

The Burger Court Opinion Writing Database

United States v. Orito

413 U.S. 139 (1973)

Paul J. Wahlbeck, George Washington University

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3.1
AP
To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall (2)
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: JAN 12 1973

No. 70-69

Recirculated: _____

United States, Appellant, } On Appeal from the United
v. } States District Court for
George Joseph Orito. } the Eastern District of
Wisconsin.

[January —, 1973]

Memorandum from MR. CHIEF JUSTICE BURGER.

Appellee Orito was charged in the United States District Court for the Eastern District of Wisconsin with violation of 18 U. S. C. § 1462¹ in that he did "knowingly transport and carry in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier, that is, Trans World Airlines and North Central Airlines, copies of [specified] lewd, lascivious, and filthy materials." The materials specified included some 80 reels of film, with as many as eight to 10 copies of some of the films. Appellee moved to dismiss the indictment on the ground that the statute violated his First and

¹ 18 U. S. C. § 1462 provides in pertinent part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matters of indecent character; . . .

"Shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 3-5

F—April 7, 1973

2nd DRAFT

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: _____ Justice

Circulated:

APR 9 1973

Recirculated:

SUPREME COURT OF THE UNITED STATES

—
No. 70-69
—

United States, Appellant, } On Appeal from the United
v. } States District Court for
George Joseph Orito. } the Eastern District of
Wisconsin.

[April —, 1973]

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

Appellee Orito was charged in the United States District Court for the Eastern District of Wisconsin with violation of 18 U. S. C. § 1462¹ in that he did "knowingly transport and carry in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier, that is, Trans World Airlines and North Central Airlines, copies of [specified] lewd, lascivious, and filthy materials." The materials specified included some 80 reels of film, with as many as eight to 10 copies of some of the films. Appellee moved to dismiss the indictment on the ground that the statute violated his First and

¹ 18 U. S. C. § 1462 provides in pertinent part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matters of indecent character; . . .

"Shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 2

E—May 7, 1973

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

3rd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Recirculated: MAY 6 1973

No. 70-69

United States, Appellant,
v.
George Joseph Orito. } On Appeal from the United
States District Court for
the Eastern District of
Wisconsin.

[May —, 1973]

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

Appellee Orito was charged in the United States District Court for the Eastern District of Wisconsin with violation of 18 U. S. C. § 1462¹ in that he did "knowingly transport and carry in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier, that is, Trans World Airlines and North Central Airlines, copies of [specified] lewd, lascivious, and filthy materials." The materials specified included some 80 reels of film, with as many as eight to 10 copies of some of the films. Appellee moved to dismiss the indictment on the ground that the statute violated his First and

¹ 18 U. S. C. § 1462 provides in pertinent part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matters of indecent character; . . .

"Shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 4

E—June 14, 1973

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

5th DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Recirculated: JUN 19 1973

No. 70-69

United States, Appellant, *v.* On Appeal from the United States District Court for the Eastern District of Wisconsin.
George Joseph Orito.

[June —, 1973]

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

Appellee Orito was charged in the United States District Court for the Eastern District of Wisconsin with violation of 18 U. S. C. § 1462¹ in that he did "knowingly transport and carry in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier, that is, Trans World Airlines and North Central Airlines, copies of [specified] lewd, lascivious, and filthy materials." The materials specified included some 83 reels of film, with as many as eight to 10 copies of some of the films. Appellee moved to dismiss the indictment on the ground that the statute violated his First and

¹ 18 U. S. C. § 1462 provides in pertinent part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matters of indecent character; . . .

"Shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

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To: The Chief Justice
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
From: Douglas, J.

No. 70-69

Circulated: 1/15/73

United States, Appellant, } On Appeal from the ^{Recirculated} United States District Court for
v. } the Eastern District of Wisconsin.
George Joseph Orito.

[January —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

We held in *Stanley v. Georgia*, 394 U. S. 557, that an individual reading or examining "obscene" materials in the privacy of his home is protected against state prosecution by reason of the First Amendment made applicable to the States by reason of the Fourteenth. We said:

"These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: BRENNAN

Circulated: 3/11/73

SUPREME COURT OF THE UNITED STATES

No. 70-69

Recirculated:

United States, Appellant, } On Appeal from the United
v. } States District Court for
George Joseph Orito. } the Eastern District of
Wisconsin.

[March —, 1973]

Memorandum of MR. JUSTICE BRENNAN.

We noted probable jurisdiction to consider the constitutionality of 18 U. S. C. § 1642, which makes it a federal offense to “[bring] into the United States, or any place subject to the jurisdiction thereof, or knowingly [use] any express company or other common carrier, for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy book, pamphlet, motion-picture film, paper, letter, writing, print, or other matters of indecent character.” Appellee was charged in a one-count indictment with having knowingly transported in interstate commerce over 80 reels of allegedly obscene motion picture film. Relying primarily on our decision in *Stanley v. Georgia*, 394 U. S. 557 (1969), the United States District Court for the Eastern District of Wisconsin dismissed the indictment, holding the statute unconstitutional on its face:

“To prevent the pandering of obscene materials or its exposure to children or to unwilling adults, the government has a substantial and valid interest to bar the non-private transportation of such materials. However, the statute which is now before the court does not so delimit the government’s prerogatives: on its face, it forbids the transportation of obscene

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70-69

Recirculated: 6/6/73

United States, Appellant, | On Appeal from the United
v. | States District Court for
George Joseph Orito. | the Eastern District of
Wisconsin.

[June —, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

We noted probable jurisdiction to consider the constitutionality of 18 U. S. C. § 1642, which makes it a federal offense to “[bring] into the United States, or any place subject to the jurisdiction thereof, or knowingly [use] any express company or other common carrier, for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy book, pamphlet, motion-picture film, paper, letter, writing, print, or other matters of indecent character.” Appellee was charged in a one-count indictment with having knowingly transported in interstate commerce over 80 reels of allegedly obscene motion picture film. Relying primarily on our decision in *Stanley v. Georgia*, 394 U. S. 557 (1969), the United States District Court for the Eastern District of Wisconsin dismissed the indictment, holding the statute unconstitutional on its face.

“To prevent the pandering of obscene materials or its exposure to children or to unwilling adults, the government has a substantial and valid interest to bar the non-private transportation of such materials. However, the statute which is now before the court does not so delimit the government’s prerogatives: