

# The Burger Court Opinion Writing Database

## *Rabe v. Washington*

405 U.S. 313 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



To: Mr. Justice Douglas ✓  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

From: \_\_\_\_\_  
 Circulated: MAR 14 1972  
 Recirculated: \_\_\_\_\_

No. 71-247 -- Rabe v. Washington

MR. CHIEF JUSTICE BURGER, concurring in the result.

I concur in the result reached by the Court solely on the ground that petitioner's conviction under Washington's general obscenity statute cannot, under the circumstances of this case, be sustained consistent with the fundamental notice requirements of the Due Process clause. The evidence in this case, however, revealed that the screen of petitioner's theater was clearly visible to motorists passing on an nearby public highway and to twelve to fifteen nearby family residences. In addition, young teenage children were observed viewing the film from outside the chain link fence enclosing the theater grounds. I, for one, would be unwilling to hold that the First Amendment prevents a state from prohibiting such a "public display" of scenes depicting explicit sexual activities if the state undertook

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-247

Circulated: \_\_\_\_\_  
Recirculated: MAR 17 1972

William Rabe, Petitioner, } On Writ of Certiorari to the  
v. } Supreme Court of Wash-  
State of Washington. } ington.

[March 20, 1972]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, concurring.

I concur solely on the ground that petitioner's conviction under Washington's general obscenity statute cannot, under the circumstances of this case, be sustained consistent with the fundamental notice requirements of the Due Process Clause. The evidence in this case, however, revealed that the screen of petitioner's theater was clearly visible to motorists passing on a nearby public highway and to 12 to 15 nearby family residences. In addition, young teenage children were observed viewing the film from outside the chain link fence enclosing the theater grounds. I, for one, would be unwilling to hold that the First Amendment prevents a State from prohibiting such a "public display of scenes depicting explicit sexual activities if the State undertook to do so under a statute narrowly drawn to protect the public from potential exposure to such offensive materials. See *Redrup v. New York*, 386 U. S. 767 (1967).<sup>1</sup>

Public displays of explicit materials such as are described in this record are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and, in my

<sup>1</sup> For examples of recent statutes regulating public displays, see Ariz. Rev. Stats. § 13-537; N. Y. Penal Law §§ 245:10-245:11.

Burger  
A.M.

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 71-247

William Rabe, Petitioner, } On Writ of Certiorari to the  
                                   v. } Supreme Court of Wash-  
       State of Washington. } ington.

[March —, 1972]

PER CURIAM.

Petitioner was the manager of the Park Y Drive-In Theatre in Richland, Washington, where the motion picture "Carmen Baby" was being shown. The motion picture is a loose adaptation of Bizet's opera "Carmen," containing sexually frank scenes but no instances of sexual consummation are actually portrayed. After viewing the film from outside the theatre fence on two successive evenings, a police officer obtained a warrant and arrested petitioner for violating Washington's obscenity statute. Rev. Code Wash. § 9.68.010. Petitioner was later convicted and, on appeal, the Supreme Court of Washington affirmed. 79 Wash. 2d 254, 484 P. 2d 917 (1971).

We granted certiorari in order to consider the important constitutional question whether the display of a sexually frank motion picture in an outdoor theatre visible from nearby residential areas and highways may be criminally punished consistent with the guarantees of the First and Fourteenth Amendments. 404 U. S. 909. For reasons which will be apparent, we reverse petitioner's conviction on more narrow grounds without reaching this question.

The statute under which petitioner was convicted, Rev. Code Wash. § 9.68.010, made criminal the knowing display of "obscene" motion pictures:

"Every person who—

"(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or dis-

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 71-247

William Rabe, Petitioner,	}	On Writ of Certiorari to the Supreme Court of Wash- ington.
v.		
State of Washington.		

[March —, 1972]

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We granted certiorari. 404 U. S. 909. We reverse petitioner's conviction.

The statute under which petitioner was convicted, Rev. Code Wash. § 9.68.010, made criminal the knowing display of "obscene" motion pictures:

"Every person who—

"(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire

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3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 71-247

William Rabe, Petitioner, } On Writ of Certiorari to the  
v. } Supreme Court of Wash-  
State of Washington. } ington.

[March —, 1972]

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March eighth  
1972

Dear Lewis:

I have your memo of the 8th on  
No. 71-247 - Rabe v. Washington.

I have omitted not only footnote 1,  
but the other footnote that was in the  
earlier draft as I agree with you that  
footnote 1 is not necessary.

You will see the new circulation  
shortly.

William O. Douglas

Mr. Justice Powell

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 9, 1972

Re: No. 71-247 - Rabe v. Washington

Dear Bill:

Please note that I concur  
in the result in this case.

Sincerely,

*BR*

Mr. Justice Douglas

Copies to Conference

*Dear Byron*

*Our notes cover in the  
works. I made the suggested changes  
in mentioned. So I still want  
to review in the usual way  
I am with this amount  
only to stay for a couple days  
all*

*Not  
done*



*File  
Revis  
3-9*

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 71-247

William Rabe, Petitioner,	}	On Writ of Certiorari to the
v.		Supreme Court of Wash-
State of Washington.		ington.

[March —, 1972]

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5th DRAFT

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6th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 71-247

William Rabe, Petitioner,	}	On Writ of Certiorari to the
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[March —, 1972]

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*Wm. Douglas  
6-11*

TS

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 7, 1972

RE: No. 71-247 - Rabe v. Washington

Dear Bill:

I agree with the per curiam you  
have prepared in the above.

Sincerely,



Mr. Justice Douglas

cc: The Conference

13  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 7, 1972

71-247 - Rabe v. Washington

Dear Bill,

I am glad to join your Per Curiam  
in this case.

Sincerely yours,

Mr. Justice Douglas

Copies to the Conference

P.S.  
✓

1-2-72  
JWS

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 8, 1972

Re: No. 71-247 - Rabe v. Washington

Dear Bill:

Would you consider cutting the words "but nonetheless constitutionally protected" from the first paragraph on page four. The words don't seem critical to your point and suggest we are deciding obscenity vel non although that issue was put aside with other questions.

Otherwise please note that I concur in the result. You appear to have a Court in any event.

Sincerely,



Mr. Justice Douglas

Copies to Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 9, 1972

Re: No. 71-247 - Rabe v. Washington

Dear Bill:

Please note that I concur  
in the result in this case.

Sincerely,



Mr. Justice Douglas

Copies to conference

cc: Mr. [unclear]

*[Handwritten notes:]*  
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...the ...  
...the ...  
...the ...  
...the ...  
...the ...

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 9, 1972

Re: No. 71-247 - Rabe v. Washington

Dear Bill:

I concur in your 5th Draft  
circulated on March 9, 1972.

Sincerely,



Mr. Justice Douglas

Copies to Conference



13

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

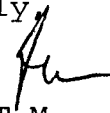
March 7, 1972

Re: No. 71-247 - Rabe v. Washington

Dear Bill:

Please join me in your per curiam.

Sincerely,

  
T.M.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 7, 1972

Re: No. 71-247 - Rabe v. Washington

Dear Bill:

Please join me in the Per Curiam you  
have prepared for this case.

Sincerely,

*H.A.B.*

H. A. B.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 10, 1972

Re: No. 71-247 - Rabe v. Washington

Dear Bill:

In my note of March 7 I indicated that I would like to be joined in the Per Curiam you have prepared for this case. Would you therefore please eliminate the notation, which appeared in the 4th and 5th draft circulations on March 9, that I am merely concurring in the result. I definitely do concur in the 5th draft of the opinion.

Sincerely,



H. A. B.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 8, 1972

Re: No. 71-247 Rabe v. Washington

Dear Bill:

I have now had an opportunity to look at some of the cases cited in your draft Per Curiam, and I am prepared to join your fine Per Curiam on the "vagueness" issue.

I am willing to accept the judgment of the Supreme Court of Washington that the film does not offend Roth/Memoirs standards. As I have not seen the film, I would prefer not to express an opinion of my own, and think this unnecessary in view of the basis of the Court's decision.

Accordingly, I would omit the second full paragraph of your footnote No. 1, as being unnecessary to our opinion.

Sincerely,

*Lewis*

Mr. Justice Douglas

lfp/ss

B

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 8, 1972

Re: No. 71-247 Rabe v. Washington

Dear Bill:

Please join me in your Per Curiam.

Sincerely,

*L. F. P.*

Mr. Justice Douglas

lfp/ss

cc: THE CONFERENCE