsport Area School District

MEMORANDUM TO THE CONFERENCE:

I have reviewed John's memorandum of October 25 and will send around a response quite soon.

Regards,



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

CHAMBERS OF
THE CHIEF JUSTICE

October 29, 1985

RE: No. 84-773, Bender v. Williamsport Area School District

MEMORANDUM TO THE CONFERENCE:

I have reviewed carefully John's recent memo discussing the standing issue in this case. I remained convinced that Youngman had standing in the court of appeals either as an individual board member or as a parent and that we can therefore reach the merits in the case.

Youngman was a named party to the district court case and was sued in his capacity as an individual member of the school board. By granting the petitioners' summary judgment, the district court enjoined Youngman as a individual member of the board from excluding the student group. Youngman, therefore, has sustained an "injury in fact" sufficient to have standing to appeal.

The existence of the school board as an independent entity does nothing to change this simple, general rule. The Eleventh Amendment immunity cases cited in John's memorandum simply have nothing to do with the analysis of standing in this case. The judgment of the district court restrains not only the board in its corporate capacity but also the action of each individual member of the school board. An individual member's ability to perform the functions of his office is effected whether the individual happens to be alone in wishing to vote his conscience, or whether that wish is joined by a majority or all of the other members. By enjoining all of the members of the board from conducting school affairs as they see fit, therefore, the judgment of the district constitutes an "injury in fact" sufficient to confer standing upon each individual member.

I agree with John that "[g]enerally speaking, members of collegial bodies do not have standing to intervene in order to perfect an appeal the body itself has declined to take." Youngman, however, has not sought to intervene; he was a named party below and the judgment of the district court had a direct impact upon him in his capacity as a member of the school board. If the point is that it is imprudent to allow an individual member to impose burdens upon the collegial body by taking an appeal, that concern does not apply to this case. Everything in

the record, as well as a healthy dose of common sense, suggests that the board, by waiting with its objection to petitioners' attorney's fees application in the district court, is cheering Youngman on.

Even if Youngman were without standing as a named defendant and member of the school board, he has standing as a parent. The parties concede that Youngman has a child at Williamsport High. I see no reason why we should reject standing, as John suggests, because "for all the record discloses, Mr. Youngman's son or daughter may be an intending member of Petros." Youngman claims that the State through Petros is establishing religion at Williamsport High. If his child is a member of the group and directly affected by this religious indoctrination, Youngman has more, not less, standing to complain of the Establishment Clause violation.

John's objection to Youngman's standing as a parent is that he has failed "to allege facts demonstrating that he is a proper party to invoke the judicial resolution of the dispute and the exercise of the court's remedial powers." Warth v. Seldin, 422 U.S. 490, 518 (1975). It is of course perfectly sensible to impose these pleading burdens upon the plaintiff who initiates the litigation. Those burdens, however, need not be placed upon a named defendant seeking to invoke the jurisdiction of the court of appeals. Once the jurisdiction of the district court over a particular dispute is established, there can be no serious contention that the same dispute between the same parties on appeal is not generally within the courts' Article III powers. To be sure, we require that the case-or-controversy last throughout the litigation. But the method for determining whether the case-or-controversy exists, and the burdens placed on the parties, should not, indeed cannot, be identical on appeal as in the district court. At the district court stage, the facts required by Warth, supra, should normally appear on the face of the complaint. At the appellate stage, however, the "complaining party" does not allege any facts but merely identifies himself as a party to the case below and challenges the validity of that decision. If the appellant's standing is challenged, he must, of course, allege facts sufficient to convince the court of appeals that he is a proper party to pursue the appeal. Had petitioners challenged Youngman's standing to appeal there can be no doubt that he would have satisfied this burden.

In sum, Youngman had standing in the court of appeals either as an individual member of the school board or as a parent. We have an obligation not to allow a strained interpretation of standing to prevent us from reaching the merits in this case.

Regards,



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



CHAMBERS OF
THE CHIEF JUSTICE

December 3, 1985

RE: No. 84-773 - Bender v. Williamsport School District

Before I proceed further with an opinion, I need to know definitely whether I am writing an opinion for the Court or a dissent. For the reasons outlined in my memo of October 29, I think that petitioner has standing to maintain this appeal. I also believe that we have an obligation to reach the merits here.

However, if the case is disposed of on standing, I assume we will vacate the Court of Appeals' judgment as well. If there is no standing here, there was none in the the Court of Appeals.

Regards,

Justices White
Powell
Rehnquist
O'Connor

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

CHAMBERS OF
THE CHIEF JUSTICE

December 20, 1985

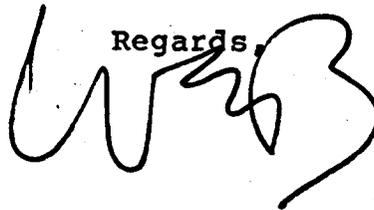
RE: No. 84-773 - Bender v. Williamsport School District

MEMORANDUM TO THE CONFERENCE:

I disagree with the "no standing" result but to get things moving I enclose a draft of a Per Curiam vacating the judgment of the Court of Appeals on the standing issue.

I may write some thoughts in dissent. If this Per Curiam is not acceptable, Bill Brennan can initiate another Per Curiam.

Regards,



85 DEC 23 A9:30

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: **20 DEC 1985**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-778

MICHAEL BENDER, ET AL., PETITIONERS v. WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[December —, 1985]

PER CURIAM.

Petitioners are members of a student-led prayer group seeking access to Williamsport High School's student extra-curricular activity period. Respondent Youngman is a former member of the Williamsport School Board. In September, 1981, Williamsport School District informed the group that the school could not permit them to meet because to do so would violate the Establishment Clause of the United States Constitution. Petitioners then brought suit, alleging that the school board's action violated their rights to free speech and free exercise of religion under the First Amendment. Petitioners sought an an injunction requiring the school to allow the club to meet on the same terms as other student clubs.

The District Court found that "because the defendant school district is not constitutionally required to deny the plaintiffs opportunity to meet, by doing so solely on constitutional grounds it has impermissibly burdened their free-speech rights." Summary judgment for petitioners was granted.

Williamsport School District did not appeal the judgment of the District Court. Respondent Youngman, however, who was at the time a member of the school board, appealed in his capacity as a defendant in the lawsuit in the District Court. The Court of Appeals reversed on the merits, hold-

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

From: **The Chief Justice**

Circulated: JAN 25 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS v. WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[January —, 1986]

CHIEF JUSTICE BURGER, dissenting.

I agree with the Court that the judgment of the District Court allowing Petros to meet during the student extracurricular activity period must be reinstated. Because Respondent Youngman had standing to appeal, however, I would reach the merits of this dispute and reverse the judgment of the Court of Appeals.

I

Mr. Youngman is a parent of a student at Williamsport High School; as a matter of conscience he is opposed to prayer activities on school premises during school hours. As this Court has repeatedly held, parents have standing to challenge conditions in public schools that their children attend. See *Engel v. Vitale*, 370 U. S. 421 (1962); *Zorach v. Clauson*, 343 U. S. 306 (1952). JUSTICE STEVENS' principal objection to Youngman's standing as a parent stems from his failure "to allege facts demonstrating that he is a proper party to invoke the judicial resolution of the dispute and the exercise of the court's remedial powers." *Ante*, at 11 and n. 8 (quoting *Warth v. Seldin*, 422 U. S. 490, 518 (1975)). It is, of course, perfectly sensible to impose such pleading burdens upon the plaintiff who initiates the litigation. These burdens, however, need not be placed upon a named defendant, like Mr. Youngman, who seeks to invoke the jurisdiction

Handwritten notes:
Burger
Stevens
Youngman
Could you [unclear] [unclear]

*stylistic changes throughout
see pages 2, 5*

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: Feb. 6, 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WIL-
LIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[February —, 1986]

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and
JUSTICE REHNQUIST join, dissenting.

I agree with the Court that the judgment of the District
Court allowing Petros to meet during the student extra-
curricular activity period must be reinstated. Because Re-
spondent Youngman had standing to appeal, however, I
would reach the merits of this dispute and reverse the judg-
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High School; as a matter of conscience he is opposed to
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tend. See *Engel v. Vitale*, 370 U. S. 421 (1962); *Zorach v.*
Clauson, 343 U. S. 306 (1952). JUSTICE STEVENS' principal
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failure "to allege facts demonstrating that he is a proper
party to invoke the judicial resolution of the dispute and the
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n. 8 (quoting *Warth v. Seldin*, 422 U. S. 490, 518 (1975)). It
is, of course, perfectly sensible to impose such pleading bur-
dens upon the plaintiff who initiates the litigation. These
burdens, however, need not be placed upon a properly named

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

*OK
Stall*

CHAMBERS OF
THE CHIEF JUSTICE

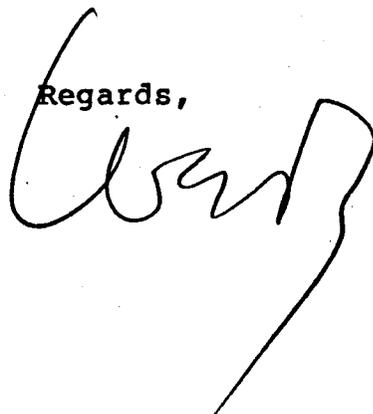
February 27, 1986

RE: No. 84-773 - Bender v. Willaimsport School District

Dear Bill:

As I said at the Conference, the purpose of the Per Curiam was to "get the show on the road." It has not served that purpose so you try.

Regards,



Justice Brennan

Copies to the Conference

RE 158 58 12.12

2025 FEB 27 10 10 AM '86

Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

see pages 1, 3

From: **The Chief Justice**

Circulated: _____

Recirculated: MAR 5 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WIL-
 LIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[March —, 1986]

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and
 JUSTICE REHNQUIST join, dissenting.

I agree with the Court that the judgment of the District
 Court allowing Petros to meet during the student extra-
 curricular activity period must be reinstated. Because Re-
 spondent Youngman had standing to appeal, however, I
 would reach the merits of this dispute and reverse the judg-
 ment of the Court of Appeals.

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Mr. Youngman is a parent of a student at Williamsport
 High School; as a matter of conscience he is opposed to
 prayer activities on school premises during school hours. As
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Clauson, 343 U. S. 306 (1952). The Court's principal objec-
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 ure "to allege facts demonstrating that he is a proper party
 to invoke the judicial resolution of the dispute and the exer-
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 (quoting *Warth v. Seldin*, 422 U. S. 490, 518 (1975)). It is,
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 upon the plaintiff who initiates the litigation. These bur-
 dens, however, need not be placed upon a properly named de-

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 15, 1985

MEMORANDUM TO THE CONFERENCE

No. 84-773 Bender v. Williamsport
Area School District

I could go along with a disposition
along the lines that John suggested.

Sincerely,

Bul

85 NOV 16 12:17

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 23, 1985

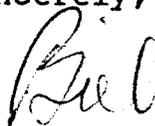
No. 84-773

Bender v. Williamsport
School District

Dear John,

I know that you would write a better opinion than the Chief's proposed per curiam in the above. Do you intend to?

Sincerely,

A handwritten signature in cursive script, appearing to read "Stevens", is written below the typed word "Sincerely,".

Justice Stevens

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 8, 1986

No. 84-773

Bender, et al. v. Williamsport
Area School District, et al.

Dear John,

Please join me in your concurrence
in the above.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

AP. ON 8-11-86

JAN 10 1986
U.S. SUPREME COURT

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 27, 1986

No. 84-773

Bender v. Williamsport
School District

Dear Chief,

Do I correctly recall that your proposed Per Curiam has not attracted a majority vote? Does this mean that, since you are dissenting, I should take on the responsibility of assigning the opinion? I think that John already has four votes for his view.

Sincerely,

Bill

The Chief Justice

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 27, 1986

No. 84-773

Bender v. Williamsport
School District

Dear Chief,

Thank you for your note of February 27. I've asked John to try his hand at a proposed opinion for the Court.

Sincerely,



The Chief Justice

Copies to the Conference

80 FEB 28 10:40

W

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 3, 1986

No. 84-773

Bender, et al. v. Williamsport
Area School District, et al.

Dear John,

Please join me in your opinion for
the Court.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

82 000-3 65:10

20 20 20 20 20 20 20 20 20 20

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 5, 1985



Re: 84-773 -

Bender v. Williamsport School District

Dear Chief,

As you know, I agree with you on
standing.

Sincerely,



The Chief Justice

cc: Justice Powell
Justice Rehnquist
Justice O'Connor

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 30, 1985

84-773 - Bender v. Williamsport
School District

Dear Chief,

I shall be interested in your dissent in
this case.

Sincerely yours,



The Chief Justice

Copies to the Conference

DEC 30 1985

U.S. SUPREME COURT
LIBRARY

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

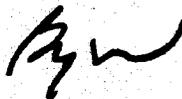
January 31, 1986

84-773 - Bender v. Williamsport
Area School District

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

APR 01 1986

U.S. SUPREME COURT
LIBRARY

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 31, 1985

Re: No. 84-773-Bender v. Williamsport Area
School District

Dear John:

I think I am with you in your conclusions in
this one.

Sincerely,

JM.

T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 3, 1986

Re: No. 84-773 - Bender v. Williamsport Area
School District

Dear John:

Please join me in your concurring opinion.

Sincerely,



T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 3, 1986

Re: No. 84-773-Bender v. Williamsport

Dear John:

Please join me.

Sincerely,

T.M.
T.M.

Justice Stevens

cc: The Conference

1986

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

From: Justice Marshall

Circulated: MAR 11 1986

Recirculated: *hrr.*

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[March —, 1986]

JUSTICE MARSHALL, concurring.

I join JUSTICE STEVENS' opinion for the Court. I write separately to emphasize that Mr. Youngman cannot, as the Solicitor General and THE CHIEF JUSTICE contend, invoke the Article III jurisdiction of this Court through a belated nontestimonial statement that he is a parent of a child in the Williamsport Area High School.

This lawsuit on appeal was *not* "the same dispute between the same parties," *post*, at 2, as the one conducted in the District Court. The dispute litigated in the District Court was one between certain students wishing to conduct prayer group activities as part of an official school activity period, on the one hand, and a school board that refused them permission to do so, on the other. Mr. Youngman participated in that lawsuit only as a member of the school board, sued in his official capacity. The real party in interest in that lawsuit was the board. *Kentucky v. Graham*, 473 U. S. —, — (1985). That controversy ended with the entry of the District Court judgment; the school board, voting 8-1 with Mr. Youngman in the minority, abandoned its earlier position and agreed to allow plaintiffs to conduct the prayer group activities they sought. There was therefore nothing left to litigate between those parties.

The lawsuit sought to be litigated on appeal is a different one. This dispute, under THE CHIEF JUSTICE's theory, is

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PP. 1-2

Justice Brennan
 Justice White
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: MAR 13 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[March —, 1986]

JUSTICE MARSHALL, concurring.

I join JUSTICE STEVENS' opinion for the Court. I write separately to emphasize that the parties cannot, as the Solicitor General and THE CHIEF JUSTICE contend, invoke the Article III jurisdiction of this Court through a belated nontestimonial statement by Mr. Youngman that he is a parent of a child in the Williamsport Area High School.

This lawsuit on appeal was *not* "the same dispute between the same parties," *post*, at 2, as the one conducted in the District Court. The dispute litigated in the District Court was one between certain students wishing to conduct prayer group activities as part of an official school activity period, on the one hand, and a school board that refused them permission to do so, on the other. Mr. Youngman participated in that lawsuit only as a member of the school board, sued in his official capacity. The real party in interest in that lawsuit was the board. *Kentucky v. Graham*, 473 U. S. —, — (1985). That controversy ended with the entry of the District Court judgment; the school board, voting 8-1 with Mr. Youngman in the minority, abandoned its earlier position and agreed to allow plaintiffs to conduct the prayer group activities they sought. There was therefore nothing left to litigate between those parties.

The lawsuit sought to be litigated on appeal is a different one. This dispute, under THE CHIEF JUSTICE's theory, is

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

November 21, 1985

MEMBERS OF
HARRY A. BLACKMUN

Memorandum to the Conference

Re: No. 84-773, Bender v. Williamsport Area School Dist.

My present inclination, so far as the standing issue is concerned, is to agree with John.

H. G. S.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 12, 1986

Re: No. 84-773, Bender v. Williamsport Area School Dist.

Dear John:

Please join me in your opinion concurring in the judgment.

Sincerely,



Justice Stevens

cc: The Conference

OR FEB 15 10:20

LIBRARY OF CONGRESS
MANUSCRIPT DIVISION

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 12, 1986

Re: No. 84-773, Bender v. Williamsport Area School Dist.

Dear John:

I joined your earlier writing on February 12, but I suspect you need a formal joinder for your majority opinion. I hereby join.

Sincerely,



Justice Stevens

cc: The Conference

80 01A ST 9AM 28

2000 10 10 10

October 25, 1985

84-773 Bender v. Williamsport School District

Dear Chief:

This is a reply to your letter concerning my view on standing. As stated at Conference, I think there is standing, and enclose my clerk's memo on this question. I agree with you that we should try to reach the merits.

My notes show that the votes in favor of standing were yours, Byron's, Thurgood's, Harry's, Bill Rehnquist's and mine. In his discussion of the case, Bill Brennan addressed the merits and apparently assumed there was standing. John came out strongly against standing, and Sandra said she considered the case "close", and agreed with much of what John said. If we reach the merits, Sandra agrees with us and would reverse.

I think we can assume that, rather than see a majority decide the merits following Widmar, Bill Brennan will join John in finding no standing, and Thurgood may well change his mind. If Sandra follows John, there would be at least four votes for "no standing". This will leave it up to Harry who - like Bill Brennan - voted to affirm on the merits but stated there was standing. We could lose Harry if John writes, as he will, one of his strong opinions.

My guess, in view of the foregoing, is that the outcome of this case will depend on whether Sandra goes with John and whether Harry changes his mind about standing.

I think most of us respect Bill Rehnquist's views on standing. What would you think of asking Bill to circulate a memorandum, or at least to provide you with a memorandum that could be incorporated into a draft opinion?

Sincerely,

The Chief Justice

lfp/ss
Enc.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 31, 1985

84-773 Bender v. Williamsport Area School District

Dear Chief:

I had considered the standing question prior to Conference.

I adhere to my vote that there is standing and we have jurisdiction to hear the appeal.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

December 4, 1985

84-773 Bender v. Williamsport School District

Dear Chief:

As I wrote you on October 31, I think there is standing, and we have jurisdiction to hear the appeal.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice White
Justice Rehnquist
Justice O'Connor

Supreme Court of the United States
SUPREME COURT, U.S.
Washington, D.C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

'85 DEC 30 AIO:10

December 27, 1985

84-773 Bender v. Williamsport School District

Dear Chief:

The Per Curiam you circulated with your memo of December 20 is fine if this remains the view of a majority.

My recollection is that you may dissent on the standing question. I am not sure that a dissent is worthwhile, and I may simply join the PC. But I will wait to take a look at what you may write.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

Circulated: FEB 13 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WIL-
 LIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[February —, 1986]

JUSTICE POWELL, dissenting.

I agree with THE CHIEF JUSTICE that respondent has standing to appeal, and also agree with much of his dissenting opinion. I write briefly to say that on its merits, this case is controlled by *Widmar v. Vincent*, 454 U. S. 263 (1981).

As in that case, respondent School District simply had "created a forum generally open for use by student groups." *Id.*, at 267. The School District provided thirty-minute periods on Tuesdays and Thursdays for high school students to meet in groups in separate school rooms for extracurricular activities, including discussion or debate on any subject of their choosing. A religious group was formed for reading passages of scripture and for prayer. Although there were no complaints by students, faculty, or parents, on the basis of a legal opinion the principal advised the group that it could not meet during these periods. As THE CHIEF JUSTICE observes in his dissent, "this is a student-initiated and student-led group seeking the same forum available to any other student extra-curricular activity group." *Ante*, at 3. At the time of this suit, there was a total of twenty-five identified groups, each organized by students. All of these groups were free to discuss any subject other than a religious one.

In *Widmar*, under essentially the same circumstances, we held that the University of Missouri at Kansas City had "discriminated against student groups and speakers based on

03/21

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

With Changes Throughout

P. 1

From: **Justice Powell**

Circulated: _____

Recirculated: **MAR 21 1986**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WIL-
 LIAMSPORT AREA SCHOOL DISTRICT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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[March —, 1986]

JUSTICE POWELL, dissenting.

I agree with THE CHIEF JUSTICE that respondent has standing to appeal, and also agree with much of his dissenting opinion. I write briefly to say that on its merits, this case is controlled by *Widmar v. Vincent*, 454 U. S. 263 (1981).

As in that case, respondent School District simply had "created a forum generally open for use by student groups." *Id.*, at 267. The School District provided thirty-minute periods on Tuesdays and Thursdays for high school students to meet in groups in separate school rooms for extracurricular activities, including discussion or debate on any subject of their choosing. A religious group was formed for reading passages of scripture and for prayer. Although there were no complaints by students, faculty, or parents, on the basis of a legal opinion the principal advised the group that it could not meet during these periods. As THE CHIEF JUSTICE observes in his dissent, this is "a student-initiated and student-led group seeking the same forum available to other student extracurricular activity groups." *Ante*, at 3. At the time of this suit, there was a total of twenty-five identified groups, each organized by students. All of these groups were free to discuss any subject other than a religious one.

In *Widmar*, under essentially the same circumstances, we held that the University of Missouri at Kansas City had "discriminated against student groups and speakers based on

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

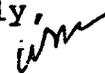
October 31, 1985

Re: No. 84-773 Bender v. Williamsport Area School
District

Dear Chief,

I agree with your memorandum on the standing of the respondent in this case. I think there is jurisdiction to hear the appeal, and I think last year that part of Oklahoma City v. Tuttle which secured the agreement of a majority stated that prudential considerations for not reaching an issue should be raised at the certiorari stage, before we had invested a lot of time in the case, or disregarded.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 4, 1985

Re: No. 84-773 Bender v. Williamsport School District

Dear Chief,

I have already responded to your question of the standing of the respondent in this case. By my letter of October 31st, I agree with you.

Sincerely,



The Chief Justice

cc: Justice White
Justice Powell
Justice O'Connor

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 23, 1985

Re: No. 84-773 Bender v. Williamsport School District

Dear Chief,

Like you, I continue to disagree with the "no standing" position embodied in the Per Curiam which you circulated on December 20th. I hope you will write out in dissent the contents of your earlier memorandum on this subject, which I would be happy to join.

Sincerely,

Wm

The Chief Justice

cc: The Conference

DEC 23 1985

U.S. SUPREME COURT
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 27, 1986

Re: No. 84-773 Bender v. Williamsport Area School District

Dear Chief,

Please join me in your dissent in this case.

Sincerely,

The Chief Justice

cc: The Conference

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

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SUPREME COURT, U.S.
JUSTICE MARSHALL

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

'85 OCT 25 P3:38

October 25, 1985

Re: 84-773 - Bender v. Williamsport Area
School District

10/25/85
J.P.S.

Dear Thurgood:

After our conference discussion of this case, you suggested that it might be useful if I put in writing my reasons for concluding that Mr. Youngman did not have standing to appeal from the judgment entered by the District Court. This letter responds to your suggestion.

In brief, it is my opinion that Youngman had no standing to appeal in his individual capacity because the judgment did not grant any relief against him as an individual and because there is nothing in the record to indicate that the outcome of this litigation could have any adverse affect on him as an individual or a parent. It is equally clear, I think, that Mr. Youngman has no standing to appeal in his official capacity. One member of a nine person governmental body has no right to prosecute an appeal on behalf of that body after its members have voted eight to one not to appeal. If I am right that the Court of Appeals never acquired jurisdiction to hear the appeal, its judgment must be vacated and that of the District Court reinstated. See Firestone Tire and Rubber Co. v. Risjord, 449 U. S. 368, 379-380 (1981).

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SUPREME COURT, U.S.
JUSTICE MARSHALL
'85 OCT 28 AM 0:36

Before commenting separately on Mr. Youngman's claimed right to appeal in his individual and official capacities, let me summarize what the record reveals about Mr. Youngman.

I.

Mr. Youngman was one of the 13 defendants named in the complaint filed in the District Court on June 2, 1982. App. 13. In their introductory paragraph

J.P.S.
I think I am with you in your conclusions on this one
JP

petitioners (plaintiffs below) described their complaint as "an action for declaratory judgment and permanent injunction ... against the Williamsport Area School District ... and each member of the School Board of the District, in their individual and official capacities." App. 13. In paragraph 23, however, the only numbered paragraph that mentions Mr. Youngman, they alleged that "John C. Youngman, Jr., is a member of the Williamsport Area School Board and is sued in that capacity." Id., at 16. Each of the other eight members of the school board was also "sued in that capacity." Id., at 15-16.

In the single answer filed on behalf of "defendants the Williamsport Port Area School District, et al.," Mr. Youngman is mentioned only once. The seventh affirmative defense averred:

Defendant John C. Youngman, Jr. did not attend the school board meeting of January 18, 1982 and therefore did not vote or participate in the decision making process with respect to the question of recognition or nonrecognition of the group "Petros." Id., at 32.

Between the date that answer was filed, July 16, 1982, and the entry of judgment on May 12, 1983, the record contains no mention of Mr. Youngman.

On May 12, 1983, the District Judge filed his opinion ruling in favor of petitioners on the merits. The holding is summarized in this paragraph:

After carefully reviewing those facts, and after giving full consideration to all pertinent legal authority, the court concludes that because the defendant school district is not constitutionally required to deny the plaintiffs the opportunity to meet, by doing so solely on constitutional grounds it has impermissibly burdened their free-speech rights. Accordingly, summary judgment will be granted in favor of plaintiffs. App. to Pet. for Cert. 68a.

In his opinion the District Court used the terms "the defendants," "school district," and even "it" interchangeably.

On June 10, 1983, Mr. Youngman filed a praecipe for his appearance "on behalf of" himself as "one of the Defendants in the above-captioned matter." Record, Docket Entry 28, p. 1. The same day Mr. Youngman filed a notice that he appeals, as "one of the Defendants," to the United States Court of Appeals for the Third Circuit. App. 166.

The petitioners never raised any question about Mr. Youngman's standing to appeal. The closest they came was in their Petition for Rehearing and Suggestion for Rehearing En Banc filed in the Third Circuit, which anticipated a challenge on mootness:

After appellees [petitioners] filed their brief on the merits, Mr. Youngman's tenure on the school board ended. Appellees believe that he continues to have standing to litigate the present appeal. One reason for this belief is that a petition for attorneys' fees under 42 U.S.C. 1988 is pending before the District Court against Mr. Youngman and the other defendants. Cf., e.g., Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 347 n.6 (1979). Id., at 5, n. 2.

It is somewhat ironic to note that petitioners suggested that Mr. Youngman "continues to have standing to litigate the present appeal" but they never suggest how he happened to have standing at the time the appeal was taken.

II.

Mr. Youngman did not have standing to appeal in his individual capacity for the simple reason that the District Court's judgment did not grant any relief against him individually. Paraphrasing our holding in Brandon v. Holt, 469 U.S. ____ (Jan. 21, 1985) (No. 83-1622), the "course of proceedings ... make it abundantly clear that the action against [Youngman] was in his official capacity and only in that capacity."

Id., at ___ [slip op. 5]. See Kentucky v. Graham, 469 U. S. ___, ___ (June 28, 1985) (No. 84-849) [slip op. 8, n. 14] ("In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed." (citing Brandon v. Holt, supra)). In this case, the "course of proceedings" quite plainly indicates that Mr. Youngman was at no point held liable in his individual capacity and had no exposure to such liability. The complaint sought no monetary relief against either the school district or the individual defendants. See Complaint, App. 13, 20-21. At the oral argument in this Court, petitioners' counsel expressly recognized that Youngman had been sued in his official capacity and that there was no claim of liability against him individually in any sense. Tr. of Oral Arg. 5. Finally, since it is plain that Youngman is not liable in his personal capacity, he is similarly not liable for attorney's fees in that capacity under 42 U.S.C. § 1988. As your opinion for the Court in Kentucky v. Graham held, "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." 469 U. S., at ___ (footnote and citation omitted) [slip op. 5]. Accord, id., at ___, ___ [slip op. 4-5, 9-11].

III.

As a member of the school board sued in his official capacity Youngman has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal. As we held in Brandon v. Holt, supra, "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." 469 U. S., at ___ [slip op. 7]. We repeated this point in your opinion in Kentucky v. Graham:

Official-capacity suits ... "generally represent only another way of pleading an action

against an entity of which an officer is an agent." Monell v. New York City Dept. of Social Services, 436 U. S. 658, 690, n. 55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. Brandon, 469 U. S., at _____. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. 469 U.S., at _____ (emphasis in original, footnote omitted) [slip op. 6].

And again, if a school board member cannot be held "personally" liable on the merits, neither can he be responsible for the opposing party's attorney's fees. Kentucky v. Graham, supra.

Mr. Youngman's status as a school board member does not permit him to "step into the shoes of the school board" and invoke the rights of the school district. In this case, Mr. Youngman was apparently the lone dissenter in a decision by the other eight members of the school board to forego an appeal. Tr. of Oral Arg. 7. (Nothing, however, appears in the record.) Generally speaking, members of collegial bodies do not have standing to intervene in order to perfect an appeal the body itself has declined to take. Mr. Youngman is not legally entitled to overrule the board's action by taking an appeal himself, just as a lone Justice on this Court is not authorized to docket and decide cases in line with his own vision of what the Constitution commands. This rather obvious proposition is confirmed by the en banc decision of the District of Columbia Court of Appeals in Smuck v. Hobson, 408 F. 2d 175 (1969):

We also find that Mr. Smuck has no appealable interest as a member of the Board of Education. While he was in that capacity a named defendant,

the Board of Education was undeniably the principal figure and could have been sued alone as a collective entity. Appellant Smuck had a fair opportunity to participate in its defense, and in the decision not to appeal. Having done so, he has no separate interest as an individual in the litigation. The order directs the board to take certain actions. But since its decisions are made by vote as a collective whole, there is no apparent way in which Smuck as an individual could violate the decree and thereby become subject to enforcement proceedings. Id., at 177-178 (footnote omitted).

Judge McGowan expressly adopted the majority's reasoning, see id., at 190; no judge disagreed with this analysis.

It would be an entirely different case if, for example, state law authorized school board action by unanimous consent, in which event Mr. Youngman could claim that he was legally entitled to protect "the effectiveness of [his] vote[]." Coleman v. Miller, 307 U. S. 433, 438 (1939). See id., at 438-446; id., at 456 (Black, J., concurring). But even in that event Mr. Youngman would have to allege that his vote was diluted or rendered nugatory under state law and even then he would have a mandamus or other remedy against the secretary of the school board, cf. id., at 436-437 (mandamus action "to compel a proper record of legislative action"); he would not be entitled to take legal action in the board's authority in his own name.

IV.

The suggestion that Youngman has standing as a parent of a child attending the Williamsport Area High School is a red herring. Unlike the plaintiffs in Brandon v. Holt, supra, Mr. Youngman cannot amend his pleadings to conform to the proof at the District Court level because the "course of proceedings," and in particular Mr. Youngman's praecipe and notice of appeal "as a defendant," indicate that the case was not tried as one by a parent suing on behalf of a child offended by the conduct of group worship activities on school

premises during the regular school day. In McCollum v. Board of Education, 333 U. S. 203 (1948), to which petitioners adverted at oral argument, Tr. of Oral Arg. 4, 7, the parent's petition for a writ of mandamus alleged that their son was in school, Record in O.T. 1947, No. 90, p. 3 (Petition ¶ 8), and that the challenged released time program gave rise to "segregation, ostracism, ridicule, hostility and embarrassment," and subjected him to "coercion and compulsion" to submit to religious indoctrination, id., at 10 (Petition ¶ 29). In marked contrast, there is nothing in the record evidencing that Mr. Youngman is even a parent, let alone that his child attends the Williamsport Area High School. Indeed, for all the record discloses, Mr. Youngman's son or daughter may be an intending member of Petros. As the praecipe, notice of appeal, and briefs filed in the Court of Appeals make clear, Mr. Youngman took his appeal "as a defendant." We have previously remarked that

The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. Wrath v. Seldin, 422 U.S. 490, 517-518 (1975).

In view of the absence of any allegations or evidence offered on behalf of students who might be offended by petitioners' group worship, the record does not even arguably support the suggestion that Mr. Youngman has standing to represent the interests of such students as a third party plaintiff.

It cannot be seriously argued that Mr. Youngman has standing because he could have moved to intervene under Federal Rule of Civil Procedure 24--but obviously failed to do so. As you know, Rule 24 requires "timely application [before] anyone shall be permitted to intervene in an action," Fed. Rule Civ. Proc. 24(a),

(b), and further stipulates that the motion "shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought," *id.*, 24(c). It is perfectly clear that Mr. Youngman filed no such pleading in either of the courts below. We consequently have no facts supporting his standing to maintain this action as a parent, facts which are required by Article III as well as Rule 24. See Warth v. Seldin, *supra*. It is also clear that if Mr. Youngman filed any motion at this late stage--and we have nothing of this sort under advisement--it would be out of time. To be sure, we have approved post-judgment intervention for the purposes of perfecting an appeal, but only where the interest of the intervening party had been represented at trial and "the motions to intervene ... were made within the applicable time for filing an appeal." United Airlines, Inc. v. McDonald, 432 U. S. 385, 396, n. 16 (1977). Neither consideration is present here. The emaciated record hardly recommends this case as one in which we should depart from the general rule that "[o]ne who does not seek to intervene ... ordinarily may not appeal from any subsequent order in the proceeding." 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1923, at 633 (1972) (footnote omitted).

If the Court should hold that Youngman had standing to appeal in this case, I intend to expand a good deal on the foregoing thoughts.

Respectfully,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 31, 1985

Re: No. 84-773 - Bender v. Williamsport
Area School District

Dear Chief:

Your memorandum prompts me to make three responses.

1. You suggest that the District Court's judgment affected Mr. Youngman's ability as "[a]n individual [school board] member" to "perform the functions of his office." It is important to note, however, that no individual relief of any kind was granted. The District Court merely decided cross-motions for summary judgment and ordered the "Clerk of Court [to] close this case," without retaining jurisdiction or specifying any injunctive relief. App. 105a. The District Court did not "enjoin[] Youngman as an individual member of the board from excluding the student group." Neither before nor after the entry of this order did Mr. Youngman have any authority as an individual member of the Board to exclude the student group. His authority was simply to cast one vote in support of or against action that the Board itself could take. And the District Court's order did not impair the ability of Mr. Youngman to vote any way he wanted to at Board meetings. I might agree that the discretion of the school board majority was constrained by the District Court's order,¹ but it is difficult to see in what

¹ Of course the Board never expressed any interest in excluding the student group but did so only because its counsel indicated there was a legal impediment to allowing the group to
(Footnote continued)

- 2 -

way Mr. Youngman was inhibited. He "vote[d] his conscience." His vote just failed to carry the day.

2. You apparently agree, at least as a general proposition, that members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take and that Mr. Youngman's standing to appeal, if any, must rest on his own status as a school board member. Although you do not comment on it, perhaps you, too, were persuaded by the reasoning in the en banc District of Columbia Circuit's opinion in Smuck v. Hobson, 408 F. 2d 175 (1969).

3. With regard to Mr. Youngman's standing as a parent, there is no authority for the notion that Mr. Youngman can pursue an appeal as a parent simply because he was a defendant in his capacity as a school board member in the trial court. Mr. Youngman would not have been bound as a parent by the District Court's judgment against the school district. See Restatement (Second) of Judgments § 36(2) (1982); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4454, p. 465 (1981) ("Another fundamental limitation is that litigation in one capacity, individual or representative, does not preclude relitigation in a different capacity, individual or representative." (footnote omitted)). The District Court's judgment thus did not bind Mr. Youngman in his capacity as a parent; there being no unfavorable judgment running against Mr. Youngman in this capacity, Mr. Youngman did not have a sufficient stake to take an appeal. More generally, the nonpreclusive effect of the District Court's judgment demonstrates that Mr. Youngman, as a parent, was not a party to those proceedings: Litigants are generally bound by judgments in suits to which they are parties; Mr. Youngman as parent was not bound by

(Footnote 1 continued from previous page)
meet. Tr. of Oral Arg. 3, 20; App. 39, 48-49; App. to Pet. for Cert. 3a, 66a. In the words of the Solicitor General, the school board was a "disinterested stakeholder." Tr. of Oral Arg. 23.

the District Court's judgment; therefore, Mr. Youngman as parent was not a party in the District Court and had no standing to take an appeal. As Professors Fleming James and Geoffrey Hazard of Yale explain:

A person may have more than one legal capacity in which she can appear as a party. Thus, a person who has been appointed a trustee for another can conduct transactions in her role as trustee and other transactions on her own behalf, and for legal purposes these are generally treated as the transactions of two different legal personages. The rules of res judicata apply to a person only in the capacity in which she appeared in the litigation. Accordingly, a trustee who brings or defends a suit in her capacity as such is not the "same party" that is involved in a subsequent action brought by or against the same person in her individual capacity. This principle applies to trustees, guardians ad litem, receivers, and the like. F. James & G. Hazard, Civil Procedure § 11.6, p. 594 (3d ed. 1985) (emphasis added and footnote omitted).

If Mr. Youngman was not a party in his capacity as a parent, he cannot take an appeal in that capacity:

One ordinarily may not be a party to an appeal unless one was both a party to the judgment from which the appeal is taken and a party to the appeal itself. Thus, a judgment between two parties in the trial court cannot be appealed by a nonparty who believes that the judgment was unfair or erroneous. Id., § 12.5, p. 660 (footnote omitted).

From whichever level of abstraction one examines the problem, it is only by overlooking this important

- 4 -

difference in capacities that one could countenance the rather cavalier manner in which Mr. Youngman asserts his standing as a parent for the first time in this Court. The "course of the proceedings" indicates that Mr. Youngman, as a parent, was not in the lawsuit in the District Court. Kentucky v. Graham, 469 U. S. ____ (1985); Brandon v. Holt, 469 U. S. ____ (1985).

Respectfully,



The Chief Justice

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. 84-773

**MICHAEL BENDER, ET AL., PETITIONERS v. WIL-
LIAMSPORT AREA SCHOOL DISTRICT ET AL.**

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

[January —, 1986]

JUSTICE STEVENS delivered the opinion for the Court.

This cases raises an important question of federal appellate jurisdiction that was not considered by the Court of Appeals: Whether one member of a School Board has standing to appeal from a declaratory judgment against the Board. We conclude that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.

I

In September 1981 a group of high school students in Williamsport, Pennsylvania formed a club called "Petros" for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members." App. 46. The group asked the principal of the high school for permission to meet on school premises during student activity periods scheduled during the regular school day on Tuesdays and Thursdays. The principal allowed Petros to hold an organizational meeting that was attended by approximately 45 students. At that meeting passages of scripture were read and some students prayed. There is no evidence that any students, or parents, expressed any opposition or concern about future meetings of Petros. The principal nevertheless advised the group that they could not hold any further meetings until he had dis-

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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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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WIL-
 LIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[January —, 1986]

JUSTICE STEVENS, concurring.

While I agree with the Court's disposition, I believe the importance of the case merits a more complete explanation of the basis for our decision. The case raises an important question of federal appellate jurisdiction that was not considered by the Court of Appeals: Whether one member of a School Board has standing to appeal from a declaratory judgment against the Board. We conclude that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.

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~~NO~~
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Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
 SEE PAGES: 1, 13

From: Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WIL-
 LIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[January —, 1986]

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins,
 concurring.

While I agree with the Court's disposition, I believe the importance of the case merits a more complete explanation of the basis for our decision. The case raises an important question of federal appellate jurisdiction that was not considered by the Court of Appeals: Whether one member of a School Board has standing to appeal from a declaratory judgment against the Board. We conclude that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.

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

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 10, 12, 13, 14

From: Justice Stevens

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~~VPS~~
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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS v. WIL-
LIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[January —, 1986]

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins,
concurring.

While I agree with the Court's disposition, I believe the importance of the case merits a more complete explanation of the basis for our decision. The case raises an important question of federal appellate jurisdiction that was not considered by the Court of Appeals: Whether one member of a School Board has standing to appeal from a declaratory judgment against the Board. We conclude that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.

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Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

pp. 1, 11, 12

From: Justice Stevens

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS v. WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

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

[February —, 1986]

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in the judgment.

While I agree with the Court's disposition, I believe the importance of the case merits a more complete explanation of the basis for our decision. The case raises an important question of federal appellate jurisdiction that was not considered by the Court of Appeals: Whether one member of a School Board has standing to appeal from a declaratory judgment against the Board. We conclude that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.

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Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

From: **Justice Stevens**

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5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-773

**MICHAEL BENDER, ET AL., PETITIONERS v. WIL-
 LIAMSPORT AREA SCHOOL DISTRICT ET AL.**

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

[March —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

This case raises an important question of federal appellate jurisdiction that was not considered by the Court of Appeals: *Whether* one member of a School Board has standing to appeal from a declaratory judgment against the Board. We conclude that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.

I

In September 1981 a group of high school students in Williamsport, Pennsylvania, formed a club called "Petros" for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members." App. 46. The group asked the Principal of the high school for permission to meet on school premises during student activity periods scheduled during the regular schoolday on Tuesdays and Thursdays. The Principal allowed Petros to hold an organizational meeting that was attended by approximately 45 students. At that meeting passages of scripture were read and some students prayed. There is no evidence that any students, or parents, expressed any opposition or concern about future meetings of Petros. The Principal nevertheless advised the group that they could not hold any further meetings until he

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 4, 1986

No. 84-773 Bender v. Williamsport School District

Dear Chief,

As I wrote you on October 25, I am still persuaded that Mr. Youngman does not have standing although if we are to reach the merits, I would agree with you, the case should be reversed.

Sincerely,



The Chief Justice

cc: Justice White
Justice Powell
Justice Rehnquist

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 30, 1985

No. 84-773 Bender v. Williamsport Area School Dist.

Dear Chief,

I agree with your Per Curiam in this case.

Sincerely,

Sandra

The Chief Justice

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 3, 1986

Re: 84-773 Bender, et al. v. Williamsport Area
School District, et al.

Dear John,

Please join me.

Sincerely,



Justice Stevens

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