The Burger Court Opinion Writing Database

California v. LaRue

409 U.S. 109 (1972)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

November 10, 1972

Re: No. 71-36 - California v. LaRue

Dear Bill:

Please join me.

Regards,

Mr. Justice Rehnquist

Copies to the Conference

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

No. 71-36

From: Douglas, J.

Circulated: 11-6

Circulated:

California et al., Appellants, v. Robert LaRue et al. } On Appeal from the United States District Court for the Central District of California.

[November —, 1972]

MR. JUSTICE DOUGLAS.

This is an action for a declaratory judgment, challenging Rules and Regulations of the Department of Alcoholic Beverage Control of California. It is a challenge of the constitutionality of the Rules on their face; no application of the Rules has in fact been made to respondents by the institution of either civil or criminal proceedings. We therefore do not have before us the precise impact of these Rules against licensees who sell alcoholic beverages in California. The opinion of the Court can, therefore, only deal with the Rules in the abstract.

The line which the Court draws between "expression" and "conduct" is generally accurate; and it also accurately describes in general the reach of the police power of a State when "expression" and "conduct" are closely brigaded. But we still do not know how broadly or how narrowly these Rules will be applied.

It is conceivable that a licensee might produce in a garden served by him a play—Shakespearian perhaps or one in a more modern setting—in which, for example, "fondling" in the sense of the Rules appears. I cannot imagine that any such performance could constitutionally be punished or restrained, even though the police power of a State is now buttressed by the Twenty-first Amend-

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TH

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
[illegible]

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-36

11/6/72

California et al., Appellants, v. Robert LaRue et al. | On Appeal from the United States District Court for the Central District of California.

[November —, 1972]

MR. JUSTICE DOUGLAS.

This is an action for a declaratory judgment, challenging Rules and Regulations of the Department of Alcoholic Beverage Control of California. It is a challenge of the constitutionality of the Rules on their face; no application of the Rules has in fact been made to respondents by the institution of either civil or criminal proceedings while the case meets the requirements of "case or controversy" within the meaning of Art. III of the Constitution and therefore complies with *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, the case does not mark the precise impact of these Rules against licensees who sell alcoholic beverages in California. The opinion of the Court can, therefore, only deal with the Rules in the abstract.

The line which the Court draws between "expression" and "conduct" is generally accurate; and it also accurately describes in general the reach of the police power of a State when "expression" and "conduct" are closely brigaded. But we still do not know how broadly or how narrowly these Rules will be applied.

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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

From: Brennan, J.

Circulated: 11/20/72

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-36

California et al., Appellants, v. Robert LaRue et al. | On Appeal from the United States District Court for the Central District of California.

[December —, 1972]

MR. JUSTICE BRENNAN, dissenting.

I ~~too~~ dissent. The California regulation at issue here clearly applies to some speech protected by the First Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, and also, no doubt, to some speech and conduct which have no constitutional protection. See *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966); *Roth* v. *United States*, 354 U. S. 476 (1957). The State points out, however, that the regulation does not prohibit speech directly, but speaks only to the conditions under which a license to sell liquor by the drink can be granted and retained. But as MR. JUSTICE MARSHALL carefully demonstrates in Part II of his dissenting opinion, by requiring the owner of a nightclub to forego the exercise of certain rights guaranteed by the First Amendment, the State has imposed an unconstitutional condition on the grant of a license. See *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Shelton* v. *Tucker*, 364 U. S. 479 (1960). Nothing in the language or history of the Twenty-first Amendment authorizes the States to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression. For that reason, I would affirm the judgment of the District Court.

3/14

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 7, 1972

71-36 - California v. LaRue

Dear Bill,

It is my present intention to join your opinion with a brief concurring statement.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

1st DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: NOV 8 1972

No. 71–36

Recirculated: _____

California et al., Appellants, v. Robert LaRue et al. } On Appeal from the United States District Court for the Central District of California.

[November —, 1972]

MR. JUSTICE STEWART, concurring.

A State has broad power under the Twenty-first Amendment to specify the times, places, and circumstances where liquor may be sold within its boundaries. *Seagram & Sons* v. *Hostetter,* 384 U. S. 35; *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S. 324, 330; *Dept. of Revenue* v. *James Beam Co.,* 377 U. S. 341, 344, 346; *California* v. *Washington,* 358 U. S. 64; *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132; *Mahoney* v. *Joseph Triner,* 304 U. S. 401; *State Board of Equalization* v. *Young's Market,* 299 U. S. 59. I should suppose, therefore, that nobody would question the power of California to prevent the sale of liquor by the drink in places where food is not served, or where dancing is permitted, or where gasoline is sold. But here California has provided that liquor by the drink shall not be sold in places where certain grossly sexual exhibitions are performed; and that action by the State, say the appellees, violates the First and Fourteenth Amendments. I cannot agree.

Every State is prevented by these same Amendments from invading the freedom of the press and from impinging upon the free exercise of religion. But does this mean that a State cannot provide that liquor shall not be sold in bookstores or within 200 feet of a church? I think not. For the State would not thereby be interferring with the First Amendment activities of the church

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

2nd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71–36

Recirculated: NOV 14 1972

California et al., Appellants. v. Robert LaRue et al. | On Appeal from the United States District Court for the Central District of California.

[November —, 1972]

MR. JUSTICE STEWART, concurring.

A State has broad power under the Twenty-first Amendment to specify the times, places, and circumstances where liquor may be dispensed within its borders. *Seagram & Sons* v. *Hostetter,* 384 U. S. 35; *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S. 324, 330; *Dept. of Revenue* v. *James Beam Co.,* 377 U. S. 341, 344, 346; *California* v. *Washington,* 358 U. S. 64; *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132; *Mahoney* v. *Joseph Triner,* 304 U. S. 401; *State Board of Equalization* v. *Young's Market,* 299 U. S. 59. I should suppose, therefore, that nobody would question the power of California to prevent the sale of liquor by the drink in places where food is not served, or where dancing is permitted, or where gasoline is sold. But here California has provided that liquor by the drink shall not be sold in places where certain grossly sexual exhibitions are performed; and that action by the State, say the appellees, violates the First and Fourteenth Amendments. I cannot agree.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 8, 1972

Re: No. 71-36 - California v. LaRue

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 3, 1972

Re: No. 71-36 - California v. LaRue

Dear Bill:

In due time I will circulate a dissent in this case.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: Conference

pp. 2, 5, 11

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

1st DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: NOV 17 1972

Recirculated: _____

No. 71-36

California et al., Appellants, v. Robert LaRue et al. | On Appeal from the United States District Court for the Central District of California.

[December —, 1972]

MR. JUSTICE MARSHALL, dissenting.

In my opinion, the District Court's judgment should be affirmed. The record in this case is not a pretty one, and it is possible that the State could constitutionally punish some of the activities described therein under a narrowly drawn scheme. But appellees challenge these regulations[1] on their face, rather than as

[1] Rule 143.3 (1) provides in relevant part:

"No licensee shall permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling of the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva, or genitals."

Rule 143.4 prohibits "The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

"(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law.

"(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

"(3) Scenes wherein a person displays the vulva or anus or the genitals.

"(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above."

B

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 8, 1972

Re: No. 71-36 - California v. LaRue

Dear Bill:

Please join me.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 6, 1972

Re: No. 71-36 California v. La Rue

Dear Bill:

Please join me.

Sincerely,

L.F.P.

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Dear Bill
In due time I will circulate a dissent in this case. B

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

From: Rehnquist, J.

Circulated: 11/2/72

Recirculated:

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-36

California et al., Appellants, v. Robert LaRue et al. | On Appeal from the United States District Court for the Central District of California.

[November —, 1972]

Mr. Justice Rehnquist delivered the opinion of the Court.

Appellant Kirby is the director of the Department of Alcoholic Beverage Control, an administrative agency vested by the California Constitution with primary authority for the licensing of the sale of alcoholic beverages in that State, and with the authority to suspend or revoke any such license if it determines that its continuation would be contrary to public welfare or morals. Article XX, § 22, California Constitution. Appellees include holders of various liquor licenses issued by appellant, and dancers at premises operated by such licensees. In 1970 the Department promulgated rules regulating the type of entertainment which might be presented in bars and night clubs which it licensed. Appellees then brought this action in the United States District Court for the Central District of California under the provisions of 28 U. S. C. §§ 1331, 1333, 2201, 2202, and 42 U. S. C. § 1983. A three-judge court was convened in accordance with 28 U. S. C. §§ 2281 and 2284, and the majority of that Court held that substantial portions of the regulations conflicted with the First and Fourteenth Amendments to the United States Constitution.[1]

[1] Appellees in their brief here suggest that the regulations may exceed the authority conferred upon the Department as a matter of state law. As the District Court recognized, however, such a claim is not cognizable in the suit brought by these appellees under 42 U. S. C. § 1983.

pp 4,8,9

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

From: Rehnquist, J.

Circulated: _____

Recirculated: 11/7/72

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-36

California et al., Appellants, v. Robert LaRue et al. } On Appeal from the United States District Court for the Central District of California.

[November —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant Kirby is the director of the Department of Alcoholic Beverage Control, an administrative agency vested by the California Constitution with primary authority for the licensing of the sale of alcoholic beverages in that State, and with the authority to suspend or revoke any such license if it determines that its continuation would be contrary to public welfare or morals. Article XX, § 22, California Constitution. Appellees include holders of various liquor licenses issued by appellant, and dancers at premises operated by such licensees. In 1970 the Department promulgated rules regulating the type of entertainment which might be presented in bars and night clubs which it licensed. Appellees then brought this action in the United States District Court for the Central District of California under the provisions of 28 U. S. C. §§ 1331, 1333, 2201, 2202, and 42 U. S. C. § 1983. A three-judge court was convened in accordance with 28 U. S. C. §§ 2281 and 2284, and the majority of that Court held that substantial portions of the regulations conflicted with the First and Fourteenth Amendments to the United States Constitution.[1]

[1] Appellees in their brief here suggest that the regulations may exceed the authority conferred upon the Department as a matter of state law. As the District Court recognized, however, such a claim is not cognizable in the suit brought by these appellees under 42 U. S. C. § 1983.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 13, 1972

MEMORANDUM TO THE CONFERENCE

Re: Cases held for LaRue 71-36

Of the three cases held for LaRue, two present examples of the application of the regulations there upheld to license revocation proceedings. In Poff v. Department of Alcoholic Beverage Control, No. 71-1529, and Coleman v. Department of Alcoholic Beverage Control, No. 72-195, the California A.B.C. revoked the licenses of two clubs which had bottomless entertainment. In each instance, the agency determined that conduct on the premises impaired the public welfare and morals. Without going into great detail, dancers at Poff's bar were thrusting their bared pubic areas within inches of patron's faces while simulating acts of sexual intercourse. In Coleman's bar, dancers were picking up dollar bills with, and lighting cigars and cigarets while in, their vaginal areas. This is precisely the kind of grossly sexual conduct which led to the regulations in the first place and which the state has a right to control. It seems to me that there should be no question but that cert. ought to be denied in each as a result of LaRue and, indeed, even without LaRue, the conduct would probably not be acceptable under current obscenity standards.

The third case, Cook v. Peto, No. 71-1261, involved the seizure of 376 magazines pursuant to an Ohio Department of Liquor Control regulation. Appellee challenged the validity of the regulation which reads, in relevant part:

> "No permit holder. . .shall knowingly or willfully allow in. . .his premises. . .any indecent, profane or obscene . . .literature, pictures, or advertising materials. . . ."

A three-judge court was convened to determine the constitutionality of the regulation and its underlying statutes. Although

the Liquor Control admitted that its mass seizure of appellee's magazine stock was of doubtful validity, it did not concede that it was without authority to make further seizures of that sort. The court held that the statutes and regulations violated the due process clause of the fourteenth amendment "to the extent . . . [they] prevent[ed] plaintiff permit holders or any other persons similarly situated from dealing in publications which [had] not, in a prior adversary hearing before a competent judicial tribunal, been deemed to be obscene. . . ."

The order fashioned by the district court was two-pronged. First it prevented enforcement of the regulation to the extent that it prevented licensees from dealing in publications on licensed premises prior to a determination of obscenity by a competent tribunal. It seems to me that this is the sort of conduct on licensed premises that can be regulated by the states as a result of LaRue. It is of course distinguishable from the showing of live entertainment or movies depicting grossly sexual conduct, but the state is only prohibiting the licensing of bars in places that sell potentially obscene material. At the least, therefore, the case should be noted, vacated and remanded for reconsideration in light of LaRue.

The second prong of the order prevented the seizing of massive amounts of obscene material as a means of enforcing the regulation prior to a judicial determination of obscenity. It seems to me that LaRue simply does not go to this point. LaRue is concerned with the licensing process not the enforcement of obscenity regulations by seizure of obscene materials. The district court's result in this portion seems correct under the standards of Blount v. Rizzi, Freedman v. Maryland, and Marcus v. Search Warrant.

Sincerely,